BRB Nos. 01-0876 BLA
and 02-0280 BLA

CHARITY E. CLARK (Widow of BENJAMIN J. CLARK) Claimant-Respondent v. BARNWELL COAL COMPANY and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DADE COUNTY MINING COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-In-Interest	)	DATE ISSUED: DECISION and ORDER

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

Michael E. Bevers (Crandall, Pyles, Haviland & Turner, LLP),

Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Barnwell Coal Company and American Resources Insurance Company.

Beverly D. Nelms (Frantz, McConnell & Seymour, LLP), Knoxville, Tennessee, for Dade County Mining Company and Liberty Mutual Insurance Company.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and GABAUER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer Barnwell Coal Company (Barnwell), appeals the Decision and Order, Supplemental Decision and Order, and Supplemental Decision and Order on Reconsideration (2001-BLA-0228) of Administrative Law Judge John C. Holmes rendered on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).

[1] Claimant filed her application for survivor's benefits on February 22, 1996. Director's Exhibit 1. In a Decision and Order issued on July 17, 2001, the administrative law judge found that the miner died due to complicated pneumoconiosis and, accordingly, awarded benefits. *See* 30 U.S.C. §921(c)(3): 20 C.F.R. §§718.205(c)(3), 718.304(c). The award of benefits is unchallenged on appeal. The issues raised before the Board relate primarily to the administrative law judge's finding that Barnwell is the coal mine operator responsible for the payment of benefits. That finding in turn rests upon the administrative law judge's determination, disputed by Barnwell, that Barnwell employed the miner for at least one year. Oral argument was held on this case in Washington, D.C.,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

on March 12, 2003.

The record reflects that the miner worked intermittently as a driller for multiple coal mine operators over the course of seven and one-half years.

[2] No payroll records were available to document the length of his employment with Barnwell. At a 1992 hearing on the miner's lifetime claim for benefits, the miner recalled working for Barnwell for "just a matter of months."[3] Director's Exhibit 72; Tr. at 9. In the survivor's claim, claimant testified that she did not know how long the miner worked for Barnwell, but described his employment as sporadic and stated that he worked for Barnwell two or three different times and collected unemployment in the interim. Director's Exhibit 59 at 21, 22, 50.

The administrative law judge was unable to determine the beginning and ending dates of the miner's employment with Barnwell. He additionally found the testimony of record to be unhelpful in determining the length of the miner's employment with Barnwell. However, the administrative law judge had before him Social Security Administration (SSA) records reflecting the miner's earnings from Barnwell for the years 1978, 1979, 1981, and 1983. The SSA records, which were not broken down by quarter, reported the miner's earnings from Barnwell as follows:

1978: $7,147.02

1979: $5,056.64

1981: $3,806.26

1983: $2,172.64

Director's Exhibit 3.

Utilizing the SSA earnings figures, the administrative law judge used three different computation methods to find that the miner worked for Barnwell for at least

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[2] The record indicates that the miner's last coal mine employment occurred in Alabama. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] Barnwell was dismissed from the miner's claim because the record at that time indicated that Barnwell was uninsured at the approximate time of the miner's last employment with Barnwell. Director's Exhibits 72-29, 72-31, 72-39. The Black Lung Disability Trust Fund paid the miner's benefits because no responsible operator could then be determined. Based upon further investigation of Barnwell's status during the processing of the survivor's claim, the district director determined that Barnwell had in fact been insured at the relevant time period. Thus, the district director identified Barnwell as the responsible operator in the survivor's claim. Director's Exhibit 17.

one year. First, the administrative law judge compared the miner's earnings from Barnwell for 1978 and 1979 with his earnings from five other coal mine operators during the same period. Because the miner's earnings from Barnwell exceeded those from the other operators, the administrative law judge concluded that the miner worked for more than one year with Barnwell. Second, the administrative law judge compared the miner's total earnings from coal mine employment to the coal mine industry's average earnings for the year 1983, as reported by the Bureau of Labor Statistics (BLS), in a table entered into the record by the Director, Office of Workers' Compensation Programs (the Director). Director's Exhibit 72-32. Because the miner's total earnings of $16,009.92 excluding 1983, or $18,182.56 including 1983, exceeded the BLS average earnings figure of $13,720 for the year 1983, the administrative law judge found that the miner worked for more than one year with Barnwell. Third, the administrative law judge divided the miner's yearly earnings from Barnwell by his hourly wage, which the administrative law judge found to be $8.00. Using this method, and assuming a five-day, forty-hour work week, the administrative law judge found that the miner worked "in excess of 15 months" for Barnwell. Decision and Order at 9.

On appeal assigned BRB No. 01-0876 BLA, Barnwell contends that substantial evidence does not support the finding that it employed the miner for one year. Dade County Mining Company (Dade), responds, urging affirmance of the finding that Barnwell is the responsible operator, but argues alternatively that if Barnwell did not employ the miner for at least one year, then Dade, as the successor of Barnwell, cannot be found the responsible operator. The Director responds, urging affirmance of the finding that Barnwell employed the miner for at least one year, based on the administrative law judge's second method of calculation. In a second appeal, BRB No. 02-0280 BLA, consolidated with this appeal, Barnwell challenges the administrative law judge's award of an attorney's fee.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The responsible operator is "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year . . . ." 20 C.F.R. §725.493(a)(1)(2000).

[4] A year of employment is defined to mean:

> [A] period of 1 year, or partial periods totalling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented . . . and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for purposes of paragraph (a) of this section.

20 C.F.R. §725.493(b)(2000). Thus, Section 725.493(b)(2000) contemplates a two-step inquiry into a miner's employment to determine if an employer is the responsible operator. 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, *i.e.*, whether the miner actually worked as a miner for 125 days during the one-year period. *See* 20 C.F.R. §725.493(b)(2000); *Kentland Elkhorn Coal Corp v. Hall*, 287 F.3d 555, 562, 22 BLR 2-349, 2-360 (6th Cir. 2002); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75, 22 BLR 2-334, 2-343-45 (4th Cir. 2002); *Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 876, 20 BLR 2-334, 2-345 (10th Cir. 1996); *Director, OWCP v. Gardner*, 882 F.2d 67, 69, 13 BLR 2-1, 2-5 (3d Cir. 1989); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996)(*en banc*)(McGranery, J., concurring and dissenting). Thus, a mere showing of 125 working days does not establish one year of coal mine employment. *Croucher*, 20 BLR at 1-73 (McGranery, J., concurring and dissenting); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988)(*en banc*); *but see Landes v. OWCP*, 997 F.2d 1192, 1197-98, 17 BLR 2-172, 2-176 (7th Cir. 1993); *Yauk v. Director, OWCP*, 912 F.2d 192, 195, 12 BLR 2-339, 2-343-45 (8th Cir. 1988). In determining the length of the miner's coal mine employment, the administrative law judge may apply any reasonable method of calculation. *Croucher*, 20 BLR at 1-72; *Tackett*, 12 BLR at 1-13; *Dawson v. Old Ben Coal Co*., 11 BLR 1-58, 1-60 (1988).

The parties agree that the administrative law judge's first method of calculation, comparing the miner's Barnwell earnings with those reported for other employers in 1978 and 1979, is problematic and unexplained. Upon review, we conclude that the administrative law judge's method of calculation was not reasonable on this record. *See Croucher, supra*. 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. *See* 20 C.F.R. §725.493(b)(2000).

Turning to the administrative law judge's second method of calculation, Barnwell contends that substantial evidence does not support the administrative law judge's finding of one year of employment. The Director responds that the administrative law judge's comparison of the miner's 1978, 1979, and 1981 total earnings for Barnwell with the average 1983 yearly earnings for miners as reported by BLS was a reasonable method of determining that the miner worked more than one year for Barnwell. Upon 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. Director's Exhibit 72-32. As noted, mere proof of 125 working days does not establish the threshold one year of coal mine employment. *Croucher, supra* (McGranery, J., concurring and dissenting); *Tackett, supra*. Similarly, therefore, we hold that for purposes of the threshold one-year requirement, proof that a miner's earnings exceeded the average 125-day earnings reported by BLS for a given year does not, in and of itself, establish that the miner worked for one calendar year. Here, the administrative law judge's finding was based solely on the conclusion that, because the miner's total Barnwell earnings (either $16,009.92 excluding 1983, or $18,182.56 including 1983) exceeded the average earnings for 125 days of coal mine work in 1983 ($13,720), the miner must have worked more than one year for Barnwell. Consequently, the administrative law judge's method of calculation was not reasonable. *See Croucher, supra* (McGranery, J. concurring and dissenting); *Tackett, supra*.

The Director contends that even if the administrative law judge's second method was problematic, he nevertheless reached the correct result, as demonstrated by an alternative method of calculation set forth at 20 C.F.R. §725.101(a)(32)(iii). Revised Section 725.101(a)(32)(iii) provides as follows:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(iii). This formula yields the number of days the miner worked in coal mine employment. Based on the coal mine industry's average daily earnings reported in column three of the BLS table, Director's Exhibit 72-32, the

formula yields the following calculations:

1978 $7,147.02 ÷ $80.31 = 88.99 days
1979 $5,056.64 ÷ $87.03 = 58.10 days
1981 $3,806.26 ÷ $96.80 = 39.32 days
1983 $2,172.64 ÷ $109.76=19.79 days
Total=206.20 days

The suggested formula's result of 206 days of coal mine employment would appear to undercut, not support the administrative law judge's finding of more than one year of employment with Barnwell.

The Director, however, asserts that a final step is needed: "The number of actual days worked must then be divided by 125 to determine the part of the year devoted to coal mine employment." Director's Oral Argument Brief at 8. Dividing the number of days worked by 125, the Director concludes that the miner worked 1.64 years for Barnwell. 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. *Id*. at n.8. 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 a fractional year based on the ratio of the actual number of days worked to 125." 20 C.F.R. §725.101(a)(32)(i).

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, during the calendar year, the miner actually worked 125 days as a miner. *See* 20 C.F.R. §725.493(b); *Hall, supra*; *Martin, supra*; *Pickup, supra*; *Gardner, supra*. Section 725.101(a)(32)(i), relied upon by the Director, applies where the calendar year has been established and the question is whether the miner should be credited with the entire year, having actually worked 125 days as a miner, or credited with a fractional year, having 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. *See Hall, supra*; *Martin, supra*; *Pickup, supra*; *Gardner, supra*; *Croucher, supra*; 65 Fed. Reg. 79920, 79960 (Dec. 20, 2000)(The evidence must establish "one year of coal mine employment comprising a 365-day period. Only then should the factfinder determine whether the miner spent at least 125 working days as a coal miner during the year.")

Because the Director's interpretation of 20 C.F.R. §725.101(a)(32)(iii) is not reasonable, we decline to read into the regulatory formula the additional computation suggested by the Director. Assessing the administrative law judge's finding using Section 725.101(a)(32)(iii) as written, we conclude that the formula's result of 206 days does not, on this record, support the administrative law judge's finding of more than one year of employment with Barnwell. Therefore, we do not affirm the administrative law judge's finding based on Section 725.101(a)(32)(iii).[5]

The parties argue that the administrative law judge's third computation method, dividing the miner's earnings from Barnwell by his hourly wage, is unexplained because the administrative law judge did not explain how he calculated an hourly wage of $8.00[6] or explain how he determined the number of weeks worked. Additionally, Barnwell alleges that the administrative law judge made assumptions that are contradicted by the record. These contentions have merit. Upon review, we are unable to determine how the administrative law judge reached a figure of $8.00 an hour. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Further, the administrative law judge found that the record contained "no evidence whatsoever that [the miner] worked overtime or weekends for Barnwell," Decision and Order at 9, and therefore assumed for purposes of calculation that the miner worked a "50 week 40 hour per week schedule . . . ." Decision and Order at 8. However, the record contains claimant's testimony that the miner worked overtime at Barnwell and earned time and a half while doing so. Director's Exhibit 59 at 56-57. Claimant explained that the miner worked overtime "quite often," putting in nine to twelve hours a day, six or seven days a week. Director's Exhibit 59 at 57-58. Consequently, the administrative law judge's finding based on the third calculation method is not supported by substantial evidence. At oral argument the parties agreed that the record is unclear. On appeal no party has suggested a way to reach a calculation of one year utilizing the third method on this record, nor is one apparent. Therefore, the Board concludes that a remand for the administrative law judge to attempt to better explain his third calculation method would serve no purpose.

In sum, substantial evidence does not support the finding that Barnwell employed the miner for at least one year as required by Section 725.493(a),(b)(2000). The record contains no evidence that Barnwell's successor, Dade, ever employed the miner. Thus, there is no question of aggregating the time worked for predecessor and successor companies. *See* 20 C.F.R.

§725.493(a)(2)(i),(ii)(2000); *Hall*, 287 F.3d at 565, 22 BLR at 2-366. Therefore, neither Barnwell nor Dade meets the criteria of a responsible operator. *See* 20 C.F.R. §725.493(a)(2000). Consequently, we reverse the administrative law judge's finding that Barnwell is the responsible operator. There being no responsible operator identified on this record, the Black Lung Disability Trust Fund must assume liability.[7] *See* 26 U.S.C. §9501(d)(1)(B); *Crabtree v. Bethlehem Steel Corp*., 7 BLR 1-354, 1-356-57 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and reversed in part, and the case is remanded for the administrative law judge to modify his orders concerning the terms of payment of benefits and of the attorney's fee.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

PETER A. GABAUER, JR.
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree with the majority that the administrative law judge's decision, holding employer liable as the responsible operator, must be vacated because substantial evidence does not support his determination that the miner worked for employer for one year pursuant to 20 C.F.R. §725.493(2000). That regulation sets forth the applicable criteria for identifying the responsible operator in the instant case. I write separately, however, because in considering 20 C.F.R. §725.101(a)(32), which provides a uniform definition of "year" for computing the length of coal mine employment when required in the adjudication of claims, the majority rejects the Director's construction of the regulation as unreasonable, without determining whether the regulation is applicable to the instant case. I would hold that Section 725.101(a)(32) is inapplicable to the case at bar and I would not rule on the reasonableness of the regulation at this time.

The Director argues that the formula set forth in 20 C.F.R. §725.101(a)(32) should be applied to the facts in evidence to find that the miner worked for employer for at least a year and thereby, to uphold employer's designation as the responsible operator. Although the new

responsible operator regulation at Section 725.494(c),(d) specifically refers to Section 725.101(a)(32), Section 725.2 states that the new responsible operator regulations at 20 C.F.R. §§725.491-95 do not apply to cases pending on January 19, 2001. Hence, the issue presented is whether employer was properly designated the responsible operator pursuant to 20 C.F.R. §725.493(2000)8 Employer correctly argues that insofar as application of Section 725.101(a)(32) changes existing law, it cannot apply to the instant case. Although the Director asserts that Section 725.101(a)(32) does not change existing law, the Director relies upon 20 C.F.R. §725.101(a)(32)(i) for the proposition that a fractional year can correctly be determined by calculating the ratio of actual working days, divided by 125.9 Director's Oral Argument Brief at 8 n.8. Because that formula permits a finding of a year of coal mine employment without proving a 365-day period of employment, it is flatly contrary to existing law construing 20 C.F.R. §725.493 (2000) as requiring a two-part analysis: first, requiring evidence of the miner's employment by the operator "for a period spanning 365 days," Director, OWCP v. Gardner, 882 F.2d 67, 71, 13 BLR 2-1, 2-5 (3d Cir. 1989); see Armco, Inc. v. Martin, 277 F.3d 468, 474-75, 22 BLR 2-334, 2-343-45 (4th Cir. 2002); Northern Coal Co. v. Director, OWCP [Pickup], 100 F.3d 871, 876, 20 BLR 2-334, 2-345 (10th Cir. 1996); second, requiring evidence that the miner worked regularly for the operator, for at least 125 days. 20 C.F.R. §493(b). See Martin; Pickup; Gardner.10

It is because the Director's construction of Section 725.101(a)(32) cannot be reconciled with Section 725.493(2000) as it has been construed by the courts, that the former regulation can have no application to the record in this case. Whether or not the Director's construction of Section 725.101(a)(32) can reasonably be applied in a case to which the new responsible operator regulations are applicable is an issue for another day.[11] Today I concur in the majority's decision that substantial evidence does not support the administrative law judge's determination that the miner worked for employer for at least one year, pursuant to 20 C.F.R. §725.493(2000). Hence, I join in the majority's judgment to vacate the administrative law judge's Decision and Order upholding employer's designation as the responsible operator.

REGINA C. McGRANERY
Administrative Appeals Judge