No. 18-9520

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROCKWOOD CASUALTY INSURANCE COMPANY,
insurer for HIDDEN SPLENDOR RESOURCES, INC.
Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and TONY N. KOURIANOS
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT
(Oral Argument Not Requested)

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STATEMENT OF PRIOR OR RELATED CASES

The Director is unaware of any other prior or related cases.

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and

TONY N. KOURIANOS,

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves Tony K. Kourianos's 2012 claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944. Mr. Kourianos (Claimant) worked as a coal miner for over twenty-seven years. On February 28, 2017, United States Department of Labor (DOL) Administrative Law Judge Paul R. Almanza issued a decision awarding BLBA benefits and ordering

Hidden Splendor Resources, Inc. (Hidden Splendor or Employer), Claimant's former employer, to pay them. Hidden Splendor appealed the ALJ's decision to DOL's Benefits Review Board on March 17, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed the award in a final decision on March 28, 2018, and Hidden Splendor petitioned this Court for review on April 2, 2018. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The miner had exposure to coal-mine dust – the injury contemplated by 33 U.S.C. § 921(c) – in the state of Utah, within this Court's territorial jurisdiction. Consequently, the Court has jurisdiction over Hidden Splendor's petition for review.

STATEMENT OF THE ISSUES

The black lung regulations provide that the coal mine operator liable for payment of BLBA benefits is the last operator that employed the claimant as a "miner" for at least a year. These regulations also provide that evidence concerning an operator's liability must be developed and submitted, and the identity of the responsible operator determined, at the first administrative stage of

the claims process, when the claim is before a DOL Office of Workers' Compensation Programs (OWCP) district director. When a claim proceeds to the second administrative level, before an adminstirative law judge (ALJ), OWCP cannot name a different potentially-liable employer if its first choice is overturned. When OWCP incorrectly identifies the responsible operator, the Black Lung Disability Trust Fund (Trust Fund) must assume liability for benefits, if awarded.

When the claim in this case was before the OWCP district director, Hidden Resources expressly agreed that it employed Claimant as a coal miner for at least one year, and voluntarily submitted evidence documenting its one-year employment relationship with Claimant. Hidden Resources then affirmatively conceded, twice, that it was liable for any benefits due Claimant. Based on Hidden Resources' clear and unqualified agreement, the OWCP district director identified Hidden Resources as the responsible operator, the party liable for benefits.

When the claim went to the ALJ, however, Hidden Splendor changed its mind, believing Claimant's hearing testimony exonerated it because it indicated that not all of Claimant's work with the coal company was as a "miner." Citing 20 C.F.R. § 725.463(b), which allows an ALJ to consider a "not reasonably ascertainable" "new issue," Hidden Splendor moved to withdraw its "stipulation"

that it was the liable employer. The ALJ denied the motion, however, finding that Hidden Splendor had failed to prove that its liability was not reasonably ascertainable beforehand.

The issues therefore are:

1. Do the black lung regulations prohibit Hidden Splendor from contesting its status as the liable party before the ALJ (and thereafter) where it conceded before the OWCP district director that it was liable, and the district director relied on that concession to name it?

2. If section 725.463(b) applies, did the ALJ abuse his discretion in determining that Hidden Splendor failed to prove that the nature of its employment relationship with Claimant was "not reasonably ascertainable" when the claim was before the OWCP district director?[1]

STATEMENT OF THE CASE

A. General Procedural Facts

Claimant filed his application for BLBA benefits in 2012. After development of the evidence and Hidden Splendor's admissions that it was liable for any benefits due Claimant, the OWCP district director determined on August

[1] Hidden Splendor also alleges that the ALJ erred in weighing the medical evidence relative to Claimant's entitlement. The Director takes no position on this substantial-evidence issue.

22, 2013, that Claimant was entitled to benefits and that Hidden Splendor was liable for those benefits. Separate Appendix at (SA) 75. Disputing Claimant's entitlement, Hidden Splendor requested a hearing, which was held on August 12, 2014, before Administrative Law Judge Paul R. Almanza (the ALJ). Based upon Claimant's hearing testimony concerning his actual job duties with Employer, Hidden Splendor requested that it be relieved of its "stipulation" that it was liable for Claimant's benefits. The ALJ denied this request by order dated April 12, 2016.[2] SA 1. On February 28, 2017, the ALJ issued a decision and order awarding benefits and ordering Hidden Splendor to pay them. SA 6. Employer appealed this decision and order to the Benefits Review Board on March 17, 2017, and the Board affirmed the decision and order on March 29, 2018. SA 30. Hidden Splendor's timely appeal to this Court followed on April 2, 2018.

B. Legal Background

1. Substantive BLBA and regulatory provisions relating to liability

The BLBA, originally enacted in 1969 as Title IV of the Federal Coal Mine Safety and Health Act, is designed to provide compensation to coal miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and to the survivors of miners whose death was caused or hastened by the disease.

[2] Details concerning the bases of the ALJ's denial, as well as those of his subsequent decision and order and the Board's affirmance of that decision, are set forth below at pp. 16-18.

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 683-84 (1991); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1214 (10th Cir. 2009).

Congress intended to have liability for these benefits fall on the miner's employer "to the maximum extent feasible." *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (quoting *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989)); 30 U.S.C. § 932(c). Congress thus made individual coal mine operators liable for benefits if the miner's disability or death arose "at least in part" out of coal mine employment with the operator after December 31, 1969, while requiring the Black Lung Disability Trust Fund to assume liability only when "there is *no* operator who is liable for the payment of such benefits." 26 U.S.C. § 9501(d)(1)(B) (emphasis added); 30 U.S.C. § 932(c).[3]

Congress additionally took steps to ensure that liable operators would be able to pay for benefits when awarded. It mandated that coal mine operators secure the payment of benefits either by obtaining permission from OWCP to self-insure or by purchasing insurance from an entity authorized under state law to insure state workers' compensation liabilities. 30 U.S.C. § 933(a); 20 C.F.R. §

[3] The Black Lung Disability Trust Fund is financed by an excise tax on the sale of coal. 26 U.S.C. § 9501. Its primary purpose is to pay approved claims for *pre-1970* coal mine employment. 20 C.F.R. § 725.490(a). Given that the vast majority of current BLBA claims involve miners who worked in coal mine employment *after 1969*, individual coal mine operators, not the Trust Fund, are typically liable for approved claims.

726.1.

To further prevent operators from passing liability onto the Trust Fund, Congress gave DOL broad authority to promulgate regulations "for determining whether pneumoconiosis arose out of employment in a particular coal mine," or, "if appropriate," "for apportioning liability" among operators. 30 U.S.C. § 932(h). DOL accordingly promulgated regulations broadly defining the cast of employers that may be potentially liable for a claim.[4] 20 C.F.R § 725.494. Of the five criteria that must be met to be potentially liable, only the third – the operator employed the Claimant as a miner for at least one year – is at issue here.

The regulations further provide that the operator satisfying those five criteria and that most recently employed the miner for more than one year will be designated as the "responsible operator," *i.e.*, the entity finally-determined to be liable for benefits if awarded. 20 C.F.R. § 725.495(a)(1). But if the most recent

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[4] An operator is "*potentially liable*" when:

(i) the miner's disability or death arose out of employment with the operator;
(ii) the entity was an operator after June 30, 1973;
(iii) the miner worked for the operator for at least one year;
(iv) the miner's employment with the operator included at least one working day after December 31, 1969; and
(v) the operator is financially capable of assuming liability for the claim.

20 C.F.R. § 725.494(a)-(e).

employer is not financially capable of assuming liability, the district director may hold liable a prior employer that is financially capable of paying benefits. 20 C.F.R. § 725.495(a)(3); *Arkansas Coals*, 739 F.3d 313 (noting that "a common reason why a director might select a prior employer as the responsible operator is if the most recent employer lacked insurance"). Naming an earlier operator is thus another way the district director reduces Trust Fund exposure.

2. Black lung procedures for identifying the responsible operator

As the description of the proceedings below make clear, *infra* at 13-18, the administrative procedures used to identify the responsible operator play an important role in this appeal.

Once a claim is filed, OWCP investigates and determines whether there are one or more operators that are potentially liable for the claim. 20 C.F.R. § 725.407(a). OWCP then sends a Notice of Claim to each potentially-liable operator. 20 C.F.R. § 725.407. Each notified operator in turn has thirty days in which to accept or contest its designation as a potentially-liable operator. 20 C.F.R. § 725.408(a)(1). If it fails to respond, it may not later challenge its designation as a "potentially liable operator," *i.e.*, it cannot challenge the five criteria or facts – including its employment relationship with the miner – that comprise the designation. 20 C.F.R. § 725.408(c); *Arkansas Coals*, 739 F.3d at 318; *see also supra* n.4 (listing the five criteria). If the operator contests its

designation, it must state the precise nature of its disagreement, and it has ninety days in which to submit documentation supporting its defense.[5] 20 C.F.R. § 725.408(b)(2).

After the operator responds to the Notice of Claim and additional evidence is submitted and developed, the district director makes preliminary determinations – embodied in the Schedule for the Submission of Additional Evidence (SSAE) – both on the miner's entitlement to benefits and on which of the potentially liable operators will be the responsible operator on the claim. 20 C.F.R. § 725.410(a).

The named responsible operator then has thirty days in which to accept or reject its designation as the liable party. 20 C.F.R. § 725.412(a)(1). If it accepts liability or does not file a timely response, "it shall be deemed to have accepted the district director's designation with respect to its liability, *and to have waived its right to contest liability in any further proceeding conducted with respect to the claim*." 20 C.F.R. § 725.412(a)(2) (emphasis added). (By contrast, the failure to respond to the SSAE does not prevent a responsible operator from later contesting

[5] Explaining its regulatory decision, the Department observed that "operators and insurers are in a better position to ascertain these facts [of the miner's employment] than is the Department of Labor." 65 Fed. Reg.79985 ¶ (c), (Dec. 20, 2000). It further allowed that an employer or insurer could ask for more time if it had difficulty obtaining evidence in a particular case. *Id*. But the Department disagreed that section 725.408 "sets a trap[] for unwary litigants. The nature of the evidence required by the Department, and the time limits are clearly set forth in the regulations, and will be communicated to potentially liable operators who are notified of the claim by the district director." *Id.*

a claimant's entitlement to benefits. 20 C.F.R. § 725.412(b).)

The district director has two options once the operator's defenses and supporting evidence are in. First, he may identify a different potentially-liable operator as the responsible operator and issue another SSAE. 20 C.F.R. § 725.415(b). Or the district director may issue a Proposed Decision and Order (PDO). The PDO contains the final determinations on entitlement and the identity of the responsible operator. 20 C.F.R. § 725.418. The PDO must dismiss as parties to the claim all other previously-notified, potentially-liable operators. 20 C.F.R. §725.418(d). The claimant and the designated responsible operator then have thirty days to contest the PDO's findings by requesting revision or an ALJ hearing. 20 C.F.R. § 725.419(a).

It bears emphasis that after OWCP issues a PDO finally designating a responsible operator and the claim is referred to an ALJ for hearing, the district director has no further opportunity (with one narrow exception not relevant here) to impose liability on another entity if the first choice is incorrect: "The district director may not notify additional operators of their potential liability after a case has been referred to the Office of Administrative Law Judges. . . ." 20 C.F.R § 725.407(d). As a consequence, if the first choice is incorrect, the Trust Fund must assume liability for the claim. *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed.Appx. 470, 472 (6th Cir. 2016); *Marfork Coal Co. v. Weis*, 251 Fed. Appx.

229, 235 (4th Cir. 2007). By limiting operator identification to the initial stage of claim adjudication, DOL accepted the risk of increased Trust Fund liability in order to provide more expeditious and fair claim adjudications. *See generally* 65 Fed. Reg. 79985 ¶ (c), 79990-91, ¶ (b); *Director, OWCP, v. Trace Fork Coal Co*, 67 F.3d 503, 507-08 (4th Cir. 1995) (addressing responsible operator identification under prior regulations). Because the Trust Fund may end up being liable if the responsible operator designation is overturned, it is essential that an operator raise its defenses (and submit supporting evidence) at the proper time and before the district director. 20 C.F.R. § 725.456(b)(1) (providing documentary evidence concerning liability not submitted to the district director may not be admitted into the record by the ALJ absent a showing of extraordinary circumstances); 20 C.F.R. § 725.457(c)(1) ("[W]itness offering testimony relevant to the liability of the responsible operator" may not testify before the ALJ "in the absence of extraordinary circumstances."). In that way, the district director can investigate and consider the defenses, and if found valid, identify a different operator.

C. <u>Relevant Facts</u>

Claimant worked as a coal miner for twenty-seven years, ending with his Hidden Splendor employment. SA 14. The Earning Statement of the Social Security Administration identifies the years worked and the amount earned at

Hidden Splendor, but not the particular months employed: 2007 ($17,847); 2010 ($14,212); and 2011 ($10,887). SA 45.

A Hidden Splendor Senior Staff Accountant telefaxed a letter to the district director on February 3, 2013, detailing the months worked by Claimant and the location of the work:

> December 26, 2006 to April 11, 2007 – In the Mine
> November 16, 2010 to January 21, 2011 – In the Mine
> April 5, 2011 to October 14, 2011 – Outside at the Loadout[6]

SA 46. These dates total approximately a year.

At the ALJ hearing, Claimant detailed his job duties when employed by Hidden Splendor. Notably, he reported that he worked as a security guard when the mine was not operational.[7] Hearing Transcript, pp. 45, 51-52-57.

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[6] To "load-out" is "[t]o load coal or rock that is to be taken out of the mine." Dictionary of Mining, Mineral, and Related Terms,at p. 317 (American Geological Institute) (1997 ed). A load out facility is that part of the mine where mined coal is transferred to truck or train for shipment. *See e.g.* http://www.mtowencomplex.com.au/en/mining-infrastructure/Pages/coal-handling-loadout.aspx (last visited Aug. 23, 2018).

[7] Security guards may be considered "miners" under the BLBA depending upon whether their specific job duties support the extraction or preparation of coal. *Compare Wackenhut Corp. v. Hansen*, 560 Fed. Appx. 747, 750 (10th Cir. Mar. 26, 2014) (unpublished) (finding coverage where worker's "patrolling mine sites and inspecting coal-conveyor tubes for fire hazards" was necessary for the extraction and preparation of coal) *with Director, OWCP v. West Virginia Workers' Compensation Coal-Workers Pneumoconiosis Fund*, No. 86-1222, 1998 WL 21181, at *3 (4th Cir. Mar. 8, 1988) (finding no coverage where all the night watchman did was "sit[] in a line-shack and watch[] non-operating equipment").

D. Proceedings before the District Director

Following receipt of Claimant's application for BLBA benefits, and verification of his coal mine employment through his social security records, an OWCP district director issued a Notice of Claim to Hidden Splendor as a potentially liable operator.[8] SA 47. This notice informed Hidden Splendor that it had thirty days to contest liability; that if it did so, the company had to "state the precise nature of [its] disagreement"; and that, if it denied any of the five conditions of liability, it had ninety days to submit supportive documentary evidence. SA 48. The notice explained that, if the company did not respond within thirty days, it "[would] not be allowed to contest its liability" by disputing any of the five conditions of liability. *Id.* Finally, the notice explained that, "[a]bsent extraordinary circumstances, no documentary evidence relevant to [the five conditions] . . . may be admitted in any further proceedings unless it is submitted within 90 days of [its] receipt of this notice or an extended period authorized by the District Director." *Id*.

In response, Hidden Splendor on October 29, 2012, completed a DOL form, where, by a checkmark, the company "denied" both that it employed Claimant as a

[8] The district director also issued a Notice of Claim to West Ridge Resources, Inc., as a potentially liable operator. SA 50. West Ridge employed Claimant from 2005 to 2011, SA 45, and responded to the Notice of Claim by denying liability, SA 53. In light of Hidden Splendor's liability concession, the district director ultimately dismissed the company as a party in the case. SA 79; *see infra* n.8.

miner for at least a year and that Claimant was exposed to coal mine dust during this employment. SA 55. But on November 26, 2012, Hidden Splendor (by attorney) submitted what it termed an "amended" response, SA 57, where the company check-marked "Acceptance of Liability" and did not contest any of the five conditions of liability, SA 58.

On May 8, 2013, in the second step of the liability determination process, the district director issued a Schedule for the Submission of Additional Evidence (SSAE). SA 60; 20 C.F.R. § 725.410. The SSAE preliminarily concluded that Claimant was entitled to BLBA benefits and that, based on the evidence developed to that point, Hidden Splendor was the responsible operator. SA 61-62. Consistent with 20 C.F.R. § 725.412(a)(1), (2), the SSAE explained that the responsible operator had until June 7, 2013, to accept or reject liability; and that if it failed to respond, "it [would] be deemed to [have] accepted its designation and to [have] waive[d] its right to contest its liability in any further proceedings." SA 61. The SSAE then instructed that, "absent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, [could] be admitted into the record once [the] case was referred to the Office of Administrative Law Judges." SA 62.

Hidden Splendor responded to the SSAE on May 14, 2013, by agreeing it was the operator responsible for any benefits due Claimant, and disagreeing over

Claimant's entitlement. SA 73-74; *see also* SA 73 (cover letter explaining that "Hidden Splendor has accepted the designation of Responsible Operator. . . ").

On August 22, 2013, the district director issued a Proposed Decision and Order finding that Claimant was entitled to benefits and identifying Hidden Splendor as the responsible operator.[9] SA 75-76. The decision informed the parties that they had thirty days to request revision or a formal hearing before an Administrative Law judge, but they "[were required to] specify the findings and conclusions with which they disagree[d] . . . ." SA 76. In response, Employer again disputed Claimant's entitlement and requested a formal administrative hearing to decide that issue, but did not dispute its potential liability. SA 80. The district director forwarded the claim to the Office of Administrative Law Judges, with liability not included in the list of contested issues. SA 81-82.

On April 21, 2014, Hidden Splendor provided the ALJ with a Statement of Contested Issues." SA 83-85. In listing the issues, the company made clear that it "[did] not dispute its designation as the Responsible Operator in this claim . . . ." SA 83 (underscoring in original).

[9] On the same date the district director notified West Ridge that DOL no longer considered that company liable for benefits in the case. SA 79.

E. Decisions of the ALJ[10]

1. ALJ Order Denying Employer's Motion to Withdraw its Concession, April 12, 2016 (SA 1)

Following the administrative hearing with Claimant's testimony concerning his various job duties with Hidden Splendor, Employer moved to withdraw its concession that it was the responsible operator. SA 2. The company argued that the ALJ could void its prior admissions of liability based upon 20 C.F.R. § 725.463(b), which allowed the ALJ to consider a "new issue" if it was "not reasonably ascertainable" before the district director. SA 2-3. DOL responded by arguing, *inter alia*, that Employer had waived its right to dispute liability by conceding the issue at the district director level. SA 89-92. DOL also asserted that section 725.463(b) was not applicable because responsible operator liability did not qualify as a "new issue." SA 92-94.

The ALJ denied this motion because Hidden Splendor had failed to prove that its liability was "not reasonably ascertainable" before the district director, as required by section 725.463(b). SA 2-3. The ALJ observed that Claimant's job duties may have come as a "surprise" to Employer, but concluded that its own accountant "distinguished between the periods when Claimant worked 'in the

[10] Because this brief is limited to the issue of liability, the decisions of the ALJ and the Board are described only as they relate to that issue.

mine' and 'at the Loadout,'" and, as Employer, it could have determined Claimant's specific job duties "by interviewing its own agent." SA 3.

2. ALJ Decision and Order Awarding Benefits, February 28, 2017 (SA 6)

In his decision awarding benefits, the ALJ did not revisit the issue of liability other than to note his denial of Hidden Splendor's motion to withdraw its concession. SA 7. For purposes of determining the total length of Claimant's coal mine employment, however, the ALJ concluded that Claimant's work as a Hidden Splendor security guard from April to October 2011 did not qualify as coal mine employment. The ALJ therefore did not include that period of time in his calculation (twenty-seven years) of Claimant's total coal mine employment.[11] *Id.*

F. Decision of the Benefits Review Board, March 29, 2018 (SA 30)

Hidden Splendor argued to the Board that the ALJ abused his discretion by not allowing it to contest its liability after conceding it before the district director. SA 32-35. The Board rejected this argument, finding that the ALJ reasonably concluded the issue was readily ascertainable and that Hidden Splendor could have determined Claimant's job duties "by interviewing its own agent [the Senior

[11] The total length of Claimant's coal mine work was relevant to the invocation of the presumption at 30 U.S.C. § 921(c)(4), which rebuttably presumes entitlement to benefits if the miner worked at least fifteen years in coal mine employment and suffered from a totally disabling respiratory condition. The ALJ's finding concerning the length of Claimant's employment as a miner with Hidden Splendor was ultimately unnecessary since Claimant had more than enough years to qualify for the fifteen-year presumption even without this employment.

Accountant] regarding the evidence it submitted." SA 34 (quoting the ALJ's decision at 3).

The Board also rejected Employer's argument that it could not submit liability evidence to the district director because its attorney did not become aware of Employer's February facsimile until after the ninety-day deadline for submitting evidence. SA 34 n.5. The Board found this argument unpersuasive: Employer never requested an extension of the time to submit evidence, *see* 20 C.F.R. § 725.423 (permitting extensions of time at district director level for "good cause"), and Employer never "averred that it had no records or access to relevant personnel with the requisite information." *Id.* The Board stated further: "[T]he test [under 20 C.F.R. § 725.463(b)] is not that the information was not *readily* ascertainable by counsel, given the information furnished up to that point by the represented party, it is that it was not *reasonably* ascertainable by the parties." *Id.* (emphasis added). Accordingly, the Board affirmed the ALJ's liability determination. SA 35.

SUMMARY OF THE ARGUMENT

The black lung regulations provide that a coal mine operator must timely raise its liability defenses before the OWCP district director, or lose them. Here, when the district director was processing the claim, Hidden Splendor agreed that it employed Claimant as a miner for at least one year, and twice affirmatively conceded that it was the entity liable for the payment of any benefits due

Claimant. Based on those concessions, the district director designated Hidden Splendor as the responsible operator, and dismissed another potentially-liable coal mine operator. It was only years later, when the claim was before the ALJ, that Hidden Splendor asserted that it did not employ Claimant as a miner for the requisite one-year period. But by then, it was too late. Hidden Splendor's repeated concessions of liability before the district director precluded it from contesting its liability before the ALJ. DOL's black lung regulations provide no release from a concession of liability made at the district director level.

Hidden Splendor's reliance on 20 C.F.R. § 725.463(b) to avoid its binding concessions is misguided. Although that section generally permits an ALJ to consider a "not reasonably ascertainable" "new issue," it does not override the specific and mandatory timeframes and obligations set forth in the comprehensive and carefully-balanced regulations for identifying the responsible operator. Moreover, an employer's potential liability cannot be a "new issue": it is identified as an issue as soon as the district director issues a Notice of Claim to the operator, and it continues as such throughout the proceedings before the district director.

Even if Hidden Splendor's liability could be considered a "new issue," the ALJ did not abuse his discretion in finding that Employer failed to prove that it was "not reasonably ascertainable." Hidden Splendor employed Claimant for more than one year, and it has only itself to blame if it did not know what Claimant was

doing and what it was paying him for. As the ALJ observed, all Hidden Splendor had to do was ask another employee, its Senior Staff Accountant – who had already submitted employment evidence – to describe Claimant's actual job duties.

STANDARD OF REVIEW

The Court reviews the ALJ's evidentiary and procedural rulings under an abuse-of-discretion standard. *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (holding that "the formulation of administrative procedures is a matter left to the discretion of the administrative agency") (internal quotation marks omitted); *see also Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1353 (10th Cir.1993) (explaining that the Court "review[s] the ALJ's exclusion of the evidence for an abuse of discretion); *see also NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 305-06 (6th Cir. 2009). The Court gives *Chevron* deference to the Director in interpreting her own regulation. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006) (providing that the Court gives "substantial deference" to the agency's reasonable interpretation of its own regulations").

ARGUMENT

I.

Hidden Splendor's concession to the district director that it is the liable coal mine operator prevents the ALJ from considering that issue, regardless of section 725.463(b)'s allowance of "new issues."

The Secretary's extensive and carefully-balanced responsible-operator regulations require a coal mine operator to timely contest, *inter alia*, that it employed a claimant as a miner for at least one year, or it will lose the defense. At critical junctures here, Hidden Splendor affirmatively conceded it was liable for this claim, and thus did not contest its employment relationship with Claimant. When it reversed course, years later, it was too late and before the wrong tribunal. The ALJ and Board correctly refused to release Employer from its concession of liability. The Court should do likewise.

The district director notified Hidden Splendor of its potential liability for this claim in October 2012. SA 47. After initially denying liability, Hidden Splendor responded in November 2012 (through its current counsel of record) by explicitly accepting liability for the claim. SA 58. In doing so, Hidden Splendor necessarily agreed to the requisite facts underlying its liability, in particular, that it employed Claimant as a miner for at least one year. *Id.*; 20 C.F.R. § 725.408(a). Hidden Splendor then confirmed its acceptance of liability

in its response to the SSAE. SA 73.

The district director relied on Hidden Splendor's representations. It dismissed West Ridge as a party, *supra* n.7, and issued a proposed decision and order designating Hidden Splendor as the responsible operator, SA 75-76. This PDO "reflected the district director's final designation." 20 C.F.R. § 725.418(d). After that, the district director had no second chance to name another operator: either Hidden Splendor or the Trust Fund was liable. *Id*.; 20 C.F.R. § 725.407(d); 65 Fed. Reg. 79990-91 (Dec. 20, 2000); *Ratliff Coal*, 664 Fed.Appx at 472 (6th Cir. 2016); *Marfork Coal*, 251 Fed. Appx. at 235.

Because there are no second chances, Hidden Splendor was required to identify all of its liability defenses to the district director. Its assertion two years later before the ALJ that it did not employ Claimant as a miner for the requisite one-year period, SA 1-2, was untimely. An employer who disputes a sufficient employment relationship, must raise the defense, like other defenses, promptly and with specificity, or lose it. 20 C.F.R. §725.408(a)(2), (a)(3); *Ratliff Coal*, 664 Fed. Appx. 475-76 (insurance guaranty association's agreement before district director that operator had financial ability to pay benefits prevented it from contesting issue before ALJ); *Baum v. Earthmovers Unlimited, Inc.*, 2016 WL 82660793, *5 (Ben. Rev. Bd.) (unpublished) (employer's failure to respond to notice of claim precluded submission of evidence that it did not employ the

claimant as a miner); *Warren v. Fleetwood Trucking Co.*, 2013 WL 2472444 (Ben. Rev. Bd.) (unpublished) (employer's failure to respond to SSAE waived its right to contest its liability in any further proceedings) *affirmed on other grounds* 586 Fed. Appx. 518 (11th Cir. 2014); *see also Arkansas Coals*, 739 F.3d at 318 (explaining that the DOL liability regulations are "narrowly and clearly focused on when and how an operator may contest its identification to a [district director]") (internal quotation marks omitted); *Nat'l Mining Assoc. v. Director, OWCP*, 292 F.2d 849, 871 D.C. Cir. 2002) ("Section 725.408 establishes a deadline for coal mine operators to submit evidence if they disagree with their designation as parties potentially liable for a miner's claim.").

Notably, this Court in *Big Horn Coal Co. v. Director, OWCP*, 55 F.3d 545 (1995), made clear the significance of a concession concerning liability. That case involved the prior liability regulations, which were interpreted by some circuits to allow renaming of the responsible operator at the ALJ level if the ALJ overturned the initial designation. *See, e.g.*, *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989). In *Big Horn Coal*, the named operator withdrew its contention that it was not the responsible operator before the ALJ, but on appeal, before the Benefits Review Board, it attempted to reintroduce the dispute. *Id.* at 547-48. The Board refused to consider the issue, and the Court agreed, explaining

that the operator's "admission of liability constitute[d] a waiver of the defense," which in turn prevented "review [of] the merits of its claim." *Id.* at 551.

Hidden Splendor nonetheless dismisses its concessions and the responsible operator regulations by asserting that its liability is still in play based upon 20 C.F.R. § 725.463(b), which permits an ALJ to consider a "not reasonably foreseeable" "new issue."[12] This authorization, however, was not intended to override the specific and mandatory responsibilities and deadlines set forth in the responsible operator regulations. Those regulations clearly state that an operator must timely raise and support its liability defenses before the district director, or lose them. Allowing section 725.463(b) to implicitly modify the operator identification regulations would undermine DOL's careful balancing of employers' right to defend with Congress's intent to minimize Trust Fund liability. If employers can concede liability before the district director and then contest it before the ALJ and succeed, district directors will be forced to identify the responsible operator with insufficient information, which ultimately will "shift

[12] Section 725.463(b) is a holdover provision from the 1978 black lung regulations, which preceded the promulgation in 2000 of the current operator identification regulations establishing mandatory deadlines. *See supra* at 6-11 (explaining genesis of operator identification regulations). Hidden Splendor's reliance on the 1978 preamble to section 725.463 (OB 19), which merely reiterates that an ALJ may address unforeseeable new issues, is thus not well-taken because, as explained *supra* at 23, at that time it was permissible (at least in some circuits) to name a new responsible operator if an ALJ overturned the initial designation.

responsibility for the payment of benefits to the Trust Fund." *Ratliff Coal*, 664 Fed. Appx. at 475. In short, while section 725.463(b) may expand the scope of an ALJ hearing in certain ways, it "in no way restrict[s] the parties' ability to *narrow* the scope of the hearing" through voluntary admissions. *Johnson v. Royal Coal Co.*, 326 F.3d 421, 425 (4th Cir. 2003).

Nor does the scope of section 725.463(b) logically encompass liability issues. An operator's liability is not a "new issue," and awareness of the issue is always "reasonably ascertainable." That is because an operator's liability is front and center at the very outset of a claim – when the district director issues the notice of claim to the employer. *D.D.R. v. Workman Constr., Inc.*, 2008 WL 429810, *2 (Ben. Rev. Bd. 2008) (unpublished) ("[E]mployer's liability as the responsible operator was a fundamental issue since its initial identification by the district director."); *see also Big Horn Coal*, 55 F.3d at 551 (noting that "liability is the crux of 'responsible operator' status"). Moreover, an employer's liability resurfaces when the district director issues a SSAE. And it is presented for a third time in the PDO when the district director issues his final designation. It is not surprising, then, that Hidden Splendor makes no effort to actually prove that responsible operator liability can be considered a "new issue."

Section 725.463(b) does not provide a backdoor to circumvent the operator identification regulations. When a potential responsible operator concedes liability, it concedes liability.[13]

II.

In any event, the ALJ committed no abuse of discretion by finding under section 725.463(b) that Hidden Splendor's liability was reasonably ascertainable.

Should the Court disagree concerning the foregoing, and find that 20 C.F.R. § 725.463(b) in fact may apply to liability issues, the ALJ still correctly enforced Hidden Splendor's concession because he found the "new" liability issue reasonably foreseeable at the district director level. SA 2-3. The ALJ correctly explained that nothing prevented Employer from obtaining the relevant details from its own employee, the company's accountant: "Employer might have ascertained what job duties Claimant performed, and thereby determined whether Hidden Splendor should have been named the [responsible operator], by interviewing its own agent regarding the evidence it submitted." SA 3; *see supra*

[13] Section 725.463 more appropriately relates to entitlement (typically medical) issues. For these, there are no specific requirements that the parties produce evidence before the district director. Later-developed medical evidence (which is admissible to the ALJ, *see* 20 C.F.R. § 725.456(b)(2)) may thus raise issues not previously foreseeable. By contrast, an operator is required to apprise the district director of its evidence pertaining to liability or the evidence will not be admitted before the ALJ "in the absence of extraordinary circumstances." *See* 20 C.F.R. §§ 725.456(b)(1) (requiring submission of documentary evidence), 725.457(c)(1) (requiring identification of potential witnesses).

n.5 (describing, *inter alia*, DOL's observation that employers are in the best position to ascertain the nature of a miner's employment). At bottom, Employer's defense boils down to that it did not know why Claimant was its employee or what his duties were, and that it had no way of finding these things out until years later when Claimant testified at the ALJ hearing. These barely credible explanations do not excuse its concession and certainly do not justify foisting liability onto the Trust Fund. The ALJ did not abuse his discretion in rejecting Employer's argument.

Hidden Splendor attempts to obscure the obvious by pointing out that the accountant's "facsimile was not provided to the DOL until February 6, 2013," outside of the ninety-day period it was given to dispute liability and provide supportive documentation. Opening Brief at (OB) 17. While true, that is no answer to its failure to contact the accountant sooner (or to ask for more time), especially since the district director's notices to Employer made it clear that liability evidence must be developed and submitted at the district director level. Nor is it an answer that Hidden Splendor (apparently) failed to give its own attorney the information that it provided to DOL. OB 13. That is simply unsound business practice. The district director issues legal documents that have legal

consequences. The ALJ properly refused to excuse Hidden Splendor's failure to adequately investigate.[14]

Ignoring its own role in its current troubles, Employer relies heavily on common law principles that allow courts to relieve a party of a stipulation. OB 19-25. Employer's reliance on the common law is misplaced for three reasons. First, these general principles cannot override the black lung regulations that explicitly make concessions of liability binding. These duly-promulgated procedures are legislative rules that not only the agency, but the courts, are bound to follow. *E.g.* 3 Admin. L. & Prac. §10.21 (3d ed.) ("In short, a legislative rule has binding effect and must be followed by a court unless the court can find it arbitrary.").

Second, even the common law principles prohibit setting aside a stipulation "where such action will be likely to result in serious injury to one of the parties." *Morrison v. Hurst Drilling*, 212 Kan. 706, 512 P.2d 438 (1973); *see* OB 20-21 (quoting *Morrison* at length). Here, the Trust Fund will suffer "serious injury" if Hidden Splendor is allowed to recant. The Trust Fund will be forced to assume liability, where the district director did everything right and arguably would have named another coal mine operator (West Ridge) had Employer timely contested its liability.

[14] "Troubles hurt the most when they prove self-inflicted." Sophocles, *Oedipus the King*.

Third, Hidden Splendor misses the point of the cases it cites. OB 19. They establish that appellate courts, utilizing an abuse of discretion standard, give fact finders a wide berth. In all the cited decisions, the courts affirmed the fact finders' determination to set aside or not set aside stipulations; none reversed the fact finders' determinations. The same should hold true here. The ALJ reasonably refused to excuse Hidden Splendor's concession of liability.

CONCLUSION

In view of the foregoing, the Court should affirm the determination below that Hidden Splendor is the responsible operator.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary for the proper disposition of this case.

CERTIFICATE OF COMPLIANCE

1. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionately spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 6,570 words as counted by Microsoft Office Word 2010.
2. Pursuant to the ECF User Manual, I certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.
3. Pursuant to the ECF User Manual, I certify that the hard copies to be submitted to the Court and parties to the case will be exact copies of the version submitted electronically today.
4. Pursuant to 10th R. 25.5, I certify that all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, copies of the Director's response brief were served electronically using the Court's CM/ECF system on the Court and the following:

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