PART II

DEFINITIONS

L. RESPONSIBLE OPERATOR

1. GENERALLY

In order for an employer to be a responsible operator, that is the party responsible for the payment of black lung benefits, it must satisfy several requirements. Initially, the employer must be an operator, defined under Section 3(d) of the Federal Coal Mine Safety and Health Act of 1977 as any entity that owns, controls, or supervises a "coal mine." *See* 30 U.S.C. §802(d); 20 C.F.R. §725.491; *see also* ***Long v. Clearfield Bituminous Coal Corp.***, 1 BLR 1-149 (1977)(containing a basic analysis of who is an operator under the Act). Pursuant to 20 C.F.R. §725.492(a)(2), an employer deemed to be a responsible operator must have operated a coal mine or other facility for some period after June 30, 1973.

Where a company has leased a mine, the test for determining whether the company is an operator under Section 3(d) is whether it has reserved to itself, under its contractual arrangements, powers to exercise supervision and control over the coal mine. The test is *not* whether the company has in fact exercised such powers. *Long*, 1 BLR at 1-157; *see generally* ***Price v. Dresser Industries, Inc.***, 8 BLR 1-179, 1-181 (1985). The Board has also held that an independent contractor may be deemed an "operator" if it has maintained a continuing presence at the mine, rather than only *de minimis* or sporadic contact. ***Itell v. Ritchey Trucking Co.***, 8 BLR 1-356 (1985).

Additionally, the employee must have been employed as a "miner" for his employer to be appropriately considered a responsible operator. *See* 30 U.S.C. §§932(b), (c), 902(d); *see generally* 20 C.F.R. §§725.490(a), 725.101(a)(26). A "miner" is an individual who works or has worked in or around a coal mine or coal preparation facility and performs or has performed functions integral to the extraction or preparation of coal. *See* Part II A. of the Desk Book.

An employer is not the responsible operator in a particular case unless it is the employer that has employed the miner most recently for a cumulative period of at least one year. 20 C.F.R. §725.493(a). Intermittent periods of coal mine employment may be accumulated to establish the required one year. 20 C.F.R. §725.492(c); *see also* ***Boyd v. Island Creek Coal Co.***, 8 BLR 1-458 (1986). In making these calculations, the administrative law judge must ascertain both the beginning and ending dates of all relevant periods of employment. ***Boyd****, supra*, at 1-460; ***Snedeker v. Island Creek***

Coal, 5 BLR 1-91, 1-93 (1982). If an employer nevertheless establishes that the miner did not work for it for a period of at least 125 days, the determination shall be made that the miner was not regularly employed there for a cumulative year. 20 C.F.R. §725.493(b).

An employer also cannot be deemed a responsible operator unless the miner's disability or death arose at least in part out of employment in or around a mine or other facility while it was operated by that employer. 20 C.F.R. §725.492(a)(1). To aid claimant in satisfying this requirement, the regulations provide a rebuttable presumption that the miner's work-related pneumoconiosis arose in whole or in part out of his employment with the putative responsible operator, while he was so employed in a mine or mines run by such operator. 20 C.F.R. §§725.493(a)(6), 725.492(c). To rebut this presumption, employer must establish that the miner's work for it did not contribute to or aggravate his disability. ***Rowan v. Lewis Coal and Coke Co.***, 12 BLR 1-31 (1988); ***Hendrik v. Sterling Smokeless Coal Co.***, 6 BLR 1-1029 (1984); ***Zamski v. Consolidation Coal Co.***, 2 BLR 1-1005, 1-1011 (1980). Rebuttal may be established through a showing that the miner was not exposed to coal dust for significant periods of time. ***Rowan****, supra* at 1-34; ***Harriger v. B & G Construction Co.***, 4 BLR 1-542 (1982); ***Moore v. Duquesne Light Co.***, 4 BLR 1-40.2, 1-48 (1981). Such a showing may be made to demonstrate that the miner's impairment arose either before or after employment with the named operator. *See* ***Moore****, supra* at 1-49.

Another requirement that must be satisfied before an operator is found responsible is that it must be financially capable of assuming benefit liability. 20 C.F.R. §725.492(a)(4). In the absence of evidence to the contrary, a showing that a business or a corporate entity exists will be deemed sufficient evidence of an operator's capacity to assume liability. 20 C.F.R. §725.492(b). The burden of producing such evidence lies with the named responsible operator. *See* ***Gilbert v. Williamson Coal Co., Inc.***, 7 BLR 1-289, 1-294 (1984). The regulations set forth requirements for insurance coverage and provide penalties for failure to insure. *See, e.g.*, 20 C.F.R. §§725.492(a)(4), 725.495.

Finally, to hold an employer liable as a responsible operator, it must be shown that the miner's employment with that employer included at least one working day after December 31, 1969. 20 C.F.R. §725.492(a)(3). Where the miner's last coal mine employment was prior to January 1, 1970, operators are relieved of liability for payment of benefits. *See* 30 U.S.C. §932(c), (j). A "working day" is defined as any day or part of any day for which an individual received pay for work as a miner. 20 C.F.R. §725.493(b).

CASE LISTINGS

[a company that constructs, enlarges, repairs coal preparation facilities is "operator" when it possesses contractual power to close coal processing plant thus exercising control over coal mine] ***Hughes v. Heyl & Patterson, Inc.***, 1 BLR 1-604, 1-610 (1978).

[function of the *land*, rather than employees determines whether employer is an operator] ***Bower v. Amigo Smokeless Coal Co.***, 2 BLR 1-729, 1-733 (1979), *aff'd*, 642 F.2d 68, 2 BLR 2-68 (4th Cir. 1981).

[burden on employer to establish miner's disability did not arise at least in part from exposure, even though partial disability occurred prior to January 1, 1970 and where miner worked even one day post-1969] ***Marinelli v. North American Coal Corp.***, 3 BLR 1-658.

[employer can show that miner's irrebuttable presumption of total disability did not arise out of employment with it through evidence that complicated pneumoconiosis diagnosed prior to commencing work with employer] ***Allen v. Florence Mining Co.***, 3 BLR 1-180, 1-183 (1981); ***Truitt v. North American Coal Corp.***, 2 BLR 1-199, 1-205 (1979), *appeal dismissed sub nom.* (3d Cir. 1980); *cf.* ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497, 1-524 (1981)(invocation of the Section 411(c)(5) presumption does not have the same effect on the causation determination). [*Note:* ***Rowan v. Lewis Coal and Coke Co.***, 12 BLR 1-31 (1988).]

[employer liable for payment of benefits even though miner had worked twenty-five years prior to January 1, 1970 where miner worked for employer until 1975] ***Sturms v. Badger Coal Co.***, 4 BLR 1-208 (1981).

[operators of government-run coal mining facilities cannot serve as responsible operators under the Act] ***Moore v. Duquesne Light Co.***, 4 BLR 1-40.2, 1-46 (1981); *see also* ***Mansell v. Republic Steel Corp.***, 5 BLR 1-842, 1-843 (1983).

[to determine cumulative one-year period, fact-finder must consider all record evidence bearing on the dates of miner's employment with the named responsible operator] ***Green v. A.G.P. Coal Co., Inc.***, 4 BLR 1-109, 1-111 (1981).

[causation requirement at Section 725.492(a)(1) that miner's death or disability arise "at least in part" out of coal mine employment in employer's facility, means in "any part" not "significant part." ***Harriger v. B & G Construction Co.***, 4 BLR 1-542, 1-545 (1982).

[since Federal Employees' Compensation Act provides federal employees an exclusive cause of action against the United States, the Bureau of Mines fails to meet

requirements of Section 725.492(a)(4) and cannot be a responsible operator under the Black Lung Act] ***Moore v. Duquesne Light Co.***, 4 BLR 1-40.2 (1981).

[where no post-1969 employment is shown, employer cannot be the responsible operator and is therefore properly dismissed as a party to the claim] *See, e.g.*, ***Elkins v. Director, OWCP***, 5 BLR 1-520, 1-524 (1983); ***Baluh v. Director, OWCP***, 1 BLR 1-1001, 1-1003 (1978); ***Bedell v. Tasa Corp.***, 1 BLR 1-887, 1-888 (1978); ***Kelley v. Brookside-Pratt Mining Co.***, 1 BLR 1-619, 1-625 (1978); *see also* ***Bethlehem Mines Corp. v. Warmus***, 578 F.2d 59, 1 BLR 2-153, 2-159 (3d Cir. 1978).

[employer not liable under the Act where its established that the miner was not exposed to coal mine dust after December 31, 1969] ***Skewes v. Consolidation Coal Co.***, 6 BLR 1-834, 1-838 (1984); *see* ***Zimmerman v. J. Robert Bazley, Inc.***, 10 BLR 1-75 (1987).

[miner not totally disabled while continuing to perform his usual coal mine employment; absent "changed circumstances," employer for whom the miner worked thus cannot usually show that claimant was disabled prior to working for it except in cases involving complicated pneumoconiosis] ***Hendrick v. Sterling Smokeless Coal Co.***, 6 BLR 1-1029, 1-1031 (1984); *see* ***Rowan v. Lewis Coal and Coke Co.***, 12 BLR 1-31 (1986).

[125-day provision of Section 725.493, utilized to demonstrate that miner's employment with an operator was not regular, applies only after one-year threshold requirement is met] ***Brumley v. Clay Coal Corp.***, 6 BLR 1-956, 1-959 n.2 (1984).

[claimant was an independent contractor engaged by employer to achieve a *result*, the hauling of coal, with the *means* left to claimant's control and discretion, therefore employer was not the responsible operator] ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354, 1-356 (1984); *see* 20 C.F.R. §725.491(c)(2)(ii).

[as repair work performed exclusively by claimant from 1953 was not covered coal mine employment, employer, for whom he worked until 1976, not responsible operator] ***Seibert v. Consolidation Coal Co.***, 7 BLR 1-42, 1-44 (1984).

[employer must show that work included *no significant periods of exposure* to meet burden of establishing that disability or death did not arise in part out of employment with named responsible operator] ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309, 1-313 (1984).

[showing that dust levels of previous employer's mine higher than named employer's mine insufficient to rebut presumption of exposure to coal dust] 20 C.F.R. §725.492(c); ***Harriger v. B & G Construction Co.***, 4 BLR 1-542, 1-545 (1982).

[frequency of coal-dust exposure must be shown to be so slight that employment with

mine operator could not have caused pneumoconiosis to meet burden of proving that disability or death did not arise in part out of employment with named responsible operator; showing that dust level of employer's mine was far below the allowable levels prescribed by the regulations is insufficient] ***Rickard v. C & K Coal Co.***, 7 BLR 1-372, 1-374 (1984); *see also* ***Smith v. Central Ohio Coal Co.***, 2 BLR 1-58, 1-68 (1979); ***Cline v. Sunnyside Coal Co.***, 1 BLR 1-261, 1-264 (1977); *cf.* ***Yurga v. Bethlehem Mines Corp.***, 5 BLR 1-429, 1-433 (1982)(showing of low incidence of pneumoconiosis among employees insufficient).

[showing of coal-dust exposure for a period of at least one year precludes rebuttal of the Section 725.492(c) presumption] ***Canonico v. Director, OWCP***, 7 BLR 1-547, 1-550 (1984).

[self-employed operator not under control and supervision of employer to such an extent that he was an employee as defined by the Act; employer therefore not responsible operator for this period] ***Crews v. Leckie Smokeless Coal Co.***, 7 BLR 1-220, 1-222 (1984); *see also* ***Presley v. Sunshine, Inc.***, 8 BLR 1-410 (1985); ***Folmar v. River Hill Coal Co.***, 8 BLR 1-385, 1-387 (1985).

[employer not responsible operator where claimant found to have been employed from May 17, 1977, to May 12, 1978, five days *less* than calendar year] ***Sisko v. Helen Mining Co.***, 8 BLR 1-272 (1985).

[independent contractor providing essential mine services and having continuing presence at mine considered an operator pursuant to 30 U.S.C. §903(d); operator does not need to own, operate, supervise or control mine facility] ***Itell v. Ritchey Trucking Co.***, 8 BLR 1-356 (1985).

[miner, held to be an independent contractor, cannot qualify as a self-insurer pursuant to 20 C.F.R. §726.101 *et seq*. since here record confirms miner did not employ at least five full-time employees, 20 C.F.R. §726.101(b)(5); Trust Fund, therefore, liable] ***Folmar v. River Hill Coal Co.***, 8 BLR 1-385 (1985).

DIGESTS

The Board rejected the contention that any minimal amount of employment in twelve separate months satisfies the one-year requirement of 20 C.F.R. §725.493(a)(1). Nothing in the regulations suggests that a year means anything other than a full cumulative year of employment. ***Gration v. Westmoreland Coal Co.***, 7 BLR 1-90, 1-92 (1984); *see also* ***Bungo v. Bethlehem Mines Corp.***, 8 BLR 1-348, 1-349 (1985); ***Director, OWCP v. Gardner***, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989).

Paid time off from work may be included in determining whether claimant has worked for a cumulative one-year period. ***Boyd v. Island Creek Coal Co.***, 8 BLR 1-458 (1986); *see also* ***Verdi v. Price River Coal Co.***, 6 BLR 1-1067, 1-1070 (1984)(paid sick leave, occasioned by an employment-related injury, is included); ***Elswick v. The New River Co.***, 2 BLR 1-1109, 1-1113 (1980)(paid vacation days are included).

The beginning and ending dates of the miner's employment with employer must, at a minimum, cover a full calendar year (*e.g.*, Feb. 12, 1975 to Feb. 12, 1976), not employment in twelve consecutive months (*e.g.*, Feb. 1975 to Jan. 1976), to constitute a period of cumulative employment of not less than one year for the purpose of identifying the responsible operator. 20 C.F.R. §725.493; ***Bungo v. Bethlehem Mines Corp.***, 8 BLR 1-348 (1985); *see also* ***Director, OWCP v. Gardner***, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989).

The Board held that the administrative law judge erred by interpreting 20 C.F.R. §725.493(a) as requiring a showing that claimant worked without interruption for a period of a cumulative year. Discrete periods of employment may be accumulated to meet the durational requirement. The Board also held that "down time" cannot excuse employer from liability since claimant's injury was work-related and claimant was carried on employer's payroll during his absences. ***Boyd v. Island Creek Coal Co.***, 8 BLR 1-458 (1986).

Mere assertions of inability to pay benefits are inadequate to meet the identified responsible operator's burden of proving that it should be relieved of liability for payment of benefits pursuant to 20 C.F.R. §725.492(b). Pursuant to 33 U.S.C. §918(b), as incorporated by 30 U.S.C. §932(a), however, "other circumstances," including the inability to reach or serve the employer, may relieve the designated responsible operator of benefits liability. ***Borders v. A.G.P. Coal Co.***, 9 BLR 1-32 (1986).

The Fourth Circuit held that the federal government may not be designated as a responsible operator for claims brought under the Act because it is immune under the Doctrine of Sovereign Immunity. Since the federal government cannot be considered a responsible operator, the Court held that under 20 C.F.R. §725.493(a)(2) the petitioner was liable because it was the operator with which the miner had the latest periods of cumulative employment of not less than one year. ***Eastern Associated Coal Corp. v. Director, OWCP* [*Patrick*]**, 791 F.2d 1129 (4th Cir. 1986).

Employer's post-1969 involvement in the dismantling, loading, moving, and reassembly of equipment used in strip mining operations constituted essential mine services and a sufficient presence at mine sites in order to consider employer an operator under the Act. ***Zimmerman v. J. Robert Bazley, Inc.***, 10 BLR 1-75 (1987).

The Board, citing ***Itell v. Ritchey Trucking Co.***, 8 BLR 1-356 (1985), rejected the contention that the administrative law judge erroneously applied the Reform Act

definition of operator to this case in which the miner's employment terminated prior to the effective date of the 1987 Amendments. ***Zimmerman v. J. Robert Bazley, Inc.***, 10 BLR 1-75 (1987).

The Board, citing ***Skewes v. Consolidation Coal Co.***, 6 BLR 1-834 (1984), held that the Section 725.492(c) presumption refers only to dust exposure during the course of the miner's employment, and does not provide for rebuttal by the absence of post-1969 dust exposure. The Board further held that to rebut the Section 725.493(a)(6) presumption on the basis of evidence of the absence of post-1969 dust exposure, employer must establish that the miner was not exposed to any coal mine dust after December 31, 1969. ***Zimmerman v. J. Robert Bazley, Inc.***, 10 BLR 1-75 (1987).

Section 725.493(b) should be interpreted in the same manner as 20 C.F.R. §718.301 when determining the length of coal mine employment. The Board held that the analysis set out in ***Dawson v. Old Ben Coal Co.***, 11 BLR 1-58 (1988)(*en banc*) should be applied in determining the length of coal mine employment for purposes of identifying the responsible operator under Section 725.493. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(*en banc*), *aff'd*, Nos. 88-3531, 88-3578 (6th Cir., May 11, 1989) (unpublished).

The Board reverses the administrative law judge's finding that employer is the responsible operator. The administrative law judge found claimant was paid for 39 weeks of employment over a 14 month period, including a 14 week period during which claimant participated in a strike. The Board held that time spent by claimant in a voluntary union strike does not constitute coal mine employment under the Act and that, therefore, the administrative law judge erred in finding that claimant worked for one year for employer. ***Tackett v. Cargo Mining Co.***, 12 BLR 1-11 (1988)(*en banc*), *aff'd*, Nos. 88-3531, 88-3578 (6th Cir., May 11, 1989)(unpublished).

A majority of the panel of the United States Court of Appeals for the Sixth Circuit overruled the Board's application of ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984) and held that, under the facts of this case, the district director was not prohibited from naming a new responsible operator after an earlier operator had been dismissed. Here, no hearing had been held prior to dismissal of the first operator, unlike in ***Crabtree*** where the claim had been fully litigated. The judge dissenting in this case, however, agreed with the Board's application of ***Crabtree*** and the language in 20 C.F.R. §725.412(a) requiring that the responsible operator be identified "as soon after the filing of the claim as the evidence obtained permits." ***Director, OWCP v. Oglebay Norton Co.* [*Goddard*]**, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989)(Wellford, J., dissenting), *reversing and remanding* ***Goddard v. Oglebay Norton Co.***, 12 BLR 1-130 (1988).

The Board affirmed the administrative law judge's finding that the prior operator ceased to exist as a business entity and was therefore not the responsible operator under 20 C.F.R. §725.493. ***Worley v. Blue Diamond Coal Co.***, 12 BLR 1-20 (1988), *aff'd*, No.

88-3638 (6th Cir., May 23, 1989)(unpublished).

The Board reversed the administrative law judge's dismissal as responsible operator of a company which operated coal mines prior to June 1973 but thereafter ceased mining operations, leased its coal mine property and retained ownership of its coal mining permits. Following ***Long v. Clearfield Bituminous Coal Corp.***, 1 BLR 1-149 (1977), the Board concluded that the lessor retained sufficient right of control and supervision of mining operations, after June 30, 1973, to meet the definition of an operator. The significant indicia of retention of control included the lessor's possession, under certain lease agreements, of the right of inspection, the right of ejectment and confession of judgment, and the right to direct the manner and amount of coal extraction. ***Yebernetsky v. Elliott Coal Mining Co., Inc.***, BRB No. 84-2560 BLA (June 30, 1988) (unpublished), *aff'd on reconsideration*, (1988)(unpublished).

The Board holds that ***Hendrick v. Sterling Smokeless Coal Co.***, 6 BLR 1-1029 (1984), merely restated the holding in ***Truitt v. North American Coal Corp.***, 2 BLR 1-199 (1979), *appeal dismissed sub nom.* (3d Cir. 1980), that, in cases in which the onset of complicated pneumoconiosis, as established under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), predates coal mine employment with employer, that employer is relieved as the responsible operator under Section 725.493(a)(6). ***Hendrick*** does not expand the rule in ***Truitt*** to include cases involving total disability due to simple pneumoconiosis, as in the instant case. ***Rowan v. Lewis Coal and Coke Co.***, 12 BLR 1-31 (1988).

The Board reverses the administrative law judge's dismissal as responsible operator of a company which operated coal mines prior to June 1973 but thereafter ceased mining operations, leased its coal mine property and retained ownership of its coal mining permits. Following ***Long v. Clearfield Bituminous Coal Corp.***, 1 BLR 1-149 (1977), the Board concluded that the lessor retained sufficient right of control and supervision of mining operations, after June 30, 1973, to meet the definition of an operator. The significant indicia of retention of control included the lessor's possession, under certain lease agreements, of the right of inspection, the right of ejectment and confession of judgment, and the right to direct the manner and amount of coal extraction. ***Buck v. Elliot Coal Mining Co., Inc.***, 12 BLR 1-187 (1989); ***Demchak v. Elliott Coal Mining Co., Inc.***, 12 BLR 1-178 (1989).

The United States Court of Appeals for the Fourth Circuit has held that an operator can not escape liability under the Act by effectively changing its business form. ***Donovan v. McKee***, 845 F.2d 70, 10 BLR 2-133 (4th Cir. 1988).

The United States Court of Appeals for the Third Circuit has held that where an operator withdraws its objection to a claim, the operator will be considered to have waived its right to contest the claim. ***Bethenergy Mines, Inc. v. Director, OWCP*** **[*Markovich*]**, 854 F.2d 632, 11 BLR 2-105 (3d Cir. 1988); *but see* ***Vance v. Eastern Associated***

Coal Corp., 8 BLR 1-68 (1985)(Board holds that responsible operator does not waive its right to contest a claim by submitting DOL form CM-970a in response to initial findings).

The Board held that independent railroad companies are covered under the Act because they are not specifically excluded under 20 C.F.R. §725.491. ***Roberson v. Norfolk & Western Railway Co.***, 13 BLR 1-6 (1989).

The United States Court of Appeals for the Sixth Circuit, citing ***Zavora v. United States Steel Corp.***, 2 BLR 1-1202 (1980), held that where the identified operator did not employ claimant as a miner, the operator can not be held liable as the responsible operator for purposes of payment of benefits. ***Falcon Coal Co. v. Clemons***, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989).

The United States Courts of Appeals for the Fourth and Sixth Circuits have held that due process requires that the carrier be given adequate notice and an opportunity to defend on the question of direct liability. ***Warner Coal Co. v. Director, OWCP***, **[*Warman*]**, 804 F.2d 346, 11 BLR 2-62 (6th Cir. 1986); ***Caudill Construction Co. v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989); ***Tazco v. Director, OWCP***, 892 F.2d 482, 13 BLR 2-313 (4th Cir. 1990).

The Board held that the Department of Labor must resolve the operator issue in a preliminary proceeding and/or proceed against all putative responsible operators at every stage of the claims adjudication. Where the identified responsible operators are dismissed, the Department is not entitled to another opportunity to identify other putative responsible operators. ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984); *see also* ***Sisko v. Helen Mining Co.***, 8 BLR 1-272 (1985); *but see* ***Beckett v. Raven Smokeless Coal Co.***, 14 BLR 1-43 (1990).

The Board held that where DOL had named three employers as responsible operators prior to any formal hearing on the merits and the employer eventually held liable had had almost four years to develop a defense against entitlement that ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984) was not applicable. The Board noted that the concerns represented in ***Crabtree*** regarding piecemeal litigation were not present herein. ***Beckett v. Raven Smokeless Coal Co.***, 14 BLR 1-43 (1990).

Where complicated pneumoconiosis is established, the insurance carrier on the risk at the time of establishment of complicated pneumoconiosis is responsible for payment of benefits, regardless of continued coal mine employment and subsequent change of employer's insurance carrier. *See* ***Swanson v. R.G. Johnson Co.***, 15 BLR 1-149 (1991).

Consistent with its decision in ***Beckett v. Raven Smokeless Coal Co.***, 14 BLR 1-43 (1990), the Board held that inasmuch as the DOL had named employer as the

responsible operator prior to any formal hearing on the merits of the claim, and, as employer had had almost two years to develop a defense against claimant's claim for benefits, the Board's holding in ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984) was not applicable. The Board further held that the district director's identification of employer during the processing of the claim was proper pursuant to 20 C.F.R. §725.412(a), inasmuch as employer was designated the putative responsible operator once sufficient evidence was made available to the district director, albeit ten years after the claim was filed. *See* ***Lewis v. Consolidation Coal Co.***, 15 BLR 1-37 (1991).

The Board affirmed the administrative law judge's determination that employer's involvement in the repair of mining equipment used in strip mining operations constituted essential services and that a sufficient presence at mine sites was demonstrated. Thus, the Board affirmed the administrative law judge's determination that employer was an operator under the Act. ***Etzweiler v. Cleveland Brothers Equipment Co.***, 16 BLR 1-38 (1992)(*en banc*).

Although both Sections 725.202(a) and 725.492(c) provide an avenue for the putative responsible operator to escape liability, the Section 725.202(a) presumption, for construction/transportation workers, and the Section 725.492(c) presumption, applicable to *all* miners, differ somewhat. To rebut the Section 725.202(a) presumption, the party opposing entitlement must establish that a claimant, who is a construction/transportation worker, was not regularly exposed to coal mine dust or that such claimant was not regularly exposed in or around a mine (or mine site, *see* ***Ray v. Williamson Shaft Contracting Co.***, 14 BLR 1-105 (1990)(*en banc*)). *See* ***Ray****, supra;* ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985); ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Ritchey v. Blair Electric Service Co.***, 6 BLR 1-966 (1984). To rebut the Section 725.492(c) presumption, employer must establish the absence of significant periods of coal dust exposure in which the frequency of exposure must be so slight as to preclude contribution to the development of dust-related disease; proof of significant periods of non-exposure is not adequate to support rebuttal. *See* ***Rickard v. C & K Coal Co.***, 7 BLR 1-372 (1984); ***Harriger v. B & G Construction Co.***, 4 BLR 1-542 (1982), *aff'd*, 760 F.2d 555 (3d Cir. 1985); ***Garrett v. Cowin & Co., Inc.***, 16 BLR 1-77 (1990).

The administrative law judge properly found that rebuttal of the presumption under Section 725.492(c) was not established inasmuch as employer's assertion that there were periods of non-exposure in claimant's employment is not sufficient to establish rebuttal. *See* ***Rowan v. Lewis Coal and Coke Co.***, 12 BLR 1-31 (1988); ***Rickard v. C & K Coal Co.***, 7 BLR 1-372 (1984); ***Garrett v. Cowin & Co., Inc.***, 16 BLR 1-77 (1990).

For purposes of identifying the responsible operator in cases where claimant is reporting to one mine site but is on the payroll of another mine, the administrative law judge properly considered the factors of employment articulated in *Larson's*, regarding

the right to control details of claimant's work during the period in question. ***Hoover v. Manor Mines, Inc.***, 17 BLR 1-1 (1992).

In identifying the responsible operator by considering the right to control factors of *Larson's*, the administrative law judge permissibly found that although claimant was working at one mine site, Copper Valley, during the period in question, claimant was in the employ of another operator, Manor Mines. The administrative law judge relied upon the facts that claimant was retained on the payroll of Manor Mines, which retained the right to recall claimant if the strike were settled, and a 1983 letter from a common officer of both operators which characterized claimant as an employee of Manor Mines; the administrative law judge found this evidence credible regarding the intent of the parties at the time. ***Hoover v. Manor Mines, Inc.***, 17 BLR 1-1 (1992).

In considering the factors of the right of control, no one factor is necessarily more dispositive than the others; rather, the administrative law judge properly considered the cumulation of the factors in resolving this issue. *See Larson's*, at §44.31. ***Hoover v. Manor Mines, Inc.***, 17 BLR 1-1 (1992).

The "borrowed servant doctrine" applies only in instances where the lending employer has surrendered a sufficient degree of control over the employee. ***Hoover v. Manor Mines, Inc.***, 17 BLR 1-1 (1992).

Where the lending employer has not surrendered a sufficient degree of control over claimant, the administrative law judge properly considered the "lent employee" factors articulated in *Larson's* at §48.00, and properly found that in this case there was no employment relationship between claimant and the borrowing employer, Copper Valley, for the period in question, as there was no evidence of a contract, expressed or implied, until claimant was transferred to the payroll of Copper Valley in August 1981. *See Larson's* at §48.10. ***Hoover v. Manor Mines, Inc.***, 17 BLR 1-1 (1992).

No authority exists to require a named responsible operator to affirmatively establish that a potential alternate responsible operator has the ability to pay under the Act and regulations. ***England v. Island Creek Coal Co.***, 17 BLR 1-141 (1993).

Where a named responsible operator establishes that claimant has been employed with a subsequent operator for one calendar year, the named responsible operator has completely and successfully completed its defense that it should not be liable for benefits. ***England v. Island Creek Coal Co.***, 17 BLR 1-141 (1993).

The Board affirmed the administrative law judge's determination that the evidence was insufficient to establish that an unnamed potential responsible operator did not have the capability to assume payment, where there was no evidence that the operator was not insured, and the only evidence regarding the existence of the operator was a brief statement which contended that the operator was not currently a viable business entity.

England v. Island Creek Coal Co., 17 BLR 1-141 (1993).

Where an responsible operator is dismissed, and other potential operators have not been named at any point in the proceeding, liability for payment in this matter rests with the Trust Fund, since to name another potential responsible operator while the case had been adjudicated up to the Board would offend due process and would not enhance efficient administration of the Act and expeditious processing of claims. ***England v. Island Creek Coal Co.***, 17 BLR 1-141 (1993).

The Board rejects the Director's interpretation under 20 C.F.R. §725.493(a)(4) that if a responsible operator, identified pursuant to 20 C.F.R. §725.493(a)(1), subsequently goes out of business or loses the capacity to assume obligations, liability falls to the second or third most recent qualifying operator, which meets the requirements of 20 C.F.R. §725.492, since Section 725.493(a)(4) is "subject to the provisions of paragraph (a)(2)." Paragraph (a)(2) sets forth the criteria for determining a *successor* operator. *See* 20 C.F.R. §725.493(a)(4). In contrast, the instant case is not a situation involving a successor operator covered by 20 C.F.R. §725.493(a)(2)(i), (ii), since there is no evidence that an operator purchased or leased the mine and/or assets of any employer of claimant, or that any employer had reorganized or was liquidated. *See* 20 C.F.R. §725.493(a)(2), (3); ***Matney v. Trace Fork Coal Co.***, 17 BLR 1-145 (1993).

The Board interprets the regulations to require that if the operator named pursuant to Section 725.493(a)(1) is no longer in business and is incapable of assuming liability, responsibility for liability falls to the Black Lung Disability Trust Fund, unless the operator is subject to the successor operator provision set out in Section 725.493(a)(2)-(4). ***Matney v. Trace Fork Coal Co.***, 17 BLR 1-145 (1993).

The Board held that the Black Lung Benefits Act and the Kentucky insurance statutes in question in the instant case are not in conflict since the former concerns federal benefits, while the latter concerns state benefits. Consequently, the Board held that the McCarran-Ferguson Act, which in pertinent part states that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by the State for the purpose of regulating the business of insurance. . . unless such Act specifically relates to the business of insurance,” 15 U.S.C. §1012(b), is inapplicable to the instant case. ***Bates v. Creek Coal Co., Inc.***, 18 BLR 1-1 (1993), *aff’d on recon.*, 20 BLR 1-36 (1996). [**NOTE:** On appeal, the Sixth Circuit reversed the Board’s holding and remanded on the basis that all of the self-employed mine owner’s covered employment pre-dated March 1, 1978 and therefore was not yet covered as the 1978 Amendments, which later covered this type of situation, were not yet in force. This argument was not made to the Board. For further caselaw on the issue of insurance coverage/McCarran-Ferguson Act, ***see Lovilia Coal Co. v. Williams***, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998).]

The Board affirmed the administrative law judge's finding that in light of employer's new technology, the carbonaceous material from employer's culm bank has extractable

anthracite coal in it. The Board affirmed the finding that the culm material processed by employer is coal based in part on the finding that employer operated a preparation plant to prepare the culm material for energy use, and that the preparation plant's operation was subject to safety regulations and operational safeguards mandated by MSHA, thus, its activities are subject to regulation under 30 U.S.C. §802(1). The Board specifically upheld as proper the finding that employer sells "anthracite waste material," a material "akin" to coal. Therefore, it was permissible for the administrative law judge to conclude, pursuant to ***Marshall v. Stoudt's Ferry Preparation Co.***, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1010 (1980), that "the carbonaceous material, which has coal in it, albeit a small amount, was rendered marketable by the Waste Management preparation facility, and therefore, covered under the Act and regulations." ***Schegan v. Waste Management and Processors, Inc.***, 18 BLR 1-41 (1994).

The Board departed from its dictum in ***Matney v. Trace Fork Coal Co.***, 17 BLR 1-145 (1993) regarding the application of 20 C.F.R. §725.493(a)(4), holding that 20 C.F.R. §725.493(a)(4) does not preclude from responsibility prior operators who are not also successor operators, citing ***Director, OWCP v. Trace Fork Coal Co. [Matney]***, 67 F.3d 503, 507, 19 BLR 2-290, 2-300 (4th Cir. 1995) and ***Eastern Assoc. Coal Corp. v. Director, OWCP [Patrick]***, 791 F.2d 1129 (4th Cir. 1986). Thus, as substantial evidence supported the administrative law judge's finding that the miner's two most recent employers were incapable of assuming liability for the payment of benefits, employer was properly designated as the responsible operator pursuant to 20 C.F.R. §725.493(a)(4). ***Cole v. East Kentucky Collieries***, 20 BLR 1-50 (1996).

The Board held that Lovilia Coal Company, a partnership, is a responsible operator and may be held liable for black lung benefits under the firm name pursuant to the Act and regulations. *See* 30 U.S.C. §802(d), (f); 20 C.F.R. §725.101(a)(27), (29); *see generally* 20 C.F.R. §§725.491, 725.492, 725.493; Fed. R. Civ. P. 17(b)(1); ***Penrod Drilling Co. v. Johnson***, 414 F.2d 1217 (5th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970). ***Williams v. Lovilia Coal Co.***, 20 BLR 1-58 (1996), *aff'd*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998).

The Board held that the miner, a partner-operator in the Lovilia Coal Company, working in the mines for Lovilia, is an employee covered for black lung insurance by employer's carrier, Bituminous Casualty Corporation, under the terms of the rider added to the regulations at 20 C.F.R. §726.203(a). This rider, in part, prevents an operator from excluding some employees who act as coal miners from coverage. *See* 20 C.F.R. §726.203(a), (c); 20 C.F.R. §726.210. ***Williams v. Lovilia Coal Co.***, 20 BLR 1-58 (1996), *aff'd*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998).

The Board held that corporate officers, as individuals, cannot be considered to be responsible operators unless they fall within the definition of a responsible operator at 20 C.F.R. §725.491. The Board also held that 20 C.F.R. §725.495(a), the regulation dealing with the enforcement of penalties, could not be used to modify the definition of

an operator to include corporate officers. Rather, Section 725.495(a) allows the Director to hold certain officers personally liable for debts of a corporation which has failed to secure the appropriate black lung insurance. ***Lester v. Mack Coal Co.***, 21 BLR 1-126 (1999).

The Board held that Mr. White's note attached to his bankruptcy filing, stating that Mr. Varney was also in bankruptcy proceedings, does not constitute substantial evidence of Mr. Varney's inability to pay pursuant to 20 C.F.R. §725.492(a)(4). ***Lester v. Mack Coal Co.***, 21 BLR 1-126 (1999).

The Board stated that it is well established that DOL must resolve the responsible operator issue alone in a preliminary proceeding, *see* 20 C.F.R. §725.412(d), or proceed against all potentially responsible operators at every stage of the claim adjudication prior to fully litigating the claim, ***see Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354, 1-357 (1984); ***see also England v. Island Creek Coal Co.***, 17 BLR 1-141 (1993). In this case, the district director initially found Bailey Energy to be the responsible operator, and that decision would have become final within thirty days, however, within that time, the case was referred to the OALJ for a hearing. *See* 20 C.F.R. §725.419(d). Although the Director named several companies and individual officers as parties to the hearing, he asserted that only United Pocahontas and its carrier should be held liable. Thus, the Board stated that the Director has not fulfilled his responsibility under ***Crabtree*** simply by naming Bailey Energy as a party, without continuing to proceed against it because as ***Crabtree*** states: "[T]he Department must resolve the operator issue in a preliminary proceeding, *see* 20 C.F.R. §725.412(d), and/or proceed against all putative responsible operators <u>at every stage of the claims adjudication</u>." ***Crabtree***, 7 BLR at 1-357 (emphasis added). Because the Director chose to proceed against only United Pocahontas and its insurer prior to conceding, together with United Pocahontas, claimant's entitlement to benefits, the Board held it is now too late to assign liability for those benefits to Bailey Energy and held that the administrative law judge properly found the Trust Fund liable for the payment of benefits in this case. ***Mitchem v. Bailey Energy, Inc.***, BRB No. 97-1757 BLA/A, 21 BLR 1-161 (1999)(*en banc*)(Hall, C.J. and Nelson, J., concurring and dissenting), *aff'd on recon*., 22 BLR 1-24 (1999)(*en banc*)(Hall, C.J. and Nelson, J., concurring and dissenting).

Judge Malcolm D. Nelson dissented with the majority on this issue and Chief Judge Betty Jean Hall concurred in his dissent. Judge Nelson stated that Bailey Energy meets all of the pertinent criteria outlined at 20 C.F.R. §725.493, and thus is the responsible operator in this case. 20 C.F.R. §§725.492, 725.493. Specifically, Judge Nelson stated that Bailey Energy is the coal mine operator with whom the miner had the most recent periods of cumulative employment of more than one year and that the administrative law judge properly found that the Director had not adequately established that Bailey Energy did not have the ability to pay benefits. Additionally, Judge Nelson stated that naming Bailey Energy as the responsible operator at this juncture in these proceedings does not present a *Crabtree* problem since Bailey Energy never controverted this claim,

and thus entitlement to benefits is no longer at issue. *See* 20 C.F.R. §§725.463, 725.461(b). ***Mitchem v. Bailey Energy, Inc.***, BRB No. 97-1757 BLA/A, 21 BLR 1-161 (1999)(*en banc*)(Hall, C.J. and Nelson, J., concurring and dissenting), *aff'd on recon*., 22 BLR 1-24 (1999)(*en banc*)(Hall, C.J. and Nelson, J., concurring and dissenting).

The Board also reiterated its position in ***Lester v. Mack Coal Co.***, 21 BLR 1-126 (1999) (Order on Recon.)(*en banc*) regarding the issue of whether officers of a corporation can be held liable as responsible operators pursuant to Section 725.491(a). ***Mitchem v. Bailey Energy, Inc.***, 97-1757 BLA/A, 21 BLR 1-161 (1999)(*en banc*)(Hall, C.J. and Nelson, J., concurring and dissenting), *aff'd on recon*., 22 BLR 1-24 (1999)(*en banc*) (Hall, C.J. and Nelson, J., concurring and dissenting).

The Board held that substantial evidence did not support the administrative law judge's determination based on earnings records that the miner worked for employer for one calendar year pursuant to 20 C.F.R. §725.493(b)(2000). The administrative law judge's finding that the miner's earnings with employer during 1978 and 1979 exceeded his wages from other coal mine employment of undefined duration during the same period did not establish that he worked a calendar year for employer. The administrative law judge's finding that the miner's total earnings exceeded the coal mine industry's average 125-day earnings reported by the Bureau of Labor Statistics for 1983 did not establish that he worked a calendar year for employer. The administrative law judge's finding based on dividing the miner's earnings by his hourly wage was unexplained and was not supported by substantial evidence. The Board rejected the Director's argument that an alternative calculation method set forth at revised 20 C.F.R. §725.101(a)(32)(iii) supported the finding of one calendar year of employment if applied herein, because the regulatory formula, as written, yielded only 206 days of coal mine employment. The Director's proposed additional step of dividing the formula's result by 125 appeared nowhere in the regulation and effectively credited the miner with a calendar year of employment if he worked 125 days, contrary to the standard that a mere showing of 125 working days does not establish one calendar year of employment. ***Clark v. Barnwell Coal Co.***, 22 BLR 1-275 (2003)(McGranery, J., concurring).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.495(c), regarding the criteria for determining the identity of a responsible operator, is not unreasonable or inconsistent with a federal statute. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 871-872, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Fourth Circuit held that, for purposes of identifying a responsible operator, the miner must have been regularly employed by the operator for a period of at least one year, *i.e.,* 365 days. 20 C.F.R. §725.493(a)(1)(2000). To constitute "regular employment," the miner must have worked for that operator for at least 125 days during that 365 day period. "during which the miner was regularly employed in or around a coal mine by the operator or other employer." 20 C.F.R. §725.493(b)(2000). In this case,

claimant was employed by Daniels, a steel fabricating company, for approximately twelve years. During his twelve years with Daniels, claimant was sporadically dispatched to repair and maintain the tipple at Mesa, a coal mine operator and subsidiary of Daniels. The court held that it was error to add up each separate day of coal mine employment over a miner's entire period of employment (in this case twelve years) to reach 125 days for the purpose of determining whether he was regularly employed in coal mine employment. Thus, the court held that Daniels was not liable as the responsible operator pursuant to 20 C.F.R. §725.493 (2000). ***Daniels Co. v. Mitchell***, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

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