BRB No. 96-1575 BLA

BUEL P. LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MACK COAL COMPANY/	)	DATE ISSUED:
WEST VIRGINIA COAL-WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	ON RECONSIDERATION
Party-in-Interest	)	*EN BANC*

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Buel P. Lester, Verner, West Virginia, *pro se*.

Stephen E. Crist, K. Keian Weld, and Anne L. Wilcox (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Jill M. Otte and Dorothy L. Page (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Employer, Mack Coal Company, timely filed a Motion for Reconsideration the Board's affirmance of the Decision and Order (95-BLA-0928) of Administrative Law Judge John C. Holmes awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Oral argument was held in Charleston, West Virginia on June 18, 1998.

In its original Decision and Order, the Board sustained the interpretation of the Director, Office of Workers' Compensation Programs (the Director), that the regulation at 20 C.F.R. §725.495(a), 30 U.S.C. §933(d)(1), did not modify the definition of responsible operator to include corporate officers, finding this interpretation reasonable and consistent with the regulations. *See Lester v. Mack Coal Co.*, BRB No. 96-1575 BLA (Aug. 20, 1997) (unpub.)(McGranery, J., concurring and dissenting). Thus, the Board held that, as a corporate officer of Rebb Energy, Incorporated, Mr. Robert Varney could not be held personally liable for black lung payments. However, the Board further held that pursuant to 20 C.F.R. §725.491(c)(2)(i), Mr. Varney could be held liable for benefits if identified as a sole proprietor, a partner in a partnership, or a member of a family business.[1] Because there was insufficient evidence in the record regarding Mr. Varney's status, the Board remanded the case for the administrative law judge to determine whether Mr. Varney came within the definition of a potentially liable individual, noting that it was within the administrative law judge's discretion to reopen the record for the submission of further evidence on this issue or to remand the case to the district director for further evidentiary development.

[1] The Board affirmed as unchallenged on appeal the administrative law judge's finding that claimant is entitled to benefits and his finding that Rebb Energy, Incorporated and Mr. White are financially unable to assume black lung payments. *See Lester, supra.* On reconsideration, neither party has asserted that the Board incorrectly affirmed these findings. Judge McGranery respectfully dissented from the majority's decision on this issue, stating that the administrative law judge's determination that Mr. Varney is financially unable to assume black lung payments is supported by substantial evidence. *See Lester, supra.*

On reconsideration and in its Oral Argument brief, employer asserts that the Director's interpretation of Section 725.491(a), that corporate officers cannot be considered responsible operators is unreasonable, inconsistent with the regulations, and contrary to the agency's representations prior to the case entering the appellate phase.[2] Employer's Oral Argument Brief at 2-3. Consequently, employer contends that the Board erred in accepting this interpretation. Conversely, the Director asserts that 30 U.S.C. §933(d)(1), and its implementing regulation, 20 C.F.R. §725.495(a), does not "modify the definition of an operator to include corporate officers." Rather, the Director contends that these provisions merely made certain corporate officers of an uninsured corporation jointly liable for the black lung benefits owed by the corporation," and contends that the application of these provisions is a "purely discretionary act" by the Director. Director's Oral Argument Brief at 8. The Director further asserts that nothing in Section 725.495(a) intimates that corporate officers be included within the definition of a coal mine operator.[3] *Id.* To the contrary, the Director

[2] Employer asserts that the Director's interpretation of Section 725.491 produces an unreasonable meaning of "person" as defined by the regulations. Employer's Oral Argument Brief at 3. Specifically, employer contends that under the Director's interpretation, "a mine foreman who supervises the technical operation could be held liable...even though he/she does not control the business finances, whereas a corporate officer who failed to purchase black lung insurance would escape liability." *Id.* The Director responds by stating that the exclusion of corporate officers from liability does not result in the identification as responsible operators of those employees of a mine who serve in a supervisory capacity. Director's Oral Argument Brief at 9. We agree with the Director that employer is reading the definition of "supervise" in Section 725.491(a) much too broadly.

[3] Employer responds, that "[l]imitation on liability is not immunity from liability." Employer's Oral Argument Response Brief at 5.

asserts that the language in Section 725.495(a) suggests that its purpose is to impose liability on certain officers, presidents, secretaries, and treasurers, of **uninsured** corporations, whose responsibility it is to maintain the company's insurance policies, and not to impose liability on corporate officers in general. Director's Oral Argument Brief at 8-9 (emphasis added).

Employer cites to language contained in Section 725.493(a)(2)(ii) as support for its position that corporate officers can be held personally liable for black lung benefits. Employer's Oral Argument Response Brief at 3-4. Section 725.493(a)(2)(ii), however, provides for liability to attach to "successor operators" in an effort to prevent coal operators from circumventing liability "by entering into corporate or other business transactions which make the assessment of liability against that operator a financial or legal impossibility." 20 C.F.R. §725.493(a)(2)(ii). This provision does not authorize attaching liability to corporate officers.

Additionally, employer asserts that the Director named Mr. Varney as a potential responsible operator presumably because he qualified as an operator; therefore, employer alleges that the Director is precluded from now asserting that Mr. Varney, as a corporate officer, cannot be considered a responsible operator pursuant to Section 725.491. Employer's Oral Argument Brief at 2-3. Employer also asserts that because no party contested that Mr. Varney was an operator, the administrative law judge erred in considering this issue on appeal. Employer's Oral Argument Brief at 3.

Pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), and the Board's decision in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), whenever the responsible operator issue has not been resolved, it is the Director's responsibility to name all potential operators at the district director's level. The mere naming of a party as a potential responsible operator is not a concession of this fact by the Department of Labor [DOL].[4] *See Matney, supra; Crabtree, supra.*

Employer's contention that the administrative law judge did not have jurisdiction to consider whether Mr. Varney is an operator pursuant to Section 725.491 is also without merit. Employer's Oral Argument Brief at 3. Employer contested the responsible operator issue when this case was referred to the Office of Administrative Law Judges. Director's Exhibit 38. At the hearing before the administrative law judge, employer asserted its position

[4] As the Director stated at the oral argument hearing, DOL dismissed Mr. Varney and Mr.White as putative responsible operators on November 18, 1994, and it was only after employer requested that these officers be renamed that DOL renamed them, Director's Exhibits 24, 25, 30. Oral Argument Hearing Transcript at 12-13.

that claimant is entitled to benefits, but that liability should be with Rebb Energy and/or its corporate officers. Hearing Transcript at 12, 16. Because employer argued that the corporate officers should be personally liable for benefit payments and requested that Mr. Varney and Mr. White be renamed as possible putative responsible operators, it was proper for the administrative law judge to address this issue.

Employer has not asserted any valid or persuasive rationale to support its contention that the Director's position regarding Section 725.495(a) is unreasonable or inconsistent with the regulations;[5] therefore, we adhere to the Board's original holding. Further, we continue to hold that Section 725.495(a), the regulation providing for the enforcement of penalties, cannot be used to modify the definition of a responsible 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.

However, we acknowledge the importance of encouraging coal companies to obtain and maintain insurance and the propriety of penalizing corporate entities and their corporate officers pursuant to Section 725.495(a) for neglecting to do so. Nevertheless, while enforcement of the penalties outlined in this regulation is within the Director's discretion, his failure to consistently administer this provision could ultimately discourage law-abiding companies from maintaining insurance since the result would be an increase in their liability as "default responsible operators." In this regard, we remind the Director that it is his responsibility, as administrator of the Act, *see* 20 C.F.R. §§701.201, 725.601(b); *Director, OWCP v. Hileman*, 897 F.2d 1277, 13 BLR 2-382 (4th Cir. 1990); *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992); *see generally BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g* 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989), to enforce these penalties against uninsured coal companies and their corporate officers, thereby providing an incentive for companies to obtain and maintain black lung insurance.

The Director also contends that the Board erred by holding that Mr. Varney could be

[5] In its response brief, employer asserts that the Director's interpretation of corporate officers is contrary to the purpose of the Act and will only encourage officers who are financially capable of paying benefits to not obtain liability insurance. Employer's Oral Argument Response Brief at 3-4. While the Director's interpretation does not offer further encouragement for officers of a coal company to obtain liability insurance, apart from Section 725.495(a) which permits a penalty for an employer's failure to insure, it does not appear to be contrary to the Act inasmuch as claimant will ultimately receive benefits from another source.

identified as a coal mine operator liable for benefits pursuant to Section 725.491(c)(2)(i). Director's Oral Argument Brief at 12-14. In its original decision, the Board held that Mr. Varney could be liable as a responsible operator as a "sole proprietor, a partner in a partnership, or a member of a family business" pursuant to Section 725.491(c)(2)(i). Because the record does not contain any evidence as to Mr. Varney's actual position with Rebb, the Board remanded the case to determine if Mr. Varney could be considered operator pursuant to Section 725.491(c)(2)(i). *See Lester*, slip op. at 6. The Board also noted that it is within the administrative law judge's discretion to reopen the record for the submission of further evidence regarding Mr. Varney's status or to remand this case to the district director for further evidentiary development, 20 C.F.R. §725.456(e); *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989)(*en banc*); *see generally Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). *See Lester, supra*.

The Director asserts that the Board erred in this determination inasmuch as the record evidence establishes that Mr. Varney "was not acting in a self-employed capacity as a sole proprietor, a member of a family business or partner in a partnership." Director's Oral Argument Brief at 12-14. The Director states that it is undisputed that Rebb Energy was a legally constituted corporation, operating the mine site where claimant worked. Therefore, it follows that the mine site could not also have been operated by Mr. Varney as a self-employed individual. The Director further states that the record is not silent regarding Mr. Varney's duties with Rebb. Claimant testified that Mr. Varney, in addition to being an officer, was the superintendent of the mine. Hearing Transcript at 24. The Director reasons that because Mr. Varney was an employee of Rebb, he could not have acted as a sole proprietor, a partner in a partnership, or a member of a family business. Moreover, the Director asserts that claimant was undisputably employed by Rebb and not Mr. Varney. Director's Oral Argument Brief at 12-13. Therefore, Mr. Varney cannot be considered a responsible operator since Section 725.493(a)(1) requires that claimant be employed by the operator. Director's Oral Argument Brief at 14.

In its response brief, employer asserts that Mr. Varney is not necessarily excluded from being a responsible operator pursuant to Section 725.491(c)(2)(i) merely because he was an employee of a coal company. Employer's Oral Argument Response Brief at 4-5. In other words, Mr. Varney could be a sole proprietor, a partner in a partnership, or a member of a family business and still receive compensation from that company as an employee. *Id.*

Employer's assertion has merit. Many sole proprietors, partners, and family-run business owners receive compensation for their "work" in the business. Thus, the evidence that the Director refers to does not rule out the possibility that Mr. Varney may qualify as a responsible operator pursuant to Section 725.491(c)(2)(i). The record consistently refers to Robert Varney as a corporate officer of Rebb, but contains no evidence further clarifying this

position. Director's Exhibits 7, 21, 22, 27. Accordingly, we continue to hold that there is insufficient evidence in the record regarding Mr. Varney's status to determine whether he comes within the definition outlined in Section 725.491(c)(2)(i). Therefore, we adhere to our original position and remand this case to the administrative law judge to determine whether Mr. Varney meets the definition of an operator as outlined in Section 725.491(c)(2)(i), noting that it is within his discretion to reopen the record for the submission of further evidence regarding Mr. Varney's status or to remand this case to the district director for further evidentiary development, 20 C.F.R. §725.456(e); *see Lynn, supra; Toler, supra*; *see generally Tackett, supra*.

The Board majority previously held that the administrative law judge's determination, that the Director has fulfilled his burden of showing Mr. Varney's inability to pay, is not supported by substantial evidence. Specifically, the majority held that Mr. White's note attached to his bankruptcy filing stating that Mr. Varney was also in bankruptcy proceedings, Director's Exhibit 29, does not constitute substantial evidence to substantiate this statement.[6] *See* 20 C.F.R. §802.301(a); *Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984). In employer's motion for reconsideration, it agrees with the Board that the administrative law judge erred in his decision regarding Mr. Varney's financial status. Employer's Oral Argument Brief at 1-2. In its response brief, employer notes Mr. White's statement "does not constitute evidence" on the issue of Mr. Varney's financial capability to pay benefits. Employer's Oral Argument Response Brief at 6. The Director has not addressed the majority's holding regarding this issue. Inasmuch as Mr. White's note is the only evidence in the record pertaining to Mr. Varney's ability to pay, and this evidence is clearly insufficient to establish that he is not financially able to make payments, *see England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993), we continue to hold that the administrative law judge's finding is unsupported by substantial evidence. *See* 20 C.F.R. §802.301(a); *Doss, supra*; *Zbosnik, supra*; *see also Wetzel, supra*; *Sheranko, supra*. Therefore, the administrative law judge's finding remains vacated and this case remanded for him to reconsider the issue.

[6] Judge McGranery respectfully dissented by stating that this evidence, which is unambiguous and undisputed by any evidence in the record, constitutes substantial evidence as defined by the U.S. Supreme Court, citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Accordingly, employer's Motion for Reconsideration *en banc* is granted, and the Board's previous Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGranery, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision regarding the issue of whether Mr. Varney could be liable as a responsible operator as a sole proprietor, a partner in a partnership, or a member of a family business pursuant to Section 725.491(c)(2)(i). I agree with the Director's position in this case that the record evidence establishes that Mr. Varney was not acting in a self-employed capacity as a sole proprietor, a member of a family

business, or partner in a partnership. Rather, because it is undisputed that Rebb Energy was a legally constituted corporation, operating the mine site where claimant worked, the mine site could not also have been operated by Mr. Varney as a self-employed individual. Moreover, I agree with the Director that the record is not silent regarding Mr. Varney's duties with Rebb inasmuch as claimant testified that Mr. Varney, in addition to being an officer, was the superintendent of the mine. Hearing Transcript at 24. Because Mr. Varney was an employee of Rebb, he could not have acted as a sole proprietor, a partner in a partnership, or a member of a family business. Accordingly, I would hold that Mr. Varney cannot be considered a responsible operator pursuant to Section 725.491(c)(2)(i). Consequently, the question regarding Mr. Varney's financial ability to pay would no longer be an issue in this case.

I agree in all other respects with the majority opinion.

REGINA C. McGRANERY
Administrative Appeals Judge