

Chapter 7

Designation of Responsible Operator

I. Generally

Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator or, if the responsible operator is unknown or is unable to pay benefits, liability is assessed against the Black Lung Disability Trust Fund. For an employer to be named as a responsible operator, certain statutory and regulatory requirements must be met. Direct employer liability for payment of claims can only result where the miner ceased coal mine employment after December 31, 1969. 20 C.F.R. § 725.492(a)(3) (2000) and §§ 725.494(d) and 727.495(a)(3) (2008). Moreover, an employer is liable only for the payment of benefits for any period after December 31, 1973. 20 C.F.R. § 725.492(a) (2000) and 20 C.F.R. § 725.490(a) (2008).

II. "Operator" defined

The threshold requirement for identification of the responsible operator is determining whether an "operator" is involved. Subsection 725.491(a), defines "operator" as the following:

[A]ny owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine..., [c]ertain other employers, including those engaged in coal mine construction, maintenance and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator for purposes of this part.

20 C.F.R. § 725.491(a) (2000). Similar definitions are located at 20 C.F.R. § 725.491 (2008).

III. Most recent operator liable

Liability is assessed against the most recent operator that meets the requirements at 20 C.F.R. §§ 725.492 and 725.493 (2000) and 20 C.F.R. §§ 725.491-725.494 (2008). Where there is more than one operator for whom the claimant worked a cumulative total of at least one year, liability is imposed on the most recent operator that meets the requirements for designation as set forth *infra* in this Chapter. *Snedecker v. Island Creek Coal Co.*, 5 B.L.R. 1-91 (1982). See also *C & K Coal Co. v. Taylor*, 165 F.3d 254 (3rd Cir. 1999) (a USDOL/OALJ Black Lung Benchbook (Rev. June 24, 2008)

successor mine operator was held liable for the payment of benefits where the miner had worked for the predecessor mine company for 27 years and had worked for the successor for only three months).

A. Prior to applicability of 20 C.F.R. Part 725 (2008)

An administrative law judge is required to go back up the chain of operators for which the claimant worked until the most recent operator, which meets the regulatory requirements and has the financial ability to pay, is identified. See *Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51 (1996); *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4th Cir. 1995), *rev'g. in part sub nom., Matney v. Trace Fork Coal Co.*, 17 B.L.R. 1-145 (1993).

It is noteworthy that, in *Matney*, the Fourth Circuit denied the Director's motion to remand for designation of the proper responsible operator. The court reasoned that it was improper to attempt to name a new operator after the claim had been fully litigated on the merits and benefits were awarded. The court concluded that to hold otherwise could potentially upset a claimant's entitlement to benefits, as the newly named operator would be entitled to challenge the claimant's award.

In view of this decision, if an administrative law judge is assigned a case involving multiple responsible operators with no explanation as to why one operator was not selected, then either by motion of a party or *sua sponte*, the administrative law judge may remand the case, *prior* to a hearing, for designation of the proper operator. In the event that a single operator cannot be named, the Director may be directed to provide a specific explanation of the reasons which necessitate naming more than one operator.

As previously noted, where no operator can be identified, liability for the payment of benefits lies with the Black Lung Disability Trust Fund. 20 C.F.R. §§ 725.490 and 725.493(a)(4) (2000) and 20 C.F.R. § 725.495(a)(4) (2008). In determining liability as between two or more operators meeting the criteria of 20 C.F.R. § 725.492 (2000) and 20 C.F.R. § 725.495 (2008), the liable operator is the one that most recently employed a claimant for a cumulative period of one year. 20 C.F.R. § 725.492(b) (2000) and 20 C.F.R. § 725.495(c) (2008).

B. After applicability of 20 C.F.R. Part 725 (2008)

Under the amended regulations, a claim is referred to this Office from the district director with only one operator designated as potentially responsible for the payment of benefits. 20 C.F.R. § 725.418(d) (2008). As a result, the amended regulations also contain certain restrictions with regard to actions that may be taken by administrative law judges. For example, 20 C.F.R. § 725.465(b) provides that "[t]he administrative law judge shall not

dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." 20 C.F.R. § 725.465(b) (2008). According to the Department's comments, this provision is not intended to eliminate the administrative law judge's authority to adjudicate the issue of whether the named responsible operator is in fact liable for the payment of benefits; rather, it is a means to prevent a preliminary decision by the administrative law judge dismissing the operator and, thereby requiring the Director to file an interlocutory appeal or with an appeal following a decision on the merits in which the Board may decide to affirm the dismissal of the responsible operator "solely because the operator did not have an opportunity to participate in the adjudication of the merits of the claim." 65 Fed. Reg. 80,004 - 80,005 (Dec. 20, 2000).

Moreover, § 725.456(b)(1) provides that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. § 725.456(b)(1) (2008).

For a further discussion of limitations on the submission of evidence and handling of designated responsible operators under the amended regulations, see Chapter 4.

IV. Identifying the proper operator; burden of production/persuasion

A. Director's burden to investigate and assess liability

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

In *England v. Island Creek Coal Co.*, 17 B.L.R. 1-141 (1993), the Board emphasized that it is the Director's burden to investigate and assess liability against the proper operator. Specifically, the Board determined that the named employer in *England* "completely and successfully completed its defense that [another employer] should have been named as responsible operator by demonstrating that the claimant was employed by [the other operator] for more than one calendar year." The Board stated that, by requiring that the named operator affirmatively establish that liability for the payment of benefits lay with another employer, "the Director [was] attempting to charge [the named employer] with the burden of demonstrating the ability of another operator to assume payment." The Board then concluded that such was improper as the burden lies with the Director and, as a result, it proceeded to assess liability against the Trust Fund because the Director never proceeded against the other employer and "to do so at this juncture . . . would offend due process."

**2. After applicability of
20 C.F.R. Part 725 (2008)**

The regulatory amendments at 20 C.F.R. § 725.495(c)(2) (2008) shift the burden to require that the designated responsible operator establish "[t]hat it is not the potentially liable operator that most recently employed the miner."

**B. Proceeding against the potential operator
at every stage of litigation**

**1. Prior to applicability of
20 C.F.R. Part 725 (2008)**

The Department of Labor must resolve the issue of whether an operator is the responsible operator in preliminary proceedings or proceed against all putative responsible operators at every stage of adjudication. The agency is not entitled to a second opportunity to identify another responsible operator. *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984). *But see Director, OWCP v. Oglebay Norton*, 877 F.2d 1300 (6th Cir. 1989). In *Oglebay Norton*, the court refused to apply *Crabtree* where no prejudice resulted from naming a second responsible operator, since under 20 C.F.R. § 725.412(a) (2000), an operator can be named at "any time during the processing of a claim" although it should be done "as soon after the filing of the claim as the evidence obtained permits." The Board itself also limited *Crabtree*, holding that an employer who was named as responsible operator prior to the administrative law judge hearing where two years remained to allow development of a defense was not prejudiced by such action. *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1990); *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990).

In *Mitchem v. Bailey Energy, Inc.*, 22 B.L.R. 1-24 (1999)(en banc), the Director argued that, Bailey Energy was Claimant's most recent employer and it "should be held liable because it has not proved that it is incapable of paying benefits." Employer did not file a controversion at the district director's level nor was it represented at the hearing held before an administrative law judge. At the hearing, the Director maintained that a prior employer, Pocahontas Coal, should be held liable as evidence demonstrated that Bailey Energy was uninsured and its president "had a net worth of negative one million dollars." The Board stated the following:

As discussed at oral argument, allowing the Director to change his position after an administrative law judge has awarded claimant benefits and hold Bailey Energy liable for those benefits, raises due process concerns for Bailey Energy which did not participate in the hearing before the administrative law judge. Therefore, . . . if, on remand, Bailey Energy were held to be the responsible operator in this case, it would be entitled to challenge claimant's

entitlement to benefits . . . which had been established previously. To hold Bailey Energy liable for benefits in this case clearly would be inconsistent with the holdings in *Matney* and *Crabtree* and raise the concerns which the Fourth Circuit court and the Board sought to avoid in those cases.

Our dissenting colleagues believe that Bailey Energy has forfeited its right to contest the award by failing to appear at the hearing after failing to file a controversion or a response to the initial decision. The Director, however, has not fulfilled his responsibility under *Crabtree* simply by naming Bailey Energy as a party, without continuing to proceed against it. Yet at the hearing he conceded that only United Pocahontas and its insurer could be held liable.

. . .

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, it is now too late to assign liability for those benefits to Bailey Energy.

The Board noted that, under the procedural history of the case, the Director properly notified all operators of their potential liability. However, at the hearing before an administrative law judge, the Director presented evidence that Bailey Energy was incapable of paying benefits and argued that United Pocahontas should be held liable. On appeal, the Director switched its position and sought a remand to assess liability against Bailey Energy. On reconsideration, the Board held that it properly denied the Director's request and concluded that "[t]he Director should have fully developed below the evidence regarding Bailey Energy's capability to pay." As a result, the Board concluded that the "request now to direct Bailey Energy to pay benefits comes too late." It stated that "[w]hile the Director notified all the potentially responsible operators in this case, he did not fulfill his duty to 'proceed against' all possible operators because he did not fully develop evidence regarding their financial capability pursuant to 20 C.F.R. §§ 724.410(b), (and) 725.412, . . ."

2. After applicability of 20 C.F.R. Part 725 (2008)

Under the amended regulations, the difficulties of proceeding against every potential responsible operator at each stage of litigation will be minimized. This is because the regulations require that the district director name only one potentially responsible operator before referring the claim to the Office of Administrative Law Judges. 20 C.F.R. § 725.418(d) (2008).

V. Requirements for responsible operator designation

A. Powers of supervision and control

The focus of inquiry is whether the entity has the right to control the details of the work. Principal factors bearing on the right to control include the following: (1) direct evidence of the right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984). In determining whether a company is an operator, the Board has held that the test is whether the company has reserved to itself, under its contractual arrangements, powers that allow it to exercise supervision and control over the coal mine. The test is not whether the company has, in fact, exercised such powers. *Long v. Clearfield Bituminous Coal Corp.*, 1 B.L.R. 1-149 (1977). This was upheld by the Third Circuit in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3rd Cir.1994)(lessor was without substantial control and was, therefore, not a responsible operator). Based on this rationale, a company which constructs, enlarges, and repairs coal preparation facilities is also a coal mine operator when it has the contractual power to shut down the coal processing plant, therefore, exercising control over the mine, and when the company's employees also supervised the operation of these same facilities during start up periods. *Hughes v. Heyl & Patterson, Inc.*, 647 F.2d 452 (4th Cir. 1981).

The Board later held, in *Price v. Dresser Industries, Inc.*, 8 B.L.R. 1-179 (1985), that companies having only *de minimis* or sporadic contact with a mine and/or which merely provide incidental services to coal mines are not operators within the meaning of the Act. *Id.* at 1-181. Yet, an employer's involvement in the dismantling, loading, moving, and reassembly of equipment users in strip mining operations constitutes essential mine services and sufficient presence at mine sites to consider the employer an operator. *Zimmerman v. J. Robert Bazley, Inc.*, 10 B.L.R. 1-75 (1987).

The regulatory amendments at 20 C.F.R. § 725.491 (2008) codify many of these criteria for designation of a responsible operator.

1. Independent contractors

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

An independent contractor providing heavy equipment services and maintaining a continued presence at the mine may be a responsible operator. *Itell v. Ritchey Trucking Co.*, 8 B.L.R. 1-356 (1986).

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations, an "independent contractor" may be held liable for the payment of benefits and includes "any person who contracts to perform services." 20 C.F.R. § 725.491(c) (2008). As under the prior version of the regulations, an independent contractor's "status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities."

2. Franchised equipment dealer

A franchised equipment dealer with a continuous presence at a mine has been found to be a coal operator. *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 B.L.R. 1-38 (1992).

3. Lessors

**a. Prior to applicability of
20 C.F.R. Part 725 (2008)**

The regulations at 20 C.F.R. § 725.491(b)(2)-(4) and (c)(iii) (2000) address the assignment of liability involving lessee-lessor relationships. As a general rule, lessee liability is primary, while lessor liability is secondary. However, the lessor may have primary liability if the lease or agreement is made or renewed after August 18, 1978 (the effective date of Part 725), the lessor previously operated a coal mine, *and* such lease or agreement does not require the lessee to guarantee payment of federal black lung benefits. 20 C.F.R. § 725.491(b)(2)(iii) (2000).

The Board initially held that, where a lessor of a mine retains sufficient rights of control and supervision of mining operations, including right of inspection, right of ejectment and confession of judgment, and the right to direct the manner and extraction of coal, the lessor may be held to be the responsible operator. *Yebernetsky v. Elliot Coal Mining Co., Inc.*, BRB No. 84-2560 BLA (June 30, 1988)(unpub.).

On appeal, in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3rd Cir. 1994), the court noted that the language of Section 3(d) of the Act requires that an owner or lessor retain "some right to control or supervise others' mining operations on land they own or lease." The Third Circuit interpreted this regulatory provision to require "actual operation, supervision or control and that the mere existence of an unexercised right to control cannot make a lessor or owner a responsible operator." Rather, the lessor or

owner must have "substantial, effective control" over the mining operation.

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations at 20 C.F.R. § 725.491(a)(1) (2008), an "operator" is defined to include "[a]ny owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine." 20 C.F.R. § 725.491(a)(1) (2008). The new regulations further provide the following:

(e) The operation, control or supervision referred to in paragraph (a)(1) of this section may be exercised directly or indirectly. Thus, for example, where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator. Similarly, any parent entity or other controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

20 C.F.R. § 725.491(e) (2008). The new regulations also contain provisions that define the employment relationship, in cases involving lease agreements, for purposes of ascertaining the proper responsible operator. Section 725.493 provides, in part, as follows:

(b) This paragraph contains examples of relationships that will be considered employment relationships for purposes of this part. The list is not intended to be exclusive.

. . .

(3) In any claim in which the operator which directed, controlled or supervised the miner is a lessee shall be considered primarily liable for the claim. The liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in accordance with the following considerations:

(i) Where a coal mine is leased, the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor shall be considered the employer of any employees of the lessee.

(ii) Where a coal mine is leased to a self-employed operator, the lessor shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after August 18, 1978 and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part and part 726 of this subchapter.

(iii) Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after August 18, 1978 and does not require the lessee to secure benefits provided by the Act, . . .

20 C.F.R. § 725.493(b) (2008).

4. The parent company

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

The regulations at 20 C.F.R. § 725.491(b) (2000) provide that in identifying the operator, where the individual or business entity most directly connected with the mine site is not capable of assuming liability for the payment of benefits (see § 725.492(d)), or is no longer in business, a parent entity or other member of a joint venture, partnership, or controlling business entity may be considered an operator.

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations at 20 C.F.R. § 725.491(b) (2008), the terms "owner," "lessee," and "person" includes any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization, as appropriate, except that an officer of a corporation shall not be considered an 'operator' for purposes of this part." 20 C.F.R. § 725.491(b) (2008). Moreover, the language at § 725.493(b)(2) provides that "[i]n any case in which the operator which directed, controlled or supervised the miner is no longer in business and such operator was a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or was substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered the employer of any employees of such operator." 20 C.F.R. § 725.493(b)(2) (2008).

5. The self-employed miner

**a. Prior to applicability of
20 C.F.R. Part 725 (2008)**

A self-employed miner may be considered an operator under the regulations. 20 C.F.R. §725.491(c)(2)(i) (2000). However, the self-employed operator, depending upon the circumstances of the case, may instead be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator. 20 C.F.R. § 725.491(c)(2)(ii) (2000). See *Crews v. Leckie Smokeless Coal Co.*, 7 B.L.R. 1-220 (1984).

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations at 20 C.F.R. §725.491(b) (2008), the terms "owner," "lessee," and "person" includes any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization, as appropriate, except that an officer of a corporation shall not be considered an 'operator' for purposes of this part." 20 C.F.R. § 725.491(b) (2008). Moreover, § 725.493(b)(3)(ii) states that "[w]here a coal mine is leased to a self-employed operator, the lessor shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed to renewed after August 18, 1978 and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part and part 726 of this subchapter." 20 C.F.R. § 725.493(b)(3)(ii) (2008). In addition, the amended regulations

provide that "[a] self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator." 20 C.F.R. § 725.493(b)(4) (2008).

6. Successor liability

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

Generally

Prior to the enactment of the Black Lung Benefits Reform Act of 1977, the Act at 30 U.S.C. § 932(i) provided that any mine operator who acquired a mine, or substantially all of its assets, from a prior operator after the enactment date of the title, and who was an operator of the mine on or after the effective date of the title, was responsible for the payment of all benefits that would have been payable to miners previously employed in the mine as if the acquisition had not occurred.

The Reform Act amended this section to provide that any mine operator who acquired a mine or substantially all of its assets on or after January 1, 1970, from a mine operator who was an operator on or after January 1, 1970, will be liable for payment of all benefits that would have been payable to miners previously employed by such prior operator as if the acquisition had not occurred. Thus, the last successor operator who acquired the mine or substantially all of its assets on or after January 1, 1970, shall, if found financially capable, be liable for payment of all benefits. 20 C.F.R. §§ 725.493(a)(2) and (a)(3) (2000). See *Hendrick v. Sterling Smokeless Coal Co.*, 6 B.L.R. 1-1029 (1984); *Haer v. Penn Pocahontas Coal Co.*, 1 B.L.R. 1-579 (1978); *Truitt v. North American Coal Corp.*, 2 B.L.R. 1-199 (1979), *appeal dismissed sub nom, Director, OWCP v. North American Coal Corp.*, 2 B.L.R. 2-45 (3rd Cir. 1984); *Close v. National Mines Corp.*, 7 B.L.R. 1-455 (1978).

Transfer of assets

By Order Granting Reconsideration in *Williams v. Humphrey's Enterprises, Inc.*, 19 B.L.R. 1-111 (1995)(recon.), the Board has held that "to demonstrate whether an actual transfer of assets had occurred the evidence must establish that the operator purchasing stock had control of the daily mining operations." In this case, the Board denied relief sought by the Director and reaffirmed its original decision in *Williams* to conclude that the Director did not establish an adequate record upon which to find successorship between Humphrey's Enterprises and Blackwood or Sunrise. Further, the Board rejected the Director's position that the "degree of control" is not

considered when determining successorship; rather, only the "transfer of assets" is relevant pursuant to § 725.493(a)(2)(i) of the regulations.

Working for predecessor and successor company

In *C & K Coal Co. v. Taylor*, 165 F.3d 254 (3rd Cir. 1999), the court held that a successor mine operator was liable for the payment of benefits where the miner had worked for the predecessor mine company for 27 years and then had worked for the successor for only three months. Moreover, the court declined to apportion liability between the predecessor and successor. In so holding, the court disagreed with the successor operator's argument that it could not be held responsible because it had not employed the miner for at least one year. Upon review of the statute and regulations, the court determined that, once the successor purchased the assets of the predecessor company and the miner worked for the successor, then his years of coal mine employment with the predecessor were attributed to the successor. Finally, the court concluded that a 23 year delay from the initial application for benefits to the date of the responsible operator determination did not violate employer's due process rights. However, it stated the following:

Although we recognize that inadequate information initially hampered the Office's ability to grasp the relationship among Taylor, Lamp, and C & K, we are appalled that this relatively straightforward issue bounced three times between the Office and an ALJ, accompanied by unnecessary delays. Similarly, we cannot ignore that the Board compounded the delay by permitting the Director to flout its rules that set time limits for filing briefs.

. . .

The tortured route that this matter took towards resolution simply cannot be justified. Counsel for the current Director, with admirable candor, did not try to do so at oral argument. Rather, he assured us that steps have been taken in the past few years to ensure that Black Lung claims are expeditiously resolved. Statistics reveal that the number and age of pending Black Lung cases has, indeed, steadily decreased. We cannot hope but that this trend continues. Recent progress, however, is of little consolation to (Employer) . . .

Id.

**b. After applicability of
20 C.F.R. Part 725 (2008)**

The provisions at § 725.492 contain an amended definition of "successor

operator." 20 C.F.R. § 725.492 (2008). Subsection (a) provides that "[a]ny person who . . . acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof, shall be considered a 'successor operator' with respect to any miners previously employed by such prior operator." 20 C.F.R. § 725.492(a) (2008). The new regulations also set forth additional "transactions" that are deemed to create a successor operator, including reorganization of the company and liquidation. The regulations further provide that "[t]his section shall not be construed to relieve a prior operator of any liability if such prior operator meets the conditions set forth in § 725.494." 20 C.F.R. § 725.492(d) (2008).

7. The federal government

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

Prior to the regulatory amendments, the Board held that federal agencies could be held potentially liable as an operator for the payment of benefits. In *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981), the Board reasoned that the Department of Interior's Bureau of Mines, which was operating a coal mine, could be considered an operator. However, the Board also held that the United States is not legally capable, for purposes of the regulations, of providing benefits to the claimant. Civil liability may not be imposed upon the "sovereign" except to the extent and in the manner to which it has consented. *Dalehite v. United States*, 346 U.S. 15 (1953). Under the Federal Employee's Compensation Act, Congress provided a federal employee's exclusive cause of action against the United States, and therefore, the Bureau of Mines would be incapable of assuming any liability for payment under the Black Lung Benefits Act. Although the Board in *Spradlin v. Island Creek Coal Co.*, 6 B.L.R. 1-716 (1984), refused to address whether the Mine Enforcement Safety Administration could be found to be a responsible operator, it is logical that the same analysis would apply.

b. After applicability of 20 C.F.R. Part 725 (2008)

The amended regulations at 20 C.F.R. § 725.491(f) (2008), however, provide that "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. § 725.491(f) (2008).

8. Partnerships

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

Prior to the regulatory amendments, in *Williams v. Lovilia Coal Co.*, 20 B.L.R. 1-58 (1996), the Board held that a miner's status as a partner of the responsible operator did not "affect his eligibility for benefits based on his work for that concern" and Employer's "status as the responsible operator does not turn on [the miner's] partnership agreement." Citing to the Act, which lists partnerships as entities which may be held liable for benefits, as well as FRCP 17(b)(1), which provides that a partnership may be sued to enforce a substantive right against it, the Board concluded that "a partnership which operates a coal mine . . . is properly named as the responsible operator under the firm name." The Board further noted that "there is no option in [the Act] for a partner or self-employed person to opt out of coverage for qualifying coal mine employment."

b. After applicability of 20 C.F.R. Part 725 (2008)

Under the amended regulations at § 725.491(b), the terms "owner," "lessee," and "person" include any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization, as appropriate, except that an officer of a corporation shall not be considered an 'operator' for purposes of this part." 20 C.F.R. § 725.491(b) (2008).

9. A "reorganized" company

a. Prior to applicability of 20 C.F.R. Part 725 (2008)

Prior to the regulatory amendments, in *Bates v. Creek Coal Co.*, 18 B.L.R. 1-1 (1993), the Board held that the employer was a "reorganized entity" and not a successor operator. The Board noted that a reorganization is "a change in business form as opposed to a change in substance . . . [and] does not discharge the liability of the original entity." Specifically, in *Bates*, "[operator] CCI did not buy [operator] CCC's assets; rather CCC became CCI without interrupting operations." As a result, the Board held that, in determining whether the miner worked for CCC or CCI for at least a cumulative one year period, his two years of employment with CCC is merged with his two months of subsequent employment with CCI to hold the "reorganized entity" of CCC/CCI liable for benefits. By Decision and Order on Reconsideration, the Board reaffirmed its holding in *Bates v. Creek Coal Co.*, 20 B.L.R. 1-36 (1996), *aff'g. on recon.*, 18 B.L.R. 1-1 (1993) to state that a "reorganized" company is

not a successor operator and is, therefore, primarily liable for benefits.

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations, it is noted that "[t]he following transactions shall also be deemed to create successor operator liability":

(1) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected.

20 C.F.R. § 725.492(b)(1) (2008).

10. State government

**a. Prior to applicability of
20 C.F.R. Part 725 (2008)**

Pursuant to the Eleventh Amendment of the Constitution, there is no right to sue a State government entity unless express consent is given or a statutory exemption is created. *See Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991); *Tafflin v. Levitt*, 493 U.S. 455 (1990); *West Virginia v. United States*, 479 U.S. 305 (1987).

**b. After applicability of
20 C.F.R. Part 725 (2008)**

Under the amended regulations at 20 C.F.R. § 725.491(f), "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. § 725.491(f) (2008).

B. Situs of the work performed

Since an operator is an individual or entity that owns, controls, or supervises a "coal mine,"¹ it is necessary to determine whether the miner was working at a coal mine. As an example, a claimant's work in an employer's central repair shop does not constitute coal mine employment because such work does not meet the situs requirement, and the employer is not an operator. *Seibert v. Consolidation Coal Co.*, 7 B.L.R. 1-42 (1984).

¹ See 20 C.F.R. § 725.491(a)(1) (2008).

C. Miner's disability or death arose out of coal mine employment with the operator

1. Generally

One factor that must be established before an employer may be held liable for benefits is that the miner's disability or death arose at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator. See 20 C.F.R. § 725.492(a)(1) (2000) and 20 C.F.R. § 725.491(a)(1) (2008). The Board has held that the language "at least in part" should be read "at least in any part"; there is no requirement that the causal nexus be significant. *Harringer v. B & G Construction Co.*, 4 B.L.R. 1-542 (1982).

2. Rebuttable presumptions

The regulations provide the following two presumptions to support a finding that the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis arose out of his employment with the operator. 20 C.F.R. §§ 725.492 (2000) and 725.491(d) (2008).

Under the amended regulations, there is a rebuttable presumption that the miner's "disability or death" arose in whole or in part out of his or her employment with the operator. 20 C.F.R. § 725.494(a) (2008). This subsection further provides the following:

Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability to death of the miner in accordance with this part. A miner's pneumoconiosis, or disability or death therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work caused, contributed to or aggravated the progression or advancement of the miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

20 C.F.R. § 725.494(a) (2008). *Compare* 20 C.F.R. § 725.493 (2000). It is important to note that these presumptions apply only with regard to the determination of a responsible operator and *not* to the miner's entitlement to benefits, which must be separately determined under the appropriate regulations.

a. Presumption that the miner was regularly and continuously exposed to coal dust

Section 725.492(c) provides a rebuttable presumption that during the course of an individual's employment, such individual was regularly and continuously exposed to coal dust. 20 C.F.R. § 725.492(c) (2000) and 20 C.F.R. § 725.491(d) (2008). To rebut the presumption, the employer must establish that there were *no* significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). The frequency of coal dust exposure must be shown to be so slight that employment with the mine operator could not have caused pneumoconiosis. *Richard, supra*; *Harringer v. B & G Construction Co.*, 4 B.L.R. 1-542 (1982).

Note that the Board has held that, for purposes of determining entitlement to benefits (as opposed to designating the proper responsible operator), it is error for an administrative law judge to discount coal mine employment because it was not "regular and continuous" and because it was not "performed under conditions which were substantially similar to those present in an operating underground mine." Both standards are inapplicable in determining the length of coal mine employment for purposes of establishing entitlement pursuant to the interim presumption; rather the requirements of "regular and continuous" work as well as work under "substantially similar" conditions are used only to determine which employer is responsible for the payment of benefits under the 125 day rule. *Ritchey v. Blair Electric Services Co.*, 6 B.L.R. 1-966, n.3 (1984). The Board distinguished *Luker v. Old Ben Coal Co.*, 2 B.L.R. 1-304 (1979), which applied only to establishing entitlement pursuant to 30 U.S.C. § 921(c)(4) of the Act and its implementing regulations. 20 C.F.R. §§ 410.414(b) and 718.305 (2000). Section 921(c)(4) of the Act requires that a claimant establish 15 years of work in an underground or substantially similar coal mine to be entitled to a rebuttable presumption of total disability due to pneumoconiosis. The requirement that employment be "regular and continuous" applies only to a determination of a responsible operator. 20 C.F.R. § 725.492(e) (2000). *Ritchey, supra*, n.3.

b. Presumption that the miner's pneumoconiosis arose out of coal mine employment with the operator

Subsection 725.493(a)(6) provides the claimant with a second rebuttable presumption, that his pneumoconiosis arose in whole or in part out of his employment with an operator, where that operator is determined to be the

responsible operator under paragraphs (a)(1) through (a)(4) of that section. 20 C.F.R. § 725.493(a)(6) (2000) and 20 C.F.R. § 725.494(a) (2008). A miner's pneumoconiosis, or disability therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his regular or comparable coal mine work. *Yurga v. Bethlehem Mines Corp.*, 5 B.L.R. 1-429 (1982).

The Board has held that, to satisfy rebuttal under this subsection, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980).

In *Hendrick v. Sterling Smokeless Coal Co.*, 6 B.L.R. 1-1029 (1984), the employer argued that the medical evidence established that the miner was totally disabled due to pneumoconiosis at least eight months prior to his employment with the named operator; therefore, the employer could not be the responsible operator because the claimant could not prove that his total disability arose at least in part out of employment with the named operator as required by 20 C.F.R. § 725.492(a)(1) (2000). The Board upheld the administrative law judge's rejection of the employer's argument. Under 20 C.F.R. § 727.205 (2000), a miner cannot be found to be totally disabled while continuing to perform his usual coal mine work unless either of the following is established: (1) the miner has complicated pneumoconiosis; or (2) there are changed circumstances of employment indicative of a reduced ability to perform coal mine work. *Truitt v. North American Coal Co.*, 2 B.L.R. 1-199 (1979).

D. Operation of a coal mine after June 30, 1973

The regulations at 20 C.F.R. § 725.492(a)(2) (2000) and 20 C.F.R. § 725.494(b) (2008) require that the employer must have operated a coal mine or other facility for any period after June 30, 1973 to be held liable for the payment of benefits as a responsible operator.

E. Employment after December 31, 1969

1. Generally

The miner's employment with the operator must include at least one working day after December 31, 1969. 20 C.F.R. §§ 725.492(a)(3) (2000) and 725.494(d) (2008). See also *Bethlehem Mines Corp. v. Warmus*, 578 F.2d 59 (3rd Cir. 1978). The term "working day" is defined as any day or part of a day for which a miner received pay for work as a miner. 20 C.F.R. §§ 725.493

(2000) and 725.101(a)(32) (2008).

2. "Working day" defined

The phrase "working day" is modified under the amended regulations, which reference 20 C.F.R. § 725.101(a)(32) (2008). Under § 725.101(a)(32):

A 'working day' means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. § 725.101(a)(32) (2008).

F. Cumulative employment of one year or more and the 125-day rule

1. Generally

There are two types of calculations in determining the length of a miner's employment for purposes of responsible operator designation. One calculation serves to determine whether a miner has worked for an operator for a cumulative period of one year. This calculation may be based on "any reasonable method" such as affidavits of co-workers, testimony of the miner, payroll stubs, W-2 forms, or Social Security records. The fact-finder may include time on an employer's payroll even while sick or on vacation for example.

The second type of calculation is used to determine *actual exposure* to coal dust while working for an operator. Here, the 125 day rule is utilized in pre- and post-amendment claims. In post-amendment claims, if Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* is utilized, a copy must be in the record or attached to the decision. *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007). Importantly, once the fact-finder has determined that a miner was on the operator's payroll for a period of one calendar year, or partial periods totaling one year, then it must be established that the miner spent an actual 125 working days at the operator's mine site. This requirement is designed to demonstrate that the miner suffered from "regular" exposure to coal dust while in the employ of the operator.

2. Case law examples

a. Benefits Review Board

In *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275 (2003), the judge calculated the length of coal mine employment for purposes of determining the proper responsible operator using three different methods. The Board stated that 20 C.F.R. § 725.493(b) (2000) "contemplates a two-step inquiry into the miner's employment to determine if an employer is the responsible operator." The inquiry is as follows:

First, the administrative law judge must determine whether the miner worked for an operator for one calendar year or partial periods totaling one calendar year. Then, if the administrative law judge finds that the threshold one-year requirement is met, the administrative law judge must determine whether the miner's employment was regular. (citations omitted). Thus, a mere showing of 125 working days does not establish one year of coal mine employment. (citations omitted). In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation. (citation omitted).

Under the first method to calculate length of coal mine employment, the administrative law judge compared the miner's earnings with Barnwell Coal Company (Barnwell) for 1978 and 1979 against earnings with other coal operators during the same time period. The Board found this method to be "problematic and unexplained" and concluded that "[a] finding that the miner's Barnwell wages exceeded his wages from other coal mine employment of undefined duration during 1978 and 1979 does not establish that he worked a calendar year for Barnwell."

Under the second method, the judge utilized a Bureau of Labor Statistics (BLS) table² to determine that the miner worked for Barnwell for a period of one year. The Board noted that "[u]pon review of the BLS table utilized by the administrative law judge, it is apparent that the yearly figures set forth in column two and relied upon by the administrative law judge are not based on a one-year employment period, but represent only 125 days of earnings." The Board then reiterated that 125 working days "does not establish the threshold one year of coal mine employment." The Board determined that this method of calculating length of coal mine employment was unreasonable.

² The table is located at Exhibit 610 of the *OWCP Coal Mining (BLBA) Procedure Manual*.

The third method of calculating length of coal mine employment utilized by the administrative law judge was under 20 C.F.R. § 725.101(a)(32)(iii) (2008). Here, the judge determined the total amount of wages earned by Claimant during the year for Barnwell and divided that amount by the coal mine industry's average daily earnings reported at column three of the table, which produced the number of days the miner would have worked for the year. The judge concluded that the miner worked a total of 206 days for Barnwell using this method of calculation.

The Director asserted on appeal that the judge should have then divided the total of 206 days by 125 "to determine the part of the year devoted to coal mine employment." The Director stated that, when 206 days is divided by 125, then it demonstrates that the miner worked 1.64 years for Barnwell. The Board noted the following:

Although the additional computation suggested by the Director appears nowhere in 20 C.F.R. § 725.101(a)(32)(iii), the Director argues that the need for it is 'obvious,' in order to ascertain the 'fractional year,' where a miner has worked fewer than 125 days. (citation omitted). In support of this interpretation, the Director cross-references 20 C.F.R. § 725.101(a)(32)(i), which provides, in part, that where a calendar year of employment is established but the miner actually 'worked fewer than 125 working days in a year, he or she has worked in a fractional year based on the ratio of the actual number of days worked to 125.'

The Board disagreed with the Director's approach and held the following:

For purposes of determining the threshold one-year requirement, we conclude that the Director's interpretation of 20 C.F.R. § 725.101(a)(32)(iii) is not reasonable because it collapses the two-step analysis required by 20 C.F.R. § 725.493(b) (2000) to determine whether one year of employment is established. The suggested formula at 20 C.F.R. § 725.101(a)(32)(iii), as written, yields the number of days actually worked in coal mine employment. That total here is 206 days. In dividing this number by 125, the Director confuses the threshold inquiry of whether the miner had a calendar year of employment with the second-stage inquiry of whether, having actually worked 125 days as a miner, or credited with a fractional year, having working worked fewer than 125 days as a miner during the year. Here, by contrast, the question is whether the threshold calendar year has been established. In this context, dividing the number of days worked by 125 effectively credits the miner with a year of coal mine employment if he or she worked 125 days, contrary to the standard that a mere showing of 125 working days does not

establish the threshold one-year of employment.

Based on the judge's finding of 206 days of employment as a miner for Barnwell, the Board concluded that the miner did not meet the requirement of working for a cumulative period of one year for the employer.³ Consequently, the Board concluded that substantial evidence did not support a finding that Barnwell employed the miner for at least one year as required at 20 C.F.R. § 725.493(a) and (b) (2000).

b. Sixth Circuit

In *Kentland Elkhorn Coal Corp. v. Director, OWCP [Hall]*, 287 F.3d 555 (6th Cir. Apr. 24, 2002), the Sixth Circuit initially found that Desperado Fuels was not the responsible operator as it did not employ Claimant for a period of one year. In so holding, the court concluded that time spent receiving disability benefits should be excluded in computing the length of time Claimant worked for Employer. Specifically, the miner worked for Desparado Fuels from March 6, 1989 to July 7, 1989. He suffered a work-related injury and received disability benefits from July 8, 1989 until June 12, 1990. The court held that the time period during which the miner received disability benefits could not be used to satisfy the requirement of one year of employment with Desperado Fuels. Distinguishing the Board's holding in *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986), the court noted that the miner in *Boyd* was kept on the payroll after his injury and continued to work for the employer after the injury. In the present case, Claimant quit working for Desparado Fuels after his injury and he did not even work for the company for 125 days prior to his injury.

The court then determined that the judge erroneously dismissed the other named operators, Coleman and Grassy Creek. Upon review of the evidence, the court concluded that these entities had a predecessor/successor relationship and the Claimant worked for the entities for more than one year. However, because the claim was "fully litigated on the merits" and Claimant was determined to be entitled to benefits, the court found that the parties would be prejudiced by a remand to the judge to designate Coleman/Grassy Creek as the proper responsible operator. As a result, the court dismissed Kentland from the case and held that the Black Lung Disability Trust Fund was liable for the payment of benefits.

³ The Board specifically stated that, although it declined to follow the Director's proposed interpretation of 20 C.F.R. § 725.101(a)(32)(iii) (2000), it would not decide whether the revised regulatory provisions at 20 C.F.R. § 725.101(a)(32) (2008), defining "year", was applicable to the claim.

3. Use of the 125-day rule prior to applicability of 20 C.F.R. Part 725 (2008)

a. Constitutes one year of cumulative employment for operator

In claims filed prior to January 19, 2001, which fall under the jurisdiction of the Seventh and Eighth Circuits, a finding of 125 days of employment for an operator constitutes one year of employment in support of responsible operator designation. *Landes v. Director, OWCP*, 997 F.2d 1192 (7th Cir. 1993); *Yauk v. Director, OWCP* 912 F.2d 192 (8th Cir. 1989).

b. Does not constitute one year of cumulative employment for operator

Benefits Review Board

The Board and other circuit courts considering the issue, on the other hand, limit use of the 125 day rule to determining whether an operator may be held potentially liable for the payment of benefits. In *Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996)(*en banc*), the Board rejected a claimant's argument that his length of coal mine employment must be determined using the 125-day rule. The Board held that the 125 day rule relates to identification of the proper responsible operator, not the actual length of a miner's employment for purposes of the entitlement presumptions. The Board noted the following:

[T]he 125 day provision set out at Section 725.493(b) may be applicable once the threshold requirement that the miner be employed for at least one year, or partial periods totaling one year, is satisfied. (citation omitted). Once that requirement is satisfied, employer is provided an opportunity to establish that the miner's employment was not regular by proving that the miner has not worked for employer for a period of at least 125 working days. Thus, the Board has held that a mere showing of 125 days of coal mine employment does not, in and of itself, establish one year of coal mine employment under 20 C.F.R. §725.493. (citation omitted).

In so holding, the Board noted its disagreement in this regard with the Seventh and Eighth Circuits in *Landes* and *Yauk* to state that application of the 125 day rule to determine the miner's length of coal mine employment results in miners receiving "credit for coal mine employment during periods of time where there is no evidence to support any coal mine employment whatsoever."

Fourth Circuit

In *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007), the court concluded that, in order for an operator to be held responsible for the payment of benefits, (1) it must have employed the miner for at least one calendar year, and (2) during the calendar year the miner must have actually spent a minimum of 125 working days at the mine site. The Benefits Review Board and Director, OWCP asserted that "regular employment" with an operator for a period of one year may be demonstrated if a miner demonstrates 125 working days at the mine site over the entire course of his employment with the operator. The court disagreed:

Under the view of the Board and director, 'regular employment' under § 725.493(b) is established if an employee works a total of 125 days over the course of his entire period of employment, even if that employment lasts a decade or more. So long as the employee worked a total of at least 125 days in or around a coal mine or tippie at *any* time during his employment, he will be deemed to have been 'regularly employed in or around a coal mine.' (citations omitted). We have not interpreted § 725.493 in such a manner nor, as we noted in (*Armco, Inc. v. Martin*, 277 F.3d 468, 473 (4th Cir. 2002)), do the intervening amendments to the regulations support such an interpretation . . .

The court concluded that, in naming an operator responsible for the payment of benefits, it is the Director's burden to demonstrate that the miner worked for the company for one calendar year during which the miner spent a minimum of 125 working days at the mine site.

Further, the court held that the amended provisions at § 725.101(a)(32)(iii) are not applicable to a claim arising prior to January 19, 2001 and, under the facts of the present case, they could not be used as a "guide." In support of its holding, the court reasoned as follows:

By its terms, the (amended) regulation may be used in situations where the miner's employment lasted less than one year or 'the beginning and ending dates of the miner's coal mine employment' cannot be established. (citation omitted). Here, the record contains documentary evidence of Mitchell's employment by Mesa, including 'payroll registers listing the specific dates on which the miner was dispatched to the coal mine tipples, his hours, and his pay.' (citation omitted). The formula's calculation is also to be based upon BLS average daily earnings for the coal mine industry and any calculation thereunder 'shall' be accompanied by a copy of the BLS table. Here, the ALJ did not attach the table and did not explain her calculation. Nor does it appear that she took into

account the undisputed evidence that Mitchell, by virtue of the character of his work for Mesa, was paid tippable wages at inflated overtime rates. In short, § 725.101(a)(32)(iii) is not applicable to the responsible operator inquiry in this case, nor would we affirm its use as a 'guide' given the multiple deficiencies present in its application; its use as a 'guide' in this case could not help but yield an unreliable and unfair result.

Id.

The court determined that there was insufficient evidence to designate Daniels as the responsible operator. Indeed, the court noted that evidence established that the miner was employed by Daniels from September 1974 to February 1988, "but not as a miner." Rather, Daniels operated a "fabrication shop" that "engaged in the business of building material handling systems for various coal processing plants . . ." Daniels did not, however, operate a coal mine or coal tippable, nor did it "provide services or perform work at or near any such facility." From this, the court concluded that "Daniels could not be designated a responsible operator under the Act because it is not engaged in coal mine or coal tippable work, nor did (Claimant) technically perform any such work or receive wages for it from Daniels."

The court noted that, on occasion from 1979 to 1986, the miner performed sporadic, part-time work at the tippables for Daniels' sister company, Mesa. However, it determined that, if Claimant was viewed as an employee of Mesa, then the "first step of the 'responsible operator' inquiry would not be met; namely, the evidence did not demonstrate that Claimant worked for Mesa for a period of one year or partial periods totaling one year. The court then noted that, if Claimant was viewed as an employee of Daniels, then the "first step" of the inquiry would be satisfied, *i.e.* evidence establishes that the miner worked for Daniels for a period of one year, or partial periods totaling one year from 1974 to 1988. However, the "second step" of the inquiry would remain unsatisfied; *to wit*, the evidence does not support a finding that Claimant spent an actual 125 working days at the mine site *during* a calendar year of his employment with Daniels.

In *ARMCO, Inc. v. Martin*, 277 F.3d 468 (4th Cir. 2002), the court applied the pre-amendment provisions at 20 C.F.R. § 725.493(a)(1) (1999) to hold that the 125-day rule may only be used to determine the proper responsible operator and it cannot be used to determine the claimant's length of coal mine employment for purposes of the entitlement presumptions at 20 C.F.R. § 718.301.⁴ In this vein, the court noted that 20 C.F.R. § 725.493(b) (1999)

⁴ Although the amended regulatory provisions were not applicable, the court stated that the new regulations clarified the earlier regulatory provisions and the court's holding was consistent with the amended provisions. *Id.* at 475.

provides a two-step inquiry in determining whether the named operator is properly responsible for the payment of benefits:

Under the first step, a court must determine whether a miner worked for an operator for 'a period of one year, or partial periods totaling one year.' 20 C.F.R. §725.493(b) (1999). If the court determines that this one-year requirement has been met, it must then undertake the second inquiry of whether a miner's employment during that one year was 'regular,' *i.e.* whether, during the one year, the miner 'was regularly employed in or around a coal mine.'

Id. at 474. In particular, the court found that the "regulations provide that responsible operator liability does not arise unless an operator employed a miner for one calendar year during which the miner regularly worked for that operator, defining 'regularly worked' to be a minimum of 125 days." In support of its position, the court cited to Board and circuit court decisions which reached the same result: *Croucher v. Director, OWCP*, 20 B.L.R. 1-68, 1-72 to 1-73 (1998); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996); and *Director, OWCP v. Gardner*, 882 F.2d 67, 71 (3rd Cir. 1989). The court noted that the Third Circuit explained that:

This two-step inquiry means that 'the one-year employment requirement sets a floor for the operator's connection with the miner,' below which the operator cannot be held responsible for the payment of benefits. The 125 day limit relates to the minimum amount of time the miner may have been exposed to coal dust while in the employment by the operator. (citation omitted).

Id. at 475. In so holding, the court rejected the position taken by the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989) that, if a miner works for 125 days, then s/he will be credited with one year of coal mine employment for purposes of 20 C.F.R. § 718.301 (2000) and (2008).

4. Use of the 125-day rule after applicability of 20 C.F.R. Part 725 (2008)

a. Generally

The regulations direct that the employer for whom the miner last worked regularly for a cumulative period of one year is the operator responsible for the payment of benefits under the Act. Subsection 718.301(b) defines a year of employment for purposes of determining the responsible operator, as "a period of one year, or partial periods totaling one year, during which the miner was

regularly employed in or around a coal mine by the operator or other employer" for a period of 125 working days or more. 20 C.F.R. § 725.301(b) (2000) and 20 C.F.R. §§ 725.101(a)(32) and 725.494 (2008). Once this threshold burden is met, the burden shifts to the employer to demonstrate that, notwithstanding the fact that the claimant's period of employment covered a full calendar year, the actual number of days worked did not total 125. 20 C.F.R. § 725.493(b) (2000) and 20 C.F.R. § 725.101 (a)(32) (2008); *Bungo v. Bethlehem Mines Corp.*, 8 B.L.R. 1-348, 1-350 (1986); *Burmley v. Clay Coal Corp.*, 6 B.L.R. 1-956 n.2 (1984). A working day is defined as "any day or part of a day for which a miner received pay for work as a miner." 20 C.F.R. § 725.493(b) (2000) and 20 C.F.R. § 725.101(a)(32) (2008).

b. Source of the 125-day rule

The genesis of the 125-day rule is the National Bituminous Coal Wage Agreement of 1978 ("Agreement"). The Agreement credits a miner with a full year of service for welfare and pension fund purposes if the miner worked 1000 or more hours (125 working days) in a calendar year. Because the Agreement was the product of collective bargaining between labor and industry, the Secretary adopted it as a reasonable basis for defining one year of employment under 20 C.F.R. § 725.493(b) (2000). See 43 Fed. Reg. 36805 (Aug. 18, 1978).

c. Bureau of Labor Statistics table

The regulatory provisions at 20 C.F.R. § 725.101(a)(32) (2008) make reference to a table developed by the *Bureau of Labor Statistics*. The Department uses two tables, which are identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Data from Exhibit 609, titled "Wage Base History," is set forth in Chapter 6 and may be used to compute length of coal mine employment for entitlement purposes or determine whether the miner worked for the employer for a cumulative period of one year. Data from Exhibit 610, titled "Average Earnings of Employees in Coal Mining," is set forth below and is a list average of earnings by year for miners who spent an *actual* 125 working days at a mine site:

AVERAGE EARNINGS OF EMPLOYEES IN COAL MINING

<u>Year</u>	<u>Yearly (125 days)</u>	<u>Daily</u>
2007	\$21,960.00	\$175.68
2006	22,080.00	176.64
2005	22,060.00	176.48
2004	21,570.00	172.56
2003	19,900.00	159.20

2002	19,640.00	157.12
2001	19,040.00	152.32
2000	19,090.00	152.72
1999	19,340.00	154.72
1998	19,160.00	153.28
1997	19,010.00	152.08
1996	18,740.00	149.92
1995	18,440.00	147.52
1994	17,760.00	142.08
1993	17,260.00	138.08
1992	17,200.00	137.60
1991	17,080.00	136.64
1990	16,710.00	133.68
1989	16,250.00	130.00
1988	15,940.00	127.52
1987	15,750.00	126.00
1986	15,390.00	123.12
1985	15,250.00	122.00
1984	14,800.00	118.40
1983	13,720.00	109.76
1982	12,698.75	101.59
1981	12,100.00	96.80
1980	10,927.50	87.42
1979	10,878.75	87.03
1978	10,038.75	80.31
1977	8,987.50	71.90
1976	8,008.75	64.07
1975	7,405.00	59.24
1974	6,080.00	48.64
1973	5,898.75	47.19
1972	5,576.25	44.61
1971	5,008.75	40.07
1970	4,777.50	38.22
1969	4,261.25	34.09
1968	3,801.25	30.41
1967	3,662.50	29.30
1966	3,438.75	27.51
1965	3,222.50	25.78
1964	3,031.25	24.25
1963	2,835.00	22.68
1962	2,717.50	21.74
1961	2,645.00	21.16

<u>Year</u>	<u>Bituminous</u>		<u>Anthracite</u>	
	<u>Yearly</u>	<u>Daily</u>	<u>Yearly</u>	<u>Daily</u>
1960	\$2,687.50	\$21.50	\$2,266.25	\$18.13
1959	2,661.25	21.29	2,183.75	17.47
1958	2,415.00	19.32	2,130.00	17.04
1957	2,581.25	20.65	2,172.50	17.38
1956	2,472.50	19.78	2,083.75	16.67
1955	2,275.00	18.20	1,935.00	15.48
1954	2,022.50	16.18	1,775.00	14.20
1953	2,097.50	16.78	1,695.00	13.56
1952	1,880.00	15.04	1,750.00	14.00
1951	1,915.00	15.32	1,692.50	13.54
1950	1,633.75	13.07	1,553.75	12.43
1949	1,465.00	11.72	1,447.50	11.58
1948	1,691.25	13.53	1,342.50	10.74
1947	1,606.25	12.85	1,262.50	10.10
1946	1,362.50	10.90	1,060.00	8.48
1945	1,315.00	10.52	876.25	7.01
1944	1,267.50	10.14	733.75	5.87
1943	1,057.50	8.46	648.75	5.19
1942	857.50	6.86	705.00	5.64
1941	750.00	6.00	657.50	5.26
1940	617.50	4.94	648.75	5.19
1939	598.75	4.79	705.00	5.64
1938	525.00	4.20	657.50	5.26
1937	585.00	4.68	693.75	5.55
1936	552.50	4.42	703.75	5.63
1935	478.75	3.83	707.50	5.66
1934	450.00	3.60	750.00	6.00
1933	375.00	3.00	717.50	5.74
1932	362.50	2.90	726.25	5.81
1931	455.00	3.64	801.25	6.41
1930	560.00	4.48	875.00	7.00
1929	647.50	5.18	863.75	6.91
1928	671.25	5.37	912.50	7.30
1927	723.75	5.79	925.00	7.40
1926	717.50	5.74	1,062.50	8.50
1925	713.75	5.71	1,065.00	8.52
1924	811.25	6.49	1,058.75	8.47
1923	925.00	7.40	1,007.50	8.06
1922	582.50	4.66	907.50	7.26
1921	905.00	7.24	933.75	7.47
1920	817.50	6.54	888.75	7.11

If Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* is utilized, a copy must be in the record or attached to the decision. *The Daniels Co. v. Director, OWCP [Mitchell]*, 479 F.3d 321 (4th Cir. 2007).

d. Exhibit 610 provides guidance only

In *Thomas v. BethEnergy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.), the Board held the following with regard to calculating the length of coal mine employment for purposes of identifying a responsible operator:

[W]e now hold that the administrative law judge properly rejected Big Mountain's argument that the language in Section 725.493(b) requiring the miner to have worked for at least 125 working days in order to establish regular employment was mandatory. We affirm the administrative law judge's finding that the provisions in Section 725.493(b) were included to provide guidance in factually disputed cases on the question of how to calculate a year of employment for purposes of Section 725.493, and were not intended to deny liability where it is uncontested that a miner was carried on the payroll as an employee for a period in excess of one year.

5. Employment for fewer than 125 days

If the employer establishes that the miner did not work for a period of at least 125 days, it shall be determined that the miner was not regularly employed for a cumulative year. 20 C.F.R. § 725.493(b) (2000) and 20 C.F.R. § 725.101(a)(32) (2008). The 125 day rule serves only as a method by which the employer may demonstrate that the claimant's employment during the one year period or intermittent periods totaling one year was not regular. Thus, an employer's argument that two other companies could have been found to be responsible operators because the other employers could not prove that the claimant worked for them less than 125 days is without merit because the claimant was not employed by the other employers for at least one year. *Brumley v. Clay Coal Co.*, 6 B.L.R. 1-956, n.2 (1984).

6. Intermittent employment, effect of

For purposes of § 725.493(b), one year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.493(b) (2000) and 20 C.F.R. § 725.101(a)(32)(ii) (2008). Thus, the named operator is the responsible operator where (1) the operator is the claimant's most recent employer, and (2) the claimant's cumulative employment with the operator amounted to more than one year, even where

the claimant worked for a different employer in between his work with the named operator. *Snedecker v. Island Creek Coal Co.*, 5 B.L.R. 1-91 (1982) (Island Creek was the responsible operator where claimant worked for Island Creek from July 1968 to November 1972, for Consolidation Coal from December 1972 to July 1975, and again for Island Creek from July 1975 to February 1976). A named operator was the responsible operator where the claimant worked 102 months prior to a work-related injury and 50 days thereafter, even where the injury down time lasted several years. *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986).

The Board has rejected the Director's interpretation that the "one year" requirement of this section is satisfied by a minimum amount of employment in each of 12 separate months. A year means one year of regular employment in or around the employer's coal mines. To determine whether the period is a cumulative year, the trier-of-fact must ascertain the beginning and ending dates of employment. The regulations do not suggest that a year means anything other than a full cumulative year of employment. *Graton v. Westmoreland Coal Co.*, 7 B.L.R. 1-90 (1984). See also *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986); *Bungo v. Bethlehem Mines Corp.*, 8 B.L.R. 1-348 (1985). See 20 C.F.R. §725.493(b) (2000) and 20 C.F.R. §725.101(a)(32) (2008).

G. Ability to pay

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

The regulations at 20 C.F.R. § 725.492(a)(4) (2000) provide that the operator or employer must be capable of assuming its liability for the payment of continuing benefits pursuant to the methods enumerated therein. In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability. 20 C.F.R. § 725.492(b) (2000). The methods listed for an operator to provide payment of benefits include obtaining a policy or contract of insurance, qualifying as a self-insurer, or possessing assets available for the payment of benefits. 20 C.F.R. §§ 725.492(a)(4)(i)-(iii) and 725.494 (2000). However, in any case where the operator is uninsured or has failed to secure the payment of benefits, the adjudicating officer shall require the operator to place a security deposit in the United States Treasury. 20 C.F.R. § 725.606 (2000). The regulations also outline penalties for an employer's failure to insure or otherwise secure the payment of benefits. 20 C.F.R. § 725.495 (2000).

a. Employer's burden to establish inability to pay

A mere assertion that the employer is unable to pay benefits is insufficient to allow it to be released from liability. Rather, the employer must provide evidence establishing that it lacks appropriate insurance coverage, is not self-insured, and possesses insufficient assets to assume liability. Thus, in *Gilbert v. Williamson Coal Co.*, 7 B.L.R. 1-289 (1984), the Board remanded the case for the administrative law judge to consider all the evidence regarding the ability to pay where a contract dispute arose between the employer and its carrier. See also *Borders v. A.G.P. Coal Co.*, 9 B.L.R. 1-32 (1986).

b. The federal government

An agency of the federal government is not legally capable of paying benefits and, therefore, cannot be a responsible operator. *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981).

c. Period of bond coverage

In *United States v. Insurance Co. of North America*, 131 F.3d 1037 (D.C. Cir. 1997), Employer qualified as a self-insurer and obtained 1973 and 1982 indemnity bonds from Insurance Company of North America (INA). INA argued that it was liable for only those claims which arose during the 1982 bond period and not for all claims outstanding during the bond period. The court held that "[b]ecause liability under the Act is assigned only to the operator with which a miner was most recently employed for at least one year, . . . INA was liable under the 1982 bond only for claims in which the miner had completed at least one year's employment with Kaiser during the bond period . . ." The court then remanded the case for a determination "with the admission of extrinsic evidence, if necessary, whether the parties to the bond intended that the first year of employment or the last year of employment be the trigger of liability (for INA) and to reassess damages in accordance with that determination."

d. Mine owner insured notwithstanding failure to pay

In *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998), *aff'g.*, 20 B.L.R. 1-58 (1996), the Seventh Circuit held that Employer and its insurer were liable for the payment of benefits to the miner. The miner was a joint owner of the now bankrupt coal mine which did not pay for coverage of the owners under the insurance policies created between the insurer and Employer for its employees. Despite the fact that Employer did not pay a premium for coverage of the owners, the circuit court nevertheless held the insurer to be

liable for the payment of benefits. In support of its holding, the court noted the following:

The petitioners contend that the BLBA does not require an insurer to pay benefits to a mine owner who has opted not to purchase workmen's compensation insurance for himself, and has thus not paid any premiums, but has paid the necessary premiums for his employees. We disagree. The BLBA and its regulations require that every coal operator's contract of insurance contain provisions agreeing to cover fully all of the coal operator's liabilities under the BLBA. The insurance contract between Bituminous and Lovilia is in conformity with these requirements, and specifically provides coverage for 'all compensation and other benefits' required of Lovilia under the BLBA.

. . .

[T]he law specifically requires Bituminous to pay benefits to all insured 'miners,' regardless of whether or not insurance premiums have been paid. As discussed above, § 933 of the BLBA requires coal operators to insure payments of benefits.

The court emphasized that "[w]hether Bituminous charged an appropriate premium is not relevant to whether the BLBA imposed liability on Lovilia" and, in turn, whether Bituminous was required to pay benefits to the owner/miner.

e. Bankruptcy of the employer

If the most recent employer demonstrates an inability to pay, then liability is assessed against the next most recent operator for which the miner worked for a period of one year. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the circuit court held that South East Coal Company was the employer with which Claimant last worked for a cumulative period of one year. However, the record demonstrated that South East Coal was bankrupt and, "looking back" to the next most recent operator for which the miner worked for at least one year, Benham Coal was found to be liable for the payment of benefits.

In a number of black lung cases where the employer has filed a petition for bankruptcy, the following issue has been presented: whether an administrative proceeding to determine entitlement under the Black Lung Benefits Act is exempt from the automatic stay provisions at § 362(a) of Title 11 as enforcement of regulatory and police powers. There are no Board or circuit court decisions in black lung cases which directly address this issue. However, there is sufficient statutory and case law support for the adjudication of claims notwithstanding bankruptcy of the employer.

Section 362 of Title 11 sets forth the automatic stay provisions of the bankruptcy code and reads, in pertinent part, as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of ...

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before commencement of this case under this title . . .

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay . . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . .

11 U.S.C. § 362 (1991).

The legislative history of the Bankruptcy Reform Act of 1978 offers little insight as to the interplay between these provisions. However, a few comments are important to note. The Senate Report states the following with respect to the automatic stay provisions at § 362:

The automatic stay is one of the fundamental debtor protections by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Senate Report No. 95-989, 95th Cong., 2d Sess., 1978 U.S. Code Cong. and Adm. News at 5840.

The House Report addresses the exemption to the automatic stay at section 362(b)(4) and states the following:

This section is intended to be given narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

With respect to the exemption contained at subsection 362(b)(5), the following is noted in the House Report:

[T]he exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

House Report No. 95-595, 95th Cong., 2d Sess., 1978 U.S. Code and Cong. and Adm. News at 5787.

Subsection 362(b)(4) has been construed as an exemption for equitable actions brought by governmental units to correct violations of regulatory statutes enacted to promote health and safety. *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383 (3rd Cir. 1987). The exemptions at § 362(b)(4) and (b)(5) cannot be defeated through a mere showing that the proceeding will threaten the debtor's reorganization or indirectly impose costs on the estate.

Generally, upon consideration of the plain language and legislative history of the exemptions at (b)(4) and (b)(5), the courts have permitted the entry of monetary judgments, but have not permitted the enforcement of such judgments. *United States v. Nicolet, Inc.*, 857 F.2d 202 (3rd Cir. 1988); *Re Commonwealth Oil Refining Co.*, 805 F.2d 1756 (5th Cir. 1986); *N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986); *Illinois v. Electrical Utilities*, 41 B.R. 874 (N.D. Ill. 1984); *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), *cert. denied*, 479 U.S. 910 (1987); *N.L.R.B. v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (entry of judgment for injunctive relief and back pay money permitted but enforcement of the judgment would be a "different question" not presented for review). If a

governmental unit determines that its proceeding is exempt from the automatic stay, then it need not petition the bankruptcy court to lift the stay prior to continuing the proceeding. See *Edward Cooper, supra*.

A number of administrative proceedings have been held to be exempt from the automatic stay provisions of the bankruptcy code. For example, see *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), *cert. denied*, 479 U.S. 910 (1987) (judgment may be entered against debtor in a Title VII discrimination suit); *Brock v. American Messenger Service, Inc.*, 65 B.R. 670 (D.N.H. 1986) (enforcement proceeding under Fair Labor Standards Act at Department of Labor exempt from automatic stay); *In re Perez*, 61 B.R. 367 (E.D. Cal. 1986) (assessment of civil monetary penalty under Migrant and Seasonal Agricultural Worker Protection Act permitted); *Morysville, supra* (enforcement of an OSHA citation permitted); *Brock v. Rusco Industries, Inc.*, 842 F.2d 270 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 221 (determination of liability for back wages under Fair Labor Standards Act permitted); *N.L.R.B. v. P*I*E Nationwide, Inc.*, 923 F.2d 506 (7th Cir. 1991) (fair labor standards); *Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir. 1991).

A case that has been cited as supporting the exemption of workers' compensation cases from the automatic stay provisions pursuant to §§ 362(b)(4) and (b)(5) is *In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981). In *Mansfield Tire*, the Sixth Circuit reversed the bankruptcy court and vacated its imposition of an automatic stay in proceedings before the Industrial Commission of Ohio. The circuit court held that "the administration of workers' compensation claims by the State of Ohio and the agencies created for that purpose is a valid exercise of the police or regulatory power of a governmental unit." *Id.* at 1114. In support of this conclusion, the court stated that it could "find no basis of any distinction between the *enactment* of workers' compensation laws as a valid exercise of a state's police or regulatory power on the one hand, and the *administration* of claims arising under such laws as not being an exercise or extension of that power on the other." *Id.* at 1113.

According to the Sixth Circuit, the bankruptcy court erred in holding that the Industrial Commission's activities "were not of a nature equivalent to prevention of fraud or environmental or consumer protection or safety" as indicated in the legislative history to the Act. *Id.* at 1113. To the contrary, the circuit court determined that the workers' compensation cases involved health and safety issues and that "[t]he automatic stay prevents the exercise by the Industrial Commission of its lawful powers and operates to hinder, delay and deprive Mansfield's injured workers of the benefits to which they are lawfully entitled and it affects their safety." *Id.* at 1113.

If an agency determines that its administrative proceedings fall within the rubric of a § 362(b)(4) exemption, § 105 of title 11 nevertheless

empowers the bankruptcy court with authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Thus, the bankruptcy court has discretion to enjoin federal regulatory proceedings which threaten the assets of the debtor's estate. See *N.L.R.B. v. Superior Forwarding, Inc.*, 762 F.2d 695 (8th Cir. 1985) (the court concluded that defending 52 E.E.O.C. grievances would threaten the *res* of the estate). Whether potential litigation expenses involved in a proceeding are sufficient to invoke a stay pursuant to 11 U.S.C. § 105 is a question of fact to be resolved by the bankruptcy court. *Id.* at 698.

An administrative law judge at the Department of Labor has discretion to grant a continuance in cases involving a bankrupt employer. Pursuant to 29 C.F.R. § 18.28, a continuance may be granted "in cases of prior judicial commitments or undue hardship, or a showing of other good cause." Consequently, the administrative law judge may determine that a black lung proceeding against the debtor-employer would severely threaten the assets of the estate and he or she may continue the case until the debtor is capable of assuming the financial ability to protect its interests. It is significant to note that only four to six percent of claimants prevail on their claims under the permanent Department of Labor regulations at Part 718. It is also worth mentioning that, in the case of an insolvent employer or an employer which is not financially capable of defending its interests, the Director will step in and expend resources to protect the Trust Fund.

If, on the other hand, an administrative law judge denies the motion for a stay, two issues must be resolved: (1) whether a proceeding to determine entitlement under the Black Lung Benefits Act is exempt from the automatic stay pursuant to § 362(b)(4) and (5); and (2) if the exemption is applicable, whether continuation of the black lung proceeding will seriously threaten the debtor's estate. As previously noted, if an interlocutory appeal is taken, the bankruptcy court will make the final factual determination regarding whether continuation of the proceeding will threaten the estate.

It would appear from the statute, legislative history, and case law, that administrative proceedings to determine entitlement to black lung benefits are exempt from the automatic stay provisions of the bankruptcy code pursuant to 11 U.S.C. § 362(b)(4) and (b)(5). These proceedings involve only the adjudication of liability in health and safety matters and do not involve the enforcement of money judgments or other pecuniary interests against the estate. Only in very rare instances would the litigation costs to the employer be prohibitive such that a stay of the proceedings would be appropriate.

In nearly all black lung cases, a more appropriate course of action would be to deny motions to stay the proceedings, unless there is otherwise good cause for the stay. The debtor or trustee may then petition the bankruptcy court to enjoin the action. The bankruptcy court has binding authority to

determine whether the proceeding is exempt from § 362(a) of Title 11 and, if so, whether continuation of the proceeding would threaten the debtor's assets.

2. After applicability of 20 C.F.R. Part 725 (2008)

a. Generally

The amended regulations at § 725.494(e) provide the following with regard to an employer's ability to pay:

(e) The operator is capable of assuming its liability for the payment of continuing benefits under this part. An operator will be deemed capable of assuming its liability for a claim if one of the following three conditions is met:

(1) The operator obtained a policy or contract of insurance under section 423 of the Act and part 726 of this subchapter that covers the claim, except that such policy shall not be considered sufficient to establish the operator's capability of assuming liability if the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed;

(2) The operator qualified as a self-insurer under section 423 of the Act and part 726 of this subchapter during the period in which the miner was last employed by the operator, provided that the operator still qualifies as a self-insurer or the security given by the operator pursuant to § 726.104(b) is sufficient to secure the payment of benefits in the event the claim is awarded; or

(3) The operator possesses sufficient assets to secure the payment of benefits in the event the claim is awarded in accordance with § 725.606.

20 C.F.R. § 725.494(e) (2008).

Subsection 725.495 contains the criteria for determining a responsible operator and provides the following:

(b) Except as provided in this section and § 725.408(a)(3), with respect to the adjudication of the identity of a responsible operator, the Director shall bear the burden of proving that the

responsible operator initially found liable for the payment of benefits pursuant to § 725.410 (the 'designated responsible operator') is a potentially liable operator. It shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits.

(c) The designated responsible operator shall bear the burden of proving either:

(1) That it does not possess sufficient assets to secure the payment of benefits in accordance with § 725.606;
or

(2) That it is not the potentially liable operator that most recently employed the miner. Such proof must include evidence that the miner was employed as a miner after he or she stopped working for the designated responsible operator and that the person by whom he or she was employed is a potentially liable operator with the meaning of § 725.494. In order to establish that a more recent employer is potentially liable operator, the designated responsible operator must demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits in accordance with § 725.606. The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits pursuant to part 726 of this subchapter, possess assets sufficient to secure the payment of benefits, provided such assets may be reached in a proceeding brought under subpart I of this part.

(d) In any case referred to the Office of Administrative Law Judges pursuant to § 725.421 in which the operator finally designated as responsible pursuant to § 725.418(d) is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation. If the reasons include the most recent employer's failure to meet the conditions of § 725.494(e), the record shall also contain a statement that the Office has searched the files it

maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2).

Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim. In the absence of such a statement, it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim.

20 C.F.R. § 725.495 (2008).

**b. Employer insolvent;
intervention of surety or carrier**

In *Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418 (7th Cir. 2007), a case involving the bankrupt Old Ben Coal Company and its parent, Horizon Natural Resources Company, the Seventh Circuit held that an insurance company or surety should be permitted to intervene on behalf of the defunct company in order to protect its interests. The court reasoned that "[a]ny entity, such as an insurance company or a surety that would be prejudiced by an award of black lung benefits, is entitled to intervene in an administrative proceeding with the rights of a party." The court further noted that the insurance company or surety would have to intervene as "[i]t could not protect (its) interest by directing its lawyer to represent a named party (Old Ben Coal Company) that was not a real party in interest."

By unpublished decision in *Jude v. Wolf Creek Collieries*, BRB No. 06-0659 BLA (May 23, 2007), the Board affirmed the administrative law judge's handling of procedural matters related to a defunct employer. Of relevance here, while the case was pending before the OALJ, Employer's counsel withdrew citing that the employer's parent company, Horizon Natural Resources Incorporated, had been liquidated in bankruptcy.

On request of the Director, the OALJ held the claim in abeyance pending the Director's investigation that a surety bond issued by St. Paul Fire and Marine Insurance Company (St. Paul) would secure Employer's liability for benefits. Moreover, pursuant to a Joint Liquidation Plan approved by the bankruptcy court, Horizon Liquidating Trust (Horizon) was also liable for the payment of any benefits owed by Employer. The Director provided St. Paul and Horizon with "a copy of his pleading in order to notify them of their right to request that they be permitted to intervene in the case pursuant to 20 C.F.R. § 725.360(d)." St. Paul's counsel filed a motion to be dismissed from the claim, which was denied by the administrative law judge. Although counsel for St. Paul was present at the hearing, he advised that "St. Paul would not intervene as a party to the case" and asked that its name be removed from the caption. Counsel also requested that the record be held

open for 60 days "in the event that there was some interested party that wished to submit evidence to defend against the claim."

The administrative law judge granted St. Paul's motion that it be removed from the caption of the claim, but denied its request that the record be left open for 60 days. Moreover, the judge did not dismiss St. Paul from the claim. The administrative law judge then awarded benefits and held Employer liable for payment of the benefits. The Board held that the administrative law judge "properly deemed employer capable of assuming liability for benefits based on the assurances of the Director that there has been a surety bond posted on behalf of Horizon and its subsidiaries." The Board also noted that assessing liability against Employer was consistent with the terms of the liquidation trust of the bankruptcy court.

Further, the Board held that the administrative law judge properly declined to dismiss St. Paul "as such an action would preclude the Department of Labor from exercising its enforcement remedies in district court." The Board reasoned that, "[w]hile the Black Lung Disability Trust Fund may ultimately be required to pay benefits, the Director must have an award of benefits issued against employer in order to enforce liability on the surety bond."

Finally, the Board declined to entertain St. Paul's arguments on appeal that it did not have adequate notice or opportunity to be heard on the claim. The Board noted that, "because St. Paul refused to exercise its right to intervene as a party to the case while the case was before the administrative law judge, . . . and St. Paul has not filed a motion to intervene as a party before the Board, . . . St. Paul does not have standing in this appeal to challenge the administrative law judge's award of benefits or his determination that employer is liable for benefits."

H. Insurance carrier as a named party

1. Generally

In some instances the insurance carrier of the responsible operator will be added as a party to the case. Twenty C.F.R. § 725.360(a)(4) (2000) and (2008) provides that any insurance carrier of a responsible operator is a proper party. In order for a carrier to be potentially liable for the payment of benefits, the contract for insurance coverage must be in effect at the time of a claimant's last exposure to coal dust while working for the employer. *Gilbert v. Williamson Coal Co.*, 7 B.L.R. 1-289 (1984). The issue becomes whether the insurance carrier must be given notice of potential liability and be sent a copy of the Notice of Initial Finding.

The Board's position, as stated in *Osborne v. Tazco Inc.*, 10 B.L.R. 1-102 (1987), is that separate notice of a pending claim to the carrier is not required

by the Act or the regulations. The Fourth Circuit overruled this decision on appeal in *Tazco, Inc. v. Director, OWCP*, 895 F.2d 949 (4th Cir. 1990) to state that the insurance carrier was entitled to separate notice of potential liability as "due process requires that all interested parties receive notice." The court further held that notice given to the operator could not "constitutionally be 'imputed' to the carrier." See also *Nat'l. Mines Corp. v. Carroll*, 64 F.3d 135 (3rd Cir. 1995).

Similarly, the Sixth Circuit, in *Warner Coal Co. v. Director, OWCP*, 804 F.2d 346 (6th Cir. 1986), held that written notice of the claim must be given to the carrier. The court cited 33 U.S.C. § 919(b), that the district director must notify the employer and any other person whom the district director considers an interested party, and held that based on such notice provisions of the Act, and in light of 20 C.F.R. § 725.360(b)(4) (2000) and (2008), naming insurance carriers as proper parties, notice must be given to the carrier. See also *Warner Coal Co. v. Director, OWCP*, 804 F.2d 346, 347 (6th Cir. 1989).

2. Insolvent carrier, liability of guaranty association

In *Boyd and Stevenson Coal Co. v. Director, OWCP [Slone]*, 407 F.3d 663 (4th Cir. 2005), the named responsible operator was "automatically terminated for failing to file annual reports with the Commonwealth of Virginia" and the responsible carrier was later declared insolvent. As a result, the Director sought payment of survivor's black lung benefits from the Virginia Property and Casualty Insurance Guarantee Association (VPCIGA). VPCIGA is statutorily liable for unpaid "covered claims" filed against insolvent insurers in the Commonwealth. Va. Code Ann. §§ 38.2-1603 and 38.2-1606(A)(1). Although VPCIGA asserted that it was not liable for the payment of benefits in this case, the court disagreed.

In particular, VPCIGA argued that, pursuant to Va. Code Ann. § 38.2-1606-A.1.b, the claim was untimely because:

. . . a covered claim shall not include any claim filed with the Guaranty Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

From this, VPCIGA noted that the bankruptcy notice for the insolvent carrier provided that a Proof of Claim must be filed "not later than" August 26, 1992. Consequently, because the survivor's claim was filed in April 1999, VPCIGA posited that it could not be held liable for the payment of benefits.

The court held that, although the survivor is required to independently establish entitlement to benefits, her claim was "derivative of her husband's

claim which was filed before the August 26, 1992 deadline" for purposes of the VPCIGA statutory provisions. In particular, the court found that the survivor's claim arose "out of the same injury as the miner's claim and therefore both VPCIGA and (the responsible carrier) knew that once the miner died, the payments would not necessarily cease, but instead that the claim would continue if the miner had a surviving spouse or dependent." The court concluded that the survivor claim "should be considered timely if the miner's original claim is timely filed."

The court cited to a contrary result in *Uninsured Employer's Fund v. Mounts*, 484 S.E.2d 140 (Va. Ct. App. 1997) where the miner did not file his claim until after the deadline for making claims to the insolvent carrier had passed. As a result, the Virginia appellate court concluded that VPCIGA could not be held liable for the payment of benefits.

I. Liability of corporate officers

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

In *Lester v. Mack Coal Co.*, 21 B.L.R. 1-126 (1999) (en banc on recon.), the Board was confronted with whether an administrative law judge may require the pursuit of, and then adjudicate, corporate officer liability of an uninsured responsible operator. The Board held, however, that 20 C.F.R. § 725.495(a) (2000), which provides that the president, secretary, and treasurer of an uninsured employer shall be jointly liable for the payment of any benefits, "cannot be used to modify the definition of responsible operator to include corporate officers." The Board noted that responsible operator provisions at § 725.491(c)(2)(i) provide that an individual may be held liable as a responsible operator if s/he is a sole proprietor, a partner in a partnership, or a member of a family business. As a result, the Board remanded the case to determine whether the named corporate officer also satisfied the definition of a responsible operator at § 725.491(c)(2). In this vein, it noted that the fact that the corporate officer was receiving compensation as an employee of the company would not preclude him from qualifying as a responsible operator.

Finally, the Board held that a note in the file that the corporate officer was in bankruptcy proceedings was "clearly insufficient to establish that he is not financially able to make payments." See also *Mitchem v. Bailey Energy, Inc.*, 22 B.L.R. 1-24 (1999)(en banc) ("the Director, at his discretion, may institute proceedings to impose a penalty on certain officers . . . of uninsured corporations, whose responsibility it is to maintain the company's insurance policies pursuant to Section 423 of the Act and Section 725.495(a), when they fail to secure the appropriate black lung insurance"; Section 725.495(a) "also provides that such officers may also be held severally personally liable jointly with the corporation for the payment of benefits").

In *Metzler v. Tackett & Manning Coal Corp.*, 958 F. Supp. 307 (E.D. Ky. 1997), the United States District Court for the Eastern District of Kentucky held that the six-year statute of limitations set forth at 30 U.S.C. § 934(b)(4)(B) applies to the Department's pursuit of reimbursement of benefits paid to Claimant from corporate officers of the uninsured responsible operator.

The court then noted that "[t]he defendants argue that Nancy Manning cannot be liable under 30 U.S.C. § 933(d)(1) because she was not a statutory officer at the time [Claimant] was employed by T & M and at the time [Claimant] filed his complaint under the BLBA." Citing to *Donovan v. McKee*, 669 F. Supp. 138 (S.D. W.Va. 1987), *aff'd*, 845 F.2d 70 (4th Cir. 1988) and the successor operator provisions of 30 U.S.C. § 932(i)(1), the court concluded that Defendant Manning could be held liable for Claimant's benefits:

. . . the Court finds that Nancy Manning is personally liable as secretary-treasurer of T&M, even though she was not in such position at the time Mr. Mullins was employed by T&M or at the time he filed his claim. It is unfortunate for Ms. Manning, but the statutory scheme clearly does not allow a corporation, and thus logically its officers, from escaping liability under the BLBA due to a changing of the guard in the corporate world.

Id. at 312.

2. After applicability of 20 C.F.R. Part 725 (2008)

The provisions at § 725.491(b) address the liability of corporate officers and provide, in part, the following:

. . . except that an officer of a corporation shall not be considered an 'operator' for purposes of this part. Following the issuance of an order awarding benefits against a corporation that has not secured its liability for benefits in accordance with section 423 of the Act and § 726.4, such order may be enforced against the president, secretary, or treasurer of the corporation in accordance with subpart I of this part.

20 C.F.R. § 725.491(b) (2008).

J. Due process rights of the employer violated; Trust Fund held liable for payment of benefits

1. Lost records

In *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000), the circuit court dismissed Island Creek Coal Company as the responsible operator

on grounds that the district director was responsible for years of delay and losing a significant part of the record when it was referred to the administrative law judge for a decision. Specifically, the court noted that "[s]ubstantial evidence—the orders of the Board from 1985-1993, ALJ Gilday's opinion" were missing such that the potential operator's due process rights were violated and it would "suffer prejudice were we to affirm its designation as a 'responsible operator.'" The court reasoned that "[t]his case places Island Creek in the difficult position of rebutting OWCP by proving the contents of twenty-year-old documents lost by OWCP." In a footnote, the court stated that the "Federal Respondent bears the blame for the past fourteen years of litigation in this matter" as a "record entrusted by law to OWCP has vanished." The court added that "[i]t appears that the Director and his staff have flirted with incompetence, although we do not have a record establishing that they acted in bad faith."

2. Delay in notice of claim

In *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999), the court held that an 18 year delay in notifying an operator of its potential responsibility for the payment of benefits required that liability be transferred to the Black Lung Disability Trust Fund (Trust Fund). Citing to its decision in *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799 (4th Cir. 1998) (wherein the court held that a 17 year delay violated Employer's due process rights), the Fourth Circuit stated the following:

[W]e believe that the government's failure to notify Consolidation Coal, to act upon Borda's 1981 request for modification, and to schedule a hearing on Borda's 1978 claim in a timely manner deprived Consolidation Coal of a meaningful opportunity to defend itself under §727.203(b)(1) by showing that Borda was still doing 'comparable and gainful work' as a federal mine inspector. Because Borda worked as a federal mine inspector until 1987, six years after making his 1981 request for modification, Consolidation Coal's inability to assert that defense to the 1978 claim is traceable solely to the government's troubling failure to process the modification request in a timely manner and to notify Consolidation Coal.

In *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998), the Fourth Circuit held that Employer was dismissed from the case and relieved of liability for the payment of benefits where "the extraordinary delay in notifying [Employer] of its potential liability deprived it of a meaningful opportunity to defend itself in violation of the Due Process Clause of the Fifth Amendment." Indeed, the court set forth the lengthy procedural history of the claim and found that "[Employer] was finally notified of the claim on April 6, 1992, seventeen years after notice could have been given and

eleven years after the regulations command that it be given." The court further noted the following:

The problem here is not so much that [Claimant] died before notice to [Employer], but rather that he died many years after such notice could and should have been given. The government's grossly inefficient handling of the matter - and not the random timing of death - denied [Employer] the opportunity to examine [Claimant].

(emphasis in original).

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002), the court concluded that a 16 year delay in the adjudication of the miner's claim, from the time of the 1978 filing to the 1994 order by the Board to "start afresh," did not constitute a violation of Employer's due process rights. As a result, Employer's request to transfer liability to the Black Lung Disability Trust Fund was denied. Citing to *C&K Coal Co. v. Taylor*, 165 F.3d 254 (3d Cir. 1999), the court noted that Employer received timely notification of the claim and had been able to develop its evidence, even though the delayed processing of the claim was "inexcusable." The court distinguished the holdings in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183 (4th Cir. 1995) and *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799 (4th Cir. 1998), where the Fourth Circuit transferred liability to the Black Lung Disability Trust Fund because of the Department's inordinate delay in notifying the employers of the viability of a claim and their potential liability for the payment of benefits. The court noted that, in *Borda* and *Lane Hollow*, the due process rights of the employers were denied "when the defendants had not received 'timely notice of the proceeding'" and that, under the facts in *Chubb*, "Amax received notice of, and participated in, all of the proceedings dealing with Mr. Chubb's claim since 1978."