BRB No. 94-0243 BLA

CLAYTON M. BILLUPS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHERN APPALACHIAN COAL COMPANY	)	Date Issued:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	ON RECONSIDERATION

Appeal of the Decision and Order of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Henry C. Bowen and Sean Harter (Robinson & McElwee), Charleston, West Virginia, for employer.

J. Matthew McCracken (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs, [the Director] has filed a motion for reconsideration of the Board's Decision and Order in the captioned case, *see* 20 C.F.R. §802.407, in which the Board modified in part and vacated in part the

Decision and Order (92-BLA-0859) of Administrative Law Judge Robert D. Feldman awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act) and remanded the case for reconsideration. Originally, the administrative law judge awarded benefits against employer under 20 C.F.R. Part 718, to be augmented by claimant's dependent spouse. Employer appealed, contending that it is not the properly designated responsible operator and contending that the administrative law judge erred in finding entitlement to benefits established under Part 718. The Board subsequently granted the Director's Motion to Hold Case in Abeyance pending the decision by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995), relevant to employer's contention that it is not the properly designated responsible operator. *Billups v. Southern Appalachian Coal Co.*, BRB No. 94-0243 BLA (Apr. 19, 1994)(unpub. order). In light of the court's issuance of its decision in *Matney*, the Board issued its Decision and Order. *Billups v. Southern Appalachian Coal Co.*, BRB No. 94-0243 BLA (Nov. 29, 1995)(unpub.).

Although whether the named employer was the properly designated responsible operator was an issue before the administrative law judge, *see* Director's Exhibit 36, the Board noted that the administrative law judge did not address it. In addition, the Board noted that a review of the record reveals that claimant indicated that he had more recently been employed as a coal miner, for over one year, with both Olentangy, Ltd., and with Corvette Coal Company, *see* Director's Exhibit 2; *see also* Hearing Transcript at 18-19, 22, 27-28, 37-38, but inasmuch as the Department of Labor's investigation revealed that both were not insured and were no longer in business or viable, the Director stated that neither was named as potential responsible operators capable of assuming liability, *see* 20 C.F.R. §725.492(b), *see* Director's Exhibit 37. However, as the record failed to indicate whether Olentangy, Ltd., and Corvette Coal Company were ever insured at any time and was devoid of any evidence in regard to the officers of these unnamed potential responsible operators and their capability to assume payment pursuant to 20 C.F.R. §725.495(a), the Board vacated the administrative law judge's determination that benefits were payable by employer and remanded the case for reconsideration.

On remand, the Board instructed the administrative law judge to consider whether employer was the properly designated responsible operator and/or whether the Director effectively proceeded against all potential putative responsible operators and their respective officers, as mandated by the regulations at 20 C.F.R. §§725.412(d) and 725.495(a), and thereby established a proper basis for relieving either Olentangy, Ltd., or Corvette Coal Company and their respective officers of their potential liability pursuant to Sections 725.492 and 725.495(a), in accordance with the holdings enunciated in *Matney, supra, England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993) and *Crabtree v. Bethlehem Steel Corp.*, 9 BLR 1-354, 1-357 (1984). The Board also instructed the administrative law judge to determine on remand, if possible, whether either Olentangy, Ltd., or Corvette Coal Company were insured at the time of claimant's

employment with them up to the time that Olentangy, Ltd., was forfeited by the West Virginia state attorney general's office in 1982 and the time that Corvette Coal Company's corporate charter was dissolved by court order on August 22, 1984, respectively, *see* Director's Exhibit 37. Finally, inasmuch as no authority exists requiring a named employer/responsible operator to affirmatively establish that another potential alternative responsible operator has the ability to pay under the Act and regulations, the Board noted that where a named employer/responsible operator, such as employer in this case, establishes that the claimant has been employed with a subsequent employer/operator for one calendar year, the named employer has completely and successfully completed its defense that it should not be liable for benefits, *see England, supra*. Thus, inasmuch as neither Olentangy, Ltd., or Corvette Coal Company or their respective officers were named as potential responsible operators at any point in this proceeding, although the Director already had full opportunity to do so, the Board instructed the administrative law judge that if he determines that employer is not the properly designated responsible operator on remand, liability for payment in this matter rests with the Black Lung Disability Trust Fund [the Trust Fund], *see Matney, supra; England, supra; Crabtree, supra*.

Finally, in regard to the administrative law judge's findings on the merits, the Board vacated the administrative law judge's findings under Sections 718.202(a)(1), (4), 718.203(b) and 718.204(b), (c), and remanded the case for reconsideration. In addition, the Board instructed the administrative law judge that, inasmuch as a review of the record reveals that claimant also apparently has a dependent son, *see* Director's Exhibits 1, 9, if he again finds claimant entitled to benefits on remand, he should determine whether claimant's son is his dependent for the purposes of augmenting benefits, *see* 20 C.F.R. §§725.208 and 725.209.

The Director now moves for reconsideration of the Board's decision to instruct the administrative law judge to also consider on remand whether the Director not only effectively proceeded against all potential putative responsible operators, but against their respective officers as well and to consider the officers' capability to assume payment pursuant to Section 725.495(a). The Director also moves for reconsideration of the Board's holding that if employer establishes that claimant was employed with a subsequent employer for one calendar year, employer has completely and successfully completed its defense that it should not be liable for benefits in accordance with the holding in *England, supra*. Neither employer nor claimant have responded to the Director's motion.

The Director contends that Section 725.495(a), implementing Section 423(d)(1) of the Act, 30 U.S.C. §933(d),[1] sets forth a procedure for the enforcement of a penalty

[1]Section 725.495(a) states in relevant part :

Any employer required to secure payment of benefits under the act and §725.494 which fails to secure such benefits shall be subject to a civil penalty... ; and in any case

against an employer and its officers for failing to secure the payment of benefits that is relevant only after benefits on a claim against employer have been awarded, and is not relevant to and/or is distinct from the procedures for identifying the properly designated responsible operator in a claim prior to an award of benefits. The Director further contends that whether to enforce the penalty against an employer's officers for failing to secure the payment of benefits pursuant to Section 725.495(a) is left to the discretion of the Director. The Director also contends that officers of an employer cannot be considered when naming and/or determining the properly designated responsible operator in a claim, inasmuch as the Director contends that officers do not meet the definition of an "operator" pursuant to 20 C.F.R. §725.491. Thus, when the most recent employer for more than one year of a claimant is not capable of assuming liability for failing to secure payment of benefits, the Director contends that it is within the Director's discretion to: 1) enforce the penalty against the employer's officers pursuant to Section 725.495; 2) identify and designate the next most recent employer for more than one year of a claimant as the properly designated responsible operator; or 3) pay claimant's benefits out of the Trust Fund.

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where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable for such civil penalty... and shall be severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act in respect to any injury which may occur to any employee...

20 C.F.R. §725.495(a).

Section 725.492 establishes certain criteria an employer must meet in order to be considered a responsible operator. *See* 20 C.F.R. §725.492. If the employer does not meet that criteria, then the responsible operator shall be considered the next employer with whom the claimant had the latest periods of employment of not less than one year pursuant to 20 C.F.R. §725.493(a)(4), *see Massey, supra; Eastern Associated Coal Corp. V. Director, OWCP*, 791 F.2d 1129 (4th Cir. 1986); *see also Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). As the Director contends, Section 725.495, "Penalty for Failure to Insure," apparently provides discretionary provisions for the enforcement of a penalty against an employer and its officers for failing to secure benefits, *see* 20 C.F.R. §725.495(c), (e).[2] In addition, under Part 725, Subpart H, "Enforcement of Liability," 20 C.F.R. §725.601(c) provides that more than one remedy provided by the Act might be appropriate in any given case and that the Director shall select the remedy or remedies appropriate for the enforcement action, considering the best interests of the claimant as well as those of the [Trust] Fund. One of the remedies available under Section 725, Subpart H, is provided by 20 C.F.R. §725.620(a), "Failure to Secure Benefits," which states that if an operator fails to discharge its insurance obligations under the Act, the provisions of Section 725.495 shall apply.

Pursuant to Section 725.492(a)(4)(i-iii), however, one of the criteria an employer must meet in order to be considered a responsible operator is that the operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part, "through any of the following means:"

> i) obtaining insurance;
> ii) qualifying as a self-insurer; or
> iii) possessing any assets that may be available for the payment of benefits under this part "or through an action under subpart H of this part."

20 C.F.R. §725.492(a)(4)(i-iii). One of the actions available under Subpart H of Part 725 is the penalty for failing to insure liability pursuant to Section 725.495, *see* 20 C.F.R. §725.620(a), which includes the provision that the officers of an employer/corporation may be severally liable for a civil penalty and severally personally liable, jointly with such corporation, for benefits, *see* 20 C.F.R. §725.495(a). Thus, although the penalty of holding the officers of an employer/corporation liable available under Section 725.495(a) may be discretionary, it still is to be considered, contrary to

[2]Although, as a recent United States District Court decision noted, "[l]ittle case law exists which interprets 30 U.S.C. §933," implemented by 20 C.F.R. §725.495, *see Metzler v. Tackett & Manning Coal Corp*., 958 F.Supp. 307 (E.D. Ky. 1997), a United States District court has noted its "importance" in "ensuring that officers will fulfill their obligations to require their corporations to obtain insurance under [the] Act in holding officers of a corporation personally and severally liable for the payment of black lung benefits, *see Donovan v. McKee*, 669 F.Supp. 138, 10 BLR 2-133 (S.D.W.Va. 1987), *aff'd on other grounds*, 845 F.2d 70 (4th Cir. 1988).

the Director's contention, in determining whether an employer meets the criteria to be considered a responsible operator under Section 725.492 prior to an award of benefits, i.e., whether an employer is capable of assuming liability, *see* 20 C.F.R. §725.492(a)(4).[3]

[3]The fact that Section 725.495 arises under the provisions at Subpart F of Part 725, "Responsible Coal Mine Operators," and not the "Enforcement of Liability" provisions at Subpart H lends further support to the fact that an employer's/corporation's officers' capability to assume payment pursuant to Section 725.495(a) must also be considered in determining whether the Director effectively proceeded against all potential putative responsible operators pursuant to Section 725.492. In the instant case, employer noted in its appeal, herein, that claimant identified individuals who could be officers of Corvette Coal Company and/or Olentangy, Ltd., *see* Hearing Transcript at 19, 22.

Moreover, contrary to the Director's contention, the Board retains jurisdiction of an appeal from an administrative law judge's determination regarding whether an employer meets the criteria to be considered a responsible operator under Section 725.492 prior to an award of benefits. The Board in this case is not attempting to assert jurisdiction over the separate and distinct issue regarding application of penalties for failure to insure. *See* 20 C.F.R. §725.495.

In regard to the Director's contention that officers do not meet the definition of an "operator" pursuant to Section 725.491, the United States Court of Appeals for the Fourth Circuit noted in *McKee, supra*, that the legislative history of 30 U.S.C. §802(d), implemented by 20 C.F.R. §725.491, teaches that the definition of "operator" is designed to be as broad as possible to include individuals who operate, supervise or control a coal mine, *see also* 115 *Cong. Rec.* S39985 (daily ed. Dec. 18, 1969). As the District Court in *Metzler, supra*, further noted that "Congress' intent was to ensure that the coal companies and their officers would bear the burden for black lung," and, consequently, amended the Act to allow for personal liability. Moreover, the District Court noted that, arising under the Part 726 insurance requirements for operators, 20 C.F.R. §726.4(b) states, in part, that any individual or corporate partner [who] has had or will have a substantial and reasonably direct interest in the operation of a coal mine may be determined liable for the payment of pneumoconiosis benefits, *see Metzler, supra*. Thus, we reject the Director's contentions that the Board erred in instructing the administrative law judge to consider on remand whether the Director effectively proceeded against all potential putative responsible operators as well as their respective officers pursuant to Sections 724.492 and 725.495(a).[4]

The Director also contends that the Board erred in holding that if the named employer establishes that claimant was employed with a subsequent employer for one calendar year, employer has completely and successfully completed its defense that it should not be liable for benefits in accordance with the holding in *England, supra*. The Director contends that, in accordance with the holding in *Matney, supra*, such a defense is available only if the Director fails to establish that the subsequent employer is incapable of assuming liability, which the Director notes was the factual situation in *England, supra*.[5]

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[4]In any event, the administrative law judge should also determine on remand, if possible, whether either Olentangy, Ltd., or Corvette Coal Company were insured at the time of claimant's employment with them up to the time that Olentangy. Ltd., was forfeited and the time that Corvette Coal Company's corporate charter was dissolved.

[5]The Director concedes that if an employer establishes that a claimant was employed with a subsequent employer for one calendar year, the Director has the burden of establishing that the subsequent employer is incapable of assuming liability in

The Board instructed the administrative law judge in its original Decision and Order in the captioned case that if he determines that employer is not the properly designated responsible operator on remand, liability for payment in this matter rests with the Trust Fund, *see Matney, supra; England, supra; Crabtree, supra*. As the Board originally instructed, however, we note that making the determination as to whether employer was the properly designated responsible operator includes a determination as to whether the employers with whom claimant was more recently employed for more than one year, Olentangy, Ltd., and Corvette Coal Company, were incapable of assuming liability.

Finally, although the Director properly notes that Congress intended that liability be imposed on operators rather than the Trust Fund to the maximum extent feasible, as the District Court in *Metzler, supra*, noted, "Congress' intent was to ensure that the coal companies and their officers would bear the burden for black lung" and, consequently, amended the Act to allow for personal liability. Moreover, as the Board held in its original Decision and Order in the captioned case, the Department of Labor must resolve the responsible operator issue alone in a preliminary proceeding, *see* 20 C.F.R. §725.412(d), and/or proceed against all potential putative responsible operators at every stage of the claims adjudication prior to fully litigating the claim, *see Crabtree, supra*; *see also England, supra*. Moreover, the regulations require the Director to identify, notify and develop evidence regarding potential responsible operators, *see* 20 C.F.R. §§725.410(b), 725.412; *Matney, supra*, and, as the administrator of the Act, *see* 20 C.F.R. §§701.201, 725.601(a), the Director is responsible for vigorously enforcing the insurance requirements at 20 C.F.R. §§725.492(a)(4) and 726.201, ensuring employers' ability to meet their responsibility for liability, *see* 20 C.F.R. §725.601(b), and thus, ensuring employer compliance. Consequently, inasmuch as neither Olentangy, Ltd., and Corvette Coal Company or their respective officers were named as potential responsible operators at any point in this proceeding, although the Director already had full opportunity to do so, if the administrative law judge determines that employer is not the properly designated responsible operator on remand, liability for payment in this matter rests with the Trust Fund, inasmuch as to name another potential operator at this juncture would offend due process, potentially upset the administrative law judge's finding on the merits, which have been fully litigated, and would not enhance efficient administration of the Act and expeditious processing of claims, *see Matney, supra; England, supra; Crabtree, supra*.

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order to hold the prior employer liable and that if the Director fails to do so, the Trust Fund assumes liability.

Accordingly, we grant the Director's Motion for Reconsideration, but deny the relief requested, and modify our Decision and Order in this captioned case.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge