PART I

DEFINITIONS

A. MINER

1. COAL MINE; COAL MINE DUST

DIGESTS

In drafting the Act, Congress did not wish to include every person whose employment has required the worker to have significant exposure to coal dust. ***Johnson v. Weinberger,*** 389 F. Supp. 1296 (S.D. W.Va. 1974). Rather, Congress included only those individuals who work or have worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. *See* 30 U.S.C. §902(d). In addition, Congress included individuals who work or have worked in coal mine construction or transportation in or around a coal mine, to the extent such individuals were exposed to coal dust as a result of such employment. *Id*.

In ***William Brothers, Inc. v. Pate***, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987), the court held that coal dust and coal mine dust are the same; *i.e.*, dust arising from the extraction and preparation of coal. The court nonetheless rejected the Director's contention that "coal mine dust" encompassed any dust found at a coal mine site and distinguished ***Williamson Shaft Contracting Co. v. Phillips***, 794 F.2d 865 (3d Cir. 1986). Similarly, in reversing the Board's affirmance of an ALJ's finding that an employer qualified as the responsible operator, the court held in ***Bridger Coal Co. v. Director, OWCP***, 927 F.2d 1150, 15 BLR 2-47 (10th Cir. 1991) that the putative miner, a construction worker, was not regularly exposed to coal mine dust as required by Section 725.202(a) for a cumulative period of one year or more. In so concluding, the court was critical of the Board's construction of coal mine dust as including all dusts generated by coal mining as overly broad.

PART I

DEFINITIONS

A. MINER

2. STATUS/FUNCTION/SITUS & SITUS/FUNCTION TESTS

In ***Whisman v. Director, OWCP,*** 8 BLR 1-96 (1985), the Board fashioned the three pronged test of status, function and situs for determining whether the duties performed by a claimant met and satisfied the statutory definition of "miner." In ***Swinney v. Director, OWCP,*** 7 BLR 1-524, 1-528 (1984), the Board stated that it is "a fundamental principle of black lung law that workers not directly related to the production of coal are not covered by the Act."

The Board has emphasized, and continues to emphasize, that, first and foremost, the factual questions of status of the coal, the functions performed by the worker, and the work area must be resolved by the ALJ; ***Shaw v. Director, OWCP,*** 7 BLR 1-652 (1985); ***Price v. Peabody Coal Company,*** 7 BLR 1-671 (1985). *See* ***Dawson v. Old Ben Coal Co.,*** 11 BLR 1-58, 1-60 n.1 (1988), where the Board set out the procedure which the ALJ should follow in determining years of coal mine employment pursuant to Parts 410, 718 and 727; *see also* ***Director, OWCP v. Cargo Mining Co.,*** Nos. 33-3531 and 3578 (6th Cir., May 11, 1989)(unpub.).

The courts, however, have generally followed a two-pronged (situs-function) test, although in ***Stroh v. Director, OWCP,*** 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987), the court included the "status of the coal" inquiry as part of the function test. *See also* ***Mitchell v. Director, OWCP,*** 855 F.2d 485 (7th Cir. 1988). Furthermore, while a miner involved in extraction of coal must prove a situs prong (*i.e.*, in or around a coal mine), miners involved in the preparation of coal need not establish a geographical nexus to a coal mine. ***Director, OWCP v. Zeigler Coal Co.,*** 853 F.2d 529 (7th Cir. 1988); *see also* ***Foreman v. Director, OWCP,*** 794 F.2d 569, 9 BLR 2-90 (11th Cir. 1986)(a facility used in preparation of coal, wherever it is located, constitutes a mine under the Act).

The phrase "in or around a coal mine" does not necessarily mean "on coal mine property." In ***Baker v. United States Steel Corp.,*** 867 F.2d 1297, 12 BLR 2-213 (11th Cir. 1989), the court held that, in determining "situs", the geographical distance of the work area from a mine is but one relevant factor to be considered in determining whether the miner worked "in or around a coal mine"; however, application of a rigid "fixed distance" rule is not appropriate, and the ALJ must consider all relevant circumstances underlying each particular claim.

In determining "function," the court in ***Falcon Coal Co. v. Clemons,*** 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989), ruled that the worker's duties must be an "integral" or a "necessary" part of the coal mining process in order to meet the definition of miner under the Act. In addition, the court stated:

> In general, those individuals who handle raw coal or who perform tasks necessary to keep the mine operational, and in repair are generally classified as "miners." Those whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as "miners."

Id. at 922-23, 2-279. Furthermore in ***Fox v. Director, OWCP,*** 889 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989), the court held:

> The fact that a company owns and operates its own coal mines does not bring workers employed at its other coal utilization facilities under the umbrella of the Act's coverage. Benefits under this Act must be denied to those who work with coal once it has been processed by the mine and shipped to consumers. Whether or not these consumers are a part of the same corporate entity which initially extracted the coal is of little use in an attempt to determine if an employee performed coal preparation work as contemplated by the Act.

Id. at 1042 (footnote omitted).

PART I

DEFINITIONS

A. MINER

3. CONSTRUCTION/TRANSPORTATION WORKERS

For workers involved in the transportation of coal, coal mine construction, or maintenance work, the worker must establish the appropriate two or three pronged test before being entitled to invocation of the presumption found at 20 C.F.R. §725.202(a). ***Garrett v. Cowin & Company, Inc.***, 16 BLR 1-77, No. 87-841 BLA (Dec. 21, 1990); ***Ray v. Williamson Shaft Contracting Co.,*** 14 BLR 1-105 (1990). To rebut the Section 725.202(a) presumption, the party opposing entitlement must establish that the maintenance, transportation, or construction worker was not regularly exposed to coal mine dust, or that such worker was not regularly employed in or around a mine or mine site. *See* ***Garrett,*** *supra;* ***Ray,*** *supra;* ***Tressler v. Allen & Garcia Co.,*** 8 BLR 1-365 (1985); ***Conley v. Roberts and Schaefer Co.,*** 7 BLR 1-309 (1984); ***Ritchey v. Blair Electric Service Co.,*** 6 BLR 1-966 (1984).

For purposes of invocation of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the miner who works in a coal mine other than an underground mine bears the additional burden of producing evidence that the surface conditions were substantially similar to those found in an underground mine. In ***Director, OWCP v. Midland Coal Co.,*** 855 F.2d 509 (7th Cir. 1988), the court ruled that the claimant is required only to produce sufficient evidence of the surface mining condition under which the miner worked. It is then the function of the ALJ to compare the surface mining conditions to conditions known to prevail in underground mines. In making such a comparison, the ALJ relies on his or her expertise, knowledge, and that which the court referred to as "certain appropriate objective factors." The claimant need not establish conditions prevailing in an underground mine. For Part 727 claims (filed prior to March 31, 1980), however, a claimant need not satisfy a comparability requirement. ***Peabody Coal Co. v. Director, OWCP,*** 778 F.2d 358 (7th Cir. 1985).

While the courts have not addressed the issue regarding at what beginning point (during the extraction and preparation of coal process) an individual falls under the definition of "miner", the tipple traditionally marks the demarcation point between mining and the marketing of coal; when the coal leaves the tipple, extraction and preparation are complete and it is entering into the stream of commerce. ***Collins v. Director, OWCP***, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); ***Roberts v. Weinberger,*** 527 F.2d 600 (4th Cir. 1975); ***Norfolk & Western Railway Co. v. Roberson,*** 918 F.2d 114, 13

BLR 1-6 (4th Cir. 1990); ***Norfolk & Western Railway Co. v. Director, OWCP*** [***Shrader***], 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993). Thus, in ***Southard v. Director, OWCP,*** 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984), the court found that one who works with prepared coal which has been or is in commerce fails to fall within the Act's definition of coal miner. In ***Amax Coal Company v. Fagg,*** 865 F.2d 916, 12 BLR 1-77 (7th Cir. 1989), the court held that work involving the extraction or preparation of coal includes all work which is part of the "modern commonly-applied process of extracting and preparing coal."

For transportation workers, the worker is considered a miner if his work relates to the preparation of coal for delivery rather than the delivery of the finished product to consumers in the stream of commerce. ***Mitchell v. Director, OWCP***, 855 F.2d 485 (7th Cir. 1988); *see also* ***Spurlin v. Director, OWCP,*** 956 F.2d 163, 16 BLR 2-21 (7th Cir. 1992)(transporting empty railroad cars from a railroad depot to a point near the tipple from which other employees released the cars to go to the tipple); ***Shrader***, *supra* (delivery of empty cars to coal preparation facility is integral to the process of loading coal at the preparation facility and therefore is part of coal preparation).

DIGESTS

The Fourth Circuit held that this electrical construction worker worked in coal mine construction and was exposed to coal dust as a result of such employment and thus was a miner under the Act's definition. 30 U.S.C. §902(d); 20 C.F.R. §725.202(a). The Court further distinguished its analysis regarding transportation workers, *see* ***Norfolk & Western Railway Co. v. Roberson***, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991); ***Eplion v. Director, OWCP***, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986), and held that the two-step test should not be applied in cases involving coal mine construction workers because if this test were applied, rarely if ever would a coal mine construction worker qualify as a miner under the Act. ***The Glem Co. v. McKinney***, 33 F.3d 340, 18 BLR 2-368 (4th Cir. 1994).

The Seventh Circuit held that substantial evidence supported the administrative law judge's finding, as affirmed by the Board, that claimant's surface construction work for employer building mines was sufficient under 20 C.F.R. §725.202(a) to establish 12 months of coal dust exposure, making him a miner under the Act and employer the responsible operator herein. The Court deferred to the administrative law judge's finding that the testimony provided by the two owners of R&H conflicted and upheld his finding that claimant's detailed testimony was credible. ***R&H Steel Buildings v. Director, OWCP*** **[*Seibert*]**, 146 F.3d 514, 21 BLR 2-439 (7th Cir. 1998).

PART I

DEFINITIONS

A. MINER

4. GENERAL CASE LISTINGS FOR COVERED AND NOT COVERED COAL MINE EMPLOYMENT [Listed in Circuit Order]

a. Cases in which the court found claimant's duties to be COVERED coal mine employment include:

- ***Stroh v. Director, OWCP,*** 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987)(a coal hauler who purchased raw coal from mines and hauled it to a coal processor who later sold it);

- ***Dowd v. Director, OWCP,*** 846 F.2d 193 (3d Cir. 1988)(a miner who purchases and bags unprocessed coal for later resale);

- ***Hanna v. Director, OWCP,*** 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988)(a barge worker who loaded processed coal on to a barge directly from the tipple);

- ***Amigo Smokeless Coal Co. v. Director, OWCP,*** 642 F.2d 68 (4th Cir. 1981)(laboratory technician who collected coal samples for processing and analysis);

- ***Sexton v. Mathews,*** 538 F.2d 88 (4th Cir. 1976)(shoveling coal from a tipple to a lorry);

- ***Hughes v. Heyl & Patterson, Inc.,*** 647 F.2d 452, 3 BLR 2-15 (4th Cir. 1981)(a construction firm which erected and repaired coal preparation facilities is a coal mine operator);

- ***Norfolk & Western Railway Co. v. Roberson,*** 914 F.2d 35, 13 BLR 1-6 (4th Cir. 1990)(a railway worker loading and hauling raw coal to a preparation plant);

- and ***Freeman v. Califano,*** 600 F.2d 1057 (5th Cir. 1979)(a miner who repaired railroad track at a coal mine); and ***Roberts v. Weinberger,*** 527 F.2d 600 (4th Cir. 1975)(a truck driver hauling coal between a strip mine and a tipple).

- ***Director, OWCP v. Consolidation Coal Co.,*** 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989)(repairing mine equipment at a centrally located repair shop);

- *see also* ***Louisville & Nashville R. Co. v. Donovan,*** 713 F.2d 1243, 10 BLR 2-133 (6th Cir. 1983);

- ***Adelsberger v. Mathews,*** 543 F.2d 82 (7th Cir. 1976)(a clerical employee who determined what kind of coal is prepared and shipped);

- ***Amax Coal Company v. Fagg,*** 865 F.2d 916, 12 BLR 1-77 (7th Cir. 1989)(individuals performing reclamation work);

- ***Consolidation Coal Company v. McGrath,*** 866 F.2d 1004, 12 BLR 2-152 (8th Cir. 1989)(miners who work in open pit lignite mines);

- ***Baker v. United States Steel Corp.,*** 867 F.2d 1297, 12 BLR 2-213 (11th Cir. 1989)(a miner employed one mile from closest mine is a miner under the facts of that case);

- ***Skipper v. Weinberger,*** 448 F.Supp 390 (M.D. Pa. 1977)(individuals maintaining mining equipment).

b. Cases in which the court found claimant's duties NOT COVERED coal mine employment include:

- ***Wisor v. Director, OWCP,*** 748 F.2d 176, 7 BLR 2-46 (3d Cir. 1983)(a clay miner who is required to remove quantities of coal before reaching the clay is not a coal miner where the extracted coal is left unprepared or is discarded);

- ***Zimmerman v. Benefits Review Board,*** 749 F.2d 29 (3d Cir. 1984) (employee in a charcoal briquette production facility);

- ***Kopp v. Director, OWCP,*** 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989) (court infers that federal coal mine inspectors are not miners under the Act);

- ***Director, OWCP v. Consolidation Coal Co. and Krushansky,*** 923 F.2d 38, 14 BLR 2-139 (4th Cir. 1991)(a dockworker in a loading facility handling fully prepared coal).

- ***Collins v. Director, OWCP,*** 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986)

(driver who hauled slate, a coal byproduct from tipple);

- ***Eplion v. Director, OWCP,*** 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986) (only contact with coal occurred after it had been fully processed and delivered to market);

- ***Richmond v. Director, OWCP,*** 813 F.2d 1228 (4th Cir. 1987) (table)(movement of waste coal in process of making charcoal briquettes);

- ***Hagy v. Director, OWCP,*** No. 88-3809 (4th Cir., Aug. 16, 1988) (unpub.) (delivery of limestone to a mine);

- ***Frost v. Director, OWCP,*** 821 F.2d 649 (6th Cir. 1987)(a delivery man carrying lunches to underground miners);

- ***Falcon Coal Co. v. Clemons,*** 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989) (nightwatchmen are beyond the scope of the Act);

- ***Director, OWCP v. Cargo Mining Co.,*** Nos. 88-3531 and 3578 (6th Cir., May 11, 1989) (unpub.)(a claimant is not a miner for the period of time he was on strike);

- ***Director, OWCP v. Zeigler Coal Co.,*** 853 F.2d 529 (7th Cir. 1988) (where the repairing of mining equipment occurred one and a half miles away from the mine site);

- ***Kennedy v. Director, OWCP,*** 860 F.2d 1321 (8th Cir. 1988) (transporting coal to residences and commercial establishments for their consumption);

- ***Hon v. Director, OWCP,*** 699 F.2d 441, 5 BLR 2-43 (8th Cir. 1983)(work in a blacksmith's shop is not coal mine work);

- ***Foreman v. Director, OWCP,*** 794 F.2d 569, 9 BLR 2-90 (11th Cir. 1986)(work in an ore mine power plant utilizing raw materials from company owned mines);

- ***William Brothers, Inc. v. Pate,*** 833 F.2d 261, 10 BLR 2-239 (11th Cir. 1987) (construction worker who was involved in surface mine construction project that was not yet operable and who did not work in the vicinity of an operable mine);

- ***Fox v. Director, OWCP,*** 889 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989) (preparing delivered coal in a coke plant).

PART I

DEFINITIONS

B. SURVIVORS/DEPENDENTS

DIGESTS

Widow-Subsequent Remarriage

The Sixth Circuit held that the plain language and legislative history of 30 U.S.C. §902(e)(which defines a "widow" as an individual who "is not married" rather than who "has not remarried") allows for the resumption of eligibility when an intervening marriage is terminated. ***Wolfe Creek Collieries v. Robinson,*** 872 F.2d 1264, 12 BLR 2-259 (6th Cir. 1989).

SSA Benefits As Miner's Property

Social Security benefits received by a miner's widow as a result of a miner's employment are not the miner's property. Consequently, such a widow is not dependent on the miner for support within the meaning of the Act. ***Director, OWCP v. Ball,*** 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987); *see also* ***Director, OWCP v. Hill,*** 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987); ***Director, OWCP v. Logan,*** 868 F.2d 285, 12 BLR 2-175 (8th Cir. 1989); ***Taylor v. Director, OWCP,*** 967 F.2d 961, 16 BLR 2-84 (4th Cir. 1992).

The Third Circuit held that the receipt of Social Security benefits by the miner's surviving divorced spouse, based on the miner's earnings, does not establish dependency on the miner under 20 C.F.R. §§725.217(a), 725.233(b), (g). The Third Circuit rejected claimant's argument that Social Security benefits she received based on the miner's earnings were "contributions" within the meaning of 20 C.F.R. §725.233 (b), (g), and endorsed the reasoning in ***Director, OWCP v. Ball***, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987) and ***Director, OWCP v. Hill***, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987). The Third Circuit thus affirmed the Board's decision affirming the administrative law judge's finding that claimant was not dependent on the miner and is not entitled to benefits. ***Lombardy v. Director, OWCP***, 355 F.3d 211, 23 BLR 2-37 (3d Cir. 2004).

Impact of State Law

Widowhood is determined under the laws of the state where the miner was domiciled at the time of death. ***Quigley v. Anderson Creek and Clay Co.,*** No. 90-3394 (3d Cir.,

Dec. 13, 1990)(unpub.).

Disabled Child

The intent of Congress in enacting 30 U.S.C. §402(g) of the Act was to provide benefits for children who were permanently disabled prior to age 18 and have remained so continuously to the present time. ***Reyes v. Secretary of Health, Education and Welfare,*** 476 F.2d 910, 914 n. 5 (D.C. 1973); ***Kidda v. Director, OWCP,*** 769 F.2d 165, 7 BLR 1-202 (1985).

Conveyance of a Home

The conveyance of a home pursuant to the divorce decree is not a "substantial contribution" to the divorced spouse's continued support, as defined in the Act and regulations. ***Ensinger v. Director, OWCP,*** 833 F.2d 678, 680 (7th Cir. 1987).

Eligible Survivors at Section 725.545(c)(4-7)

The Sixth Circuit, with an extensive discussion of 30 U.S.C. §932(b), incorporating 42 U.S.C. §404(d)(1) - (7), held that DOL did not err in adopting Section 204 of the Social Security Act (SSA) to disburse outstanding benefits upon the miner's death. Here, although Section 725.545(c)(1-3) conditions eligibility on a personal entitlement to survivor's benefits, subsections 4 through 7 look to next of kin and, if none, then the legal representative of the miner's estate receives payment. In agreeing with the Fourth Circuit in ***Charles v. Director, OWCP***, 1 F.3d 251, 254 (4th Cir. 1993), the Court noted that "unlike a survivor's benefit, which is the personal claim of the dependent spouse, child, or parent, the miner's claim for underpayment of benefits during his life passes by a quasi-inheritance system." Therefore, the miner's son, although not a dependant of the miner's at the time of his death and therefore ineligible for survivor's benefits, is eligible to pursue his father's claim for benefits as a successor in interest. ***The Youghiogheny & Ohio Coal Co. v. Webb***, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995).

Under Section 902(e) of the Act, the term “widow” includes not only the wife living with or dependent on the miner at the time of his death, but also a “surviving divorced wife” as that term is defined by the Social Security Act, if the “surviving divorced wife” was dependent on the miner as of the month before he died. 30 U.S.C. §902(e). Since Section 922(a)(2) of the Act provides that the miner's “widow” shall receive the full amount of benefits the deceased miner would receive if he were totally disabled, and Congress prescribed no alternative method to compute multiple widows' benefits, the Director reasonably interpreted the Act to provide for the payment of full benefits to both the miner's widow and his surviving divorced wife. ***Piney Mountain Coal Co. v. Mays***, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999).

The Eighth Circuit held that where a miner is survived by multiple dependent "widows," *e.g.*, a surviving spouse and a surviving divorced spouse, each surviving "widow" is entitled to a full basic benefit with augmentation pursuant to 30 U.S.C. §922(a)(2). The clear intent of Congress regarding this issue was expressed in the text and structure of the Act as amended in 1972. ***Peabody Coal Co. v. Director, OWCP* [*Ricker*]**, 182 F.3d 637, 21 BLR 2-663 (8th Cir. 1999).

Under the 2000 Amendments to the Regulations

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.204 is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.212(b) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.213(c) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.214(d) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.219 (d) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: The D.C. Circuit also stated that the revised regulation at Section 725.219(c) is impermissibly retroactive as applied to pending claims. This is a typographical error, however, as Section 725.219(c) was unchanged from the prior

edition of the regulations.]

PART I

DEFINITIONS

C. PNEUMOCONIOSIS

DIGESTS

Anthracosis in Lymph Nodes

The Fourth Circuit, citing ***Bueno v. Director, OWCP,*** 7 BLR 1-337, 1-340 (1984) and ***Dobrosky v. Director, OWCP,*** 4 BLR 1-680, 1-684 (1982), held that anthracosis found in lymph nodes may be sufficient to establish pneumoconiosis. ***Daugherty v. Dean Jones Coal Co.,*** 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *see also* ***Youghiogheny & Ohio Coal Co. v. Milliken,*** 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); ***Consolidation Coal Co. v. Smith,*** 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988); ***Peabody Coal Co. v. Shonk,*** 906 F.2d 264 (7th Cir. 1990).

The Fourth Circuit recognized that Section 718.201 encompasses a wide variety of conditions; including diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure. The Fourth Circuit held that the plain language of Section 718.201 demands that these diseases result in some sort of respiratory or pulmonary impairment before they can be considered "pneumoconiosis." ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

However, the Fourth Circuit noted that Section 718.201 also includes diseases that are or can be caused by coal dust inhalation. Any "chronic dust disease of the lung and its sequelae...arising out of coal mine employment" will qualify. Examples include "coal workers' pneumoconiosis" and "anthracosis." The Fourth Circuit noted that Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an "impairment" to be classified as "pneumoconiosis." The Fourth Circuit held that the definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question. ***Clinchfield Coal Co. v. Fuller***, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

Progressive Nature of Pneumoconiosis

The Seventh Circuit noted in dicta that claimant and employer had failed to substantiate arguments before the Board and the Court regarding material change in conditions. Here, the Court noted that the parties' failure to site medical authority for or against the proposition made by employer that since the miner had quit working in 1986, followed by a denial of his first claim in 1987, he could not now prove pneumoconiosis in a 1990 duplicate claim "because he could not have contracted the disease after ceasing to be a coal miner." The Court goes into a discussion of the progressive nature of pneumoconiosis that is a good resource. ***Freeman United Coal Mining Co. v. Hilliard***, 65 F.3d 667, 19 BLR 2-282, 2-287 (7th Cir. 1995).

The Seventh Circuit rejected employer's challenge to the Board's affirmance of the award of benefits in this claim originally filed in 1976. The Court held that the administrative law judge acted within his discretion in giving the most weight to x-ray readings of the most recent films of record that were submitted by the widow in a timely motion for modification. The Court noted that employer's only arguments were that the administrative law judge erred in considering the new x-ray evidence with all of the previously considered evidence of record and erred in his preference of the most recent films because the "belief that pneumoconiosis is progressive [is]..."mythology"." The Court rejected these arguments stating that the administrative law judge need not use "magic words" where, as here, his weighing of the evidence is clear and easily reviewable. Furthermore, the Court noted that etiology of pneumoconiosis is a legislative issue and may only be invalidated by medical evidence, none of which employer had submitted here. Therefore, pneumoconiosis' progressive nature was accepted and the Court warned that "[M]ine operators must put up or shut up on this issue." ***Old Ben Coal Co. v. Scott***, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998).

The Sixth Circuit rejected employer's argument that pneumoconiosis cannot arise or progress in the absence of continued exposure to coal dust in light of binding precedents by the Supreme Court and Sixth Circuit. ***Peabody Coal Co. v. Odom***, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003).

The Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on revised 20 C.F.R. §718.201(c), which is entitled to retroactive application, to find that pneumoconiosis can be latent and progressive. The court also found no merit in employer's assertion that the miner was required to prove that he suffers from one of the particular kinds of pneumoconiosis that have been found in the medical literature to manifest latent and progressive forms. Stating that the amended regulation itself is not so limited, but is instead designed to prevent operators from claiming that pneumoconiosis is *never* latent and progressive, the court noted that Section 718.201(c) was issued following full notice-and-comment procedures and reflects the Department of Labor's conclusion that either clinical or legal

pneumoconiosis is a disease that can be latent and progressive. The court held that deference to the agency's resolution of this scientific question was compelled under ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984), which imposes on mine operators the heavy burden of showing that the agency was not entitled to use its delegated authority to resolve the scientific question in this manner. Because employer did not attempt to show why the agency's conclusion was not itself supported by substantial evidence, the miner was fully entitled to rely on the regulation without the need to introduce further independent scientific evidence tending to show that it is scientifically valid. ***Midland Coal Co. v. Director, OWCP* [*Shores*]**, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(c), setting forth the definition of pneumoconiosis, should be narrowly construed to state that pneumoconiosis *can* be a progressive and latent disease, not that it is always, or typically, a latent or progressive disease. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 869, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Seventh Circuit, on the merits of the claim, held that the administrative law judge did not err in relying of the weight of the medical opinion evidence at 20 C.F.R. §718.202(a)(4) to find the existence of pneumoconiosis established, where the weight of the x-ray evidence at 20 C.F.R. §718.202(a)(1) was negative. The Seventh Circuit also held, at 20 C.F.R. §718.202(a)(4), that the administrative law judge permissibly gave less weight to Dr. Selby's opinion, that claimant's worsening lung function could not be due to coal dust exposure because he was no longer working in or around coal mines, based on the court's holding that it conflicted with the regulatory provision at 20 C.F.R. §718.201(c) that pneumoconiosis can be latent and progressive. The Seventh Circuit also determined that Dr. Selby's statements, that coal mine employment "helped preserve [claimant's] lung function" and had a "positive effect on his health," were "contrary to the congressional findings and purpose central to the [Act]." ***Roberts & Schaefer Co. v. Director, OWCP* [*Williams*]**, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

The Seventh Circuit held that the administrative law judge did not err in declining to admit evidence regarding the progressivity or latency of coal workers' pneumoconiosis. The court noted that it had previously held that both the latency and progressivity of coal workers' pneumoconiosis are legislative facts, and that a claimant is not required to prove that he suffers from the specific varieties of pneumoconiosis that the medical literature has found to be progressive or latent. ***Zeigler Coal Co. v. Director, OWCP* [*Griskell*]**, 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007).

Applicability of Revised Regulation 20 C.F.R. §718.201(a)

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.201(a)(2), which expands the definition of pneumoconiosis to include both chronic restrictive or obstructive pulmonary disease arising out of coal mine employment, is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 862, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Tenth Circuit held that, under the plain language of the revised regulation at 20 C.F.R. §718.201(a)(2), proving that one suffers from a "chronic obstructive pulmonary disease" does not establish legal pneumoconiosis unless one is able to show that the condition arose out of coal mine employment. Thus, a claimant establishes the existence of legal pneumoconiosis only if he is able to prove, without the benefit of the rebuttable presumption at 20 C.F.R. §718.203, that his chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. ***Andersen v. Director, OWCP***, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

Clinical and Legal Pneumoconiosis

The Sixth Circuit held that the administrative law judge's explanations for crediting the opinions of Drs. Broudy and Fino and discounting the contrary opinion of Dr. Rasmussen, to find the medical opinions insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), were not supported by substantial evidence. The administrative law judge credited the opinions of Drs. Broudy and Fino over the contrary opinion of Dr. Rasmussen because he found that Dr. Rasmussen relied on an incomplete medical record in that he diagnosed only clinical pneumoconiosis by x-ray, whereas Drs. Broudy and Fino relied on comprehensive documentation in reaching their conclusions that claimant did not have pneumoconiosis. The administrative law judge also found that Dr. Fino had excellent professional qualifications. The Sixth Circuit held that the administrative law judge did not adequately explain his finding that Dr. Rasmussen's report did not support a finding of legal pneumoconiosis, where the record showed that Dr. Rasmussen relied on the results of his exercise blood gas study and diffusing capacity test to determine that claimant was suffering from a pulmonary disability. The Sixth Circuit also held that the Board's explanation that Dr. Rasmussen diagnosed clinical but not legal pneumoconiosis, was inaccurate as a matter of law because (1) Dr. Rasmussen's consideration of evidence, other than the x-ray, including a physical exam, diffusing capacity test, arterial blood gas studies, and claimant's personal and occupational histories, would have been sufficient alone to support a finding of legal pneumoconiosis;

and because (2) even if Dr. Rasmussen diagnosed only clinical pneumoconiosis, as the Board concluded, such a diagnosis was necessarily legal pneumoconiosis where legal pneumoconiosis includes clinical pneumoconiosis. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

The Sixth Circuit held that the administrative law judge did not adequately explain his reasons for crediting the opinions of Drs. Broudy and Fino. The Sixth Circuit found "no rational explanation" for the administrative law judge's determination that Dr. Broudy's opinion was more credible than Dr. Rasmussen's opinion regarding the existence of pneumoconiosis, especially after the administrative law judge found that Dr. Broudy's report contained little rationale or explanation and that Dr. Rasmussen's report was well-reasoned. The Sixth Circuit noted, moreover, that what explanation Dr. Broudy did provide for his opinion that claimant did not have pneumoconiosis, directly supported Dr. Rasmussen's finding of pneumoconiosis based on the blood gas study results. With regard to Dr. Fino, the Sixth Circuit held that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, where Dr. Fino was Board-certified in Internal Medicine and Pulmonary Disease and Dr. Rasmussen was Board-certified in Internal Medicine only but had extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis. The Sixth Circuit also determined that the record refuted the administrative law judge's finding that Dr. Fino reviewed Dr. Rasmussen's exercise blood gas study and diffusing capacity test results and had determined that they were not indicative of pneumoconiosis. The Sixth Circuit thus vacated the Board's decision affirming the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) and the denial of benefits, and remanded the case to the administrative law judge for further consideration. ***Martin v. Ligon Preparation Co.***, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

PART I

DEFINITIONS

D. TOTAL DISABILITY

DIGESTS

Establishing Total Disability Under the Act

The Act provides for the payment of benefits to miners found to be totally disabled due to pneumoconiosis arising out of employment in the nation's coal mines. ***Peabody Coal Co. v. Director, OWCP,*** 778 F.2d 358 (7th Cir. 1985).

Age As a Cause of Disability

Eventually, every coal miner, whether they suffer from pneumoconiosis or not, will no longer be able to engage in the level of coal mining or comparable work as they could when they were younger. However, the Act does not compensation disability due to age, it compensates disability due to pneumoconiosis caused by coal mining. ***Meyer v. Zeigler Coal Co.,*** 894 F.2d 902, 13 BLR 2-285 (7th Cir. 1990).

PART I

DEFINITIONS

E. LENGTH OF COAL MINE EMPLOYMENT

The burden is on the claimant to establish the length of the miner's coal mine employment. ***Trusty v. Director, OWCP,*** 709 F.2d 1059 (6th Cir. 1983).

For the purposes of calculating a miner's length of coal mine employment pursuant to 20 C.F.R. §725.101(a)(32), *see also* 20 C.F.R. §718.301, a year is defined as one calendar year, or partial periods totaling one year, during which the miner has worked " in or around a coal mine or mines for at least 125 working days." However, a miner is not required to establish that he worked underground for more than 125-days per year or that he was around surface coal dust for a full eight hours an any given day for that day to count towards the 125 day total, but must only show that he worked "in or around a coal mine" for any part of 125 days in a calendar year. ***Freeman United Coal Mining Co. v. Summers***, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

It is a claimant's burden to prove the duration of coal mine employment. ***Mills v. Director, Office of Workers Compensation Programs***, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003).

F. USUAL COAL MINE EMPLOYMENT

Voluntary Overtime

In ***Shreve v. Director, OWCP,*** 864 F.2d 32, 12 BLR 2-85 (4th Cir. 1988), the Fourth Circuit held that voluntary overtime may not be considered as a part of a miner's usual coal mine employment. Thus, in determining whether a miner can perform his usual coal mine work, voluntary overtime work duties are not considered. However, the Eleventh Circuit has held that the mere fact that an employee performed certain duties "voluntarily" did not necessarily put those duties outside of the scope of the employee's employment. ***Jim Walter Resources, Inc. v. Allen,*** 995 F.2d 1027, 18 BLR 2-237 (11th Cir. 1993).

PART I

DEFINITIONS

G. COMPARABLE AND GAINFUL WORK

PART I

DEFINITIONS

H. RESPONSIBLE OPERATOR

For purposes of identifying a responsible operator, the miner must have been regularly employed by the operator for a period of at least one year, *i.e.,* 365 days. ***Director, OWCP v. Gardner***, 882 F.2d 67, 13 BLR 2-1 (3d Cir. 1989). To constitute "regular employment," the miner must have worked for that operator for at least 125 days during that 365 day period. ***Gardner***, *supra. See also* ***Falcon Coal Co. v. Clemons***, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989). Part-time employment or employment which is not year-round must be prorated. ***Frost v. Director, OWCP,*** 821 F.2d 649 (6th Cir. 1987).

DIGESTS

The operator is liable for attorney fees where the operator declines to pay the claim thirty days after it receives notice of potential liability. ***Bethlehem Mines Corp. v. Director, OWCP*** [***Markovich***], 854 F.2d 632, 11 BLR 1-105 (3d Cir. 1988).

Citing ***Zavora v. United States Steel Corp.,*** 2 BLR 1-1202 (1980), the court held that where the identified operator did not employ claimant as a miner, the operator cannot be held liable as the Responsible Operator for purposes of payment of benefits. ***Falcon Coal Co. v. Clemons***, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989).

The employer's bare reservation of a legal right of re-entry, combined with a requirement of minimum royalty payments, a right to an accounting for the tonnage produced from the leased land, and a right to monitor compliance with state and federal regulations did not demonstrate continuing operation as a matter of law. Whether employer had the power to exercise substantial control was a question of fact to be resolved by the alj. ***Elliot Coal Mining Co., Inc. v. Director, OWCP*** [***Kovalchick***], 17 F.3d 616, 16 BLR 2-24 (3d Cir. 1994).

Employer's reliance on the misrepresentation of the miner (suggesting that any benefits awarded would be paid by the Trust Fund) did not constitute good cause for employer's failure to timely respond to the notice of potential liability. ***Jonida Trucking, Inc. v. Hunt,*** 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997).

Changing Form of Business Entity

An operator cannot escape liability for benefit payments by effectively changing its business form. ***Donovan v. McKee,*** 845 F.2d 70, 10 BLR 2-133 (4th Cir. 1988).

Withdrawal of Controversion

Where the operator withdraws its objection to a claim, operator will be considered to have waived its right to contest the claim. ***Bethlehem Mines Corp. v. Director, OWCP*** [***Markovich***], 854 F.2d 632, 11 BLR 1-105 (3d Cir. 1988).

Federal Government as Operator

The Fourth Circuit held that the federal government as employer of the claimant, a coal mine inspector, is not a "responsible operator" pursuant to 20 C.F.R. §725.492. The court declined to address the issue regarding whether coal mine inspectors may be "miners" under the Act; however, *see* ***Kopp v. Director, OWCP,*** 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989) where the court infers that inspectors are not miners. ***Eastern Associated Coal v. Director, OWCP and Patrick***, 791 F.2d 1129 (4th Cir. 1986).

Notice to Carrier

Due process requires the carrier be given adequate notice and an opportunity to defend on the question of direct liability to the claimant. ***Warner Coal Company v. Director, OWCP,*** 804 F.2d 346 (6th Cir. 1986); *see also* ***Caudill Construction Company v. Abner,*** 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989); ***Tazco v. Director, OWCP,*** 892 F.2d 482, 13 BLR 2-313 (4th Cir. 1990); ***see generally Harmar Coal Co. v. Director, OWCP,*** 926 F.2d 302 (3d Cir. 1991)(in which the court dismissed employer's appeal as premature and thus did not reach the issue of whether the question of whether employer had demonstrated good cause under Section 725.413 for its failure to timely controvert should be heard by an administrative law judge).

The Fourth Circuit vacated the designation of employer as the party responsible for payment in this case and substituted the Trust Fund, holding that employer's due process rights had been violated when the Department of Labor (Department) failed to timely notify employer of its potential liability within a reasonable time following an initial award of benefits and prior to the miner's death herein. Employer had not been notified until 17 years following the filing of the initial claim and 11 years following the miner's request for a hearing, at which time the Department was required by regulation to notify employer of its potential liability. The miner died within this second time frame. The Court agreed that "government's grossly inefficient handling of the matter--and not the random timing of death--denied [employer] the opportunity to examine [the miner]," thereby hampering employer's opportunity to have the miner examined and to mount an adequate rebuttal argument at Section 727.203(b)(3). In a thorough discussion of due

process, the Court noted that, “in this core due process context, we require a showing that the notice was received too late to provide a fair opportunity to mount a meaningful defense; we do not require a showing of “actual prejudice”...the Due Process Clause does not create a right to win litigation; it creates a right not to lose without a fair opportunity to defend oneself.” ***Lane Hollow Coal Co. v. Director, OWCP*** **[*Lockhart*]**, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.408, regarding the notification of responsible operators, shifts the burden of production, not the burden of proof, by requiring operators to submit evidence rebutting an assertion of liability within a given period of time. Because the revised regulation applies only to the designated responsible operator, *i.e.* it applies only to the extent that a claimant has already carried his burden of proving that an operator is liable, Section 725.408 does not relieve the agency of its burden to identify the correct responsible party and shift that burden onto coal mine operators, and, therefore, it is not inconsistent with either the Supreme Court’s holding in ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir.1993), or the Administrative Procedure Act. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 871-872, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

Identifying the Responsible Operator

The Sixth Circuit, declining to follow the Board's holding in ***Crabtree v. Bethlehem Steel Corp.,*** 7 BLR 1-354 (1984), held that, under the facts of this case, the district director was not prohibited from naming a new responsible operator after an earlier operator had been dismissed. Note, in this case, a hearing on the merits of the miner's claim had not occurred prior to the dismissal of the first operator. In ***Crabtree,*** the claim had been fully litigated. ***Director, OWCP v. Ogelbay Norton Co.,*** 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989); *see also* ***Beckett v. Raven Smokeless Coal Co.,*** 14 BLR 1-43 (1990).

The Fourth Circuit upheld the Board, rejecting the Director's argument that Trace Fork cannot be a responsible operator unless it qualifies as a prior operator under Section 725.493(a)(2). The Court held that the Board's interpretation of Section 725.493(a)(2),(4), that an employer cannot be designated as a responsible operator unless it qualifies as a prior operator under Section 725.493(a)(2), was erroneous. The Court noted its prior interpretation in ***Eastern Asso. Coal Corp. v. Director, OWCP***, 791 F.2d 1129 (4th Cir. 1986)["the...language {of §725.493(a)(4)} simply indicates that prior and successor operators of a previous employer may also be liable for the payment of benefits as provided by §725.493(a)(2)."] was not followed by the Board. Holding, however, that the Board correctly affirmed the administrative law judge's finding that the burden to identify, notify and develop evidence regarding potential responsible operators and their ability to pay lies with the Director, the Court affirmed

the Board's and administrative law judge's dismissal of Trace Fork. Finally, the Court affirmed the Board's reliance on ***Crabtree*** in its refusal to remand the case for further development of potential responsible operators to prevent piecemeal litigation and avoid due process concerns. Judge Hall concurred in part but dissented with the majority holding that the Director should only have a prima facie burden of showing that Trace Fork met the criteria of Section 725.492. "[I]nstead place the substantial burden of raising and resolving [here ability to pay under Section 725.492(a)(4)(iii) and cancellation of insurance] on the party with the strongest incentive to discover the answer - the employer who wishes to avoid liability for the claim." ***Director, OWCP v. Trace Fork Coal Co.*** [***Matney***], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995).

The Tenth Circuit held that the administrative law judge's findings of fact regarding the miner's employment with employer were supported by substantial evidence and affirmed the finding that employer was the responsible operator herein. The miner had worked for employer from July 27, 1981 until August 16, 1982 but had been on sick leave for substantial periods throughout this employment. The administrative law judge reasoned that since employer had paid the miner during those absences, excused the absences and paid him for two weeks after he was laid off, the miner had been "regularly employed" by employer for a period of one year. The Court refused to reach the Director's urging to hold that when determining the responsible operator issue, sick leave cannot be excluded as a matter of law and that when a miner was employed for at least one year and actually worked for at least 125 days (here the miner actually worked 222 days), employer is the responsible operator as a matter of law. *See Pickup, n.9.* ***Northern Coal Co. v. Director, OWCP*** [***Pickup***], 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996).

The Sixth Circuit, in a case issued on December 31, 1997 as unpublished but reissued on January 12, 1998 as published, agreed with employer that Old Republic Insurance Co. was not liable for benefits where claimant was insured and completed all of his coal mine employment prior to March 1, 1978 as a self-employed mine owner. The Court observed that although Congress amended the definition of “miner” in the Black Lung Benefits Act (BLBA) to include previously excluded self-employed individuals, they did not expressly prescribe any retroactive application of this amendment prior to the effective date of March 1, 1978. *See* 30 U.S.C. §902(d)(1978). As claimant bought his insurance policies from Old Republic in August 1976 and July 1977, he was not insured as a “miner” under the Act. Noting that the retroactivity issue was dispositive, the Court did not reach employer’s other argument regarding Kentucky law under the McCarran Ferguson Act or its “successor operator” argument. The Court therefore reversed the Board’s affirmance of the administrative law judge’s finding that Old Republic was the responsible operator herein and remanded the case for further proceedings. ***Creek Coal Co., Inc. v. Bates***, 134 F.3d 734, 21 BLR 2-260 (6th Cir. 1997).

The Third Circuit majority held that the Office of Workers’ Compensation Programs’ (OWCP) failure to make a timely designation of the proper responsible operator (RO)

"as soon after the filing of the claim as the evidence obtained permits," Section 725,412(a), should not have jeopardized the award of benefits for which the Trust Fund was held liable by the first administrative law judge to review this case. The Court rejected the Director's argument that its request to remand for proper identification of the correct RO herein 18 months prior to the administrative hearing was adequate. Therefore, the denial of benefits made by a second administrative law judge and affirmed by the Board, which had resulted following the Board's remand for proper designation of the employer herein, was vacated by the Court. Noting with approval the concerns identified by the Board in ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1989) regarding due process and piecemeal litigation, which were relied on by the administrative law judge in denying the Director's motion to remand, the majority rejected the Director's argument that ***Director, OWCP v. Oglebay Norton Co. [Goddard]***, 877 F.2d 1300 (6th Cir. 1989), applied herein. Finally, the majority further rejected the Director's argument that the Trust Fund should be held liable when a RO can be found. 26 U.S.C. §9501(d)(B), holding that the congressional intent was to protect the claimant from the denial of benefits for lack of a RO. "Here, because of the failure of the OWCP to identify the responsible operator "as soon after the filing of the claim as the evidence obtained permits," it is the claimant who will suffer [from the overturning of the initial award of benefits] unless the Trust Fund assumes responsibility for payment of the benefits." The dissenting panel member would have affirmed the denial of benefits against the RO in the second decision, holding that the Director reasonably interpreted Section 725.412(a), (c), congressional intent and urged reliance on ***Goddard*** and ***Caudill Construction Co. v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989). ***Venicassa v. Consolidation Coal Co.***, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998).

The Seventh Circuit affirmed the Board's holding that employer and its insurer were liable to pay benefits in this case where the miner was a joint owner of a now bankrupt coal mine which did not pay for coverage of the owners under the insurance policies created between the insurer and the operator for the employees. Here, the miner often worked side-by-side with his employees in the mining process and there was no issue as to his coverage or eligibility for benefits under the Act. The Court held that contrary to the administrative law judge's findings that the policy purchased by the operator did not cover its two owners and thereby relieved the insurer of liability herein, the policy purchased satisfied the requirements of the Act under 30 U.S.C. §933(a), (b) and 20 C.F.R. §726.203(a). By including the requisite endorsements, the insurer redefined the liability it assumed under the contract to include liability for benefits imposed by the Act, *i.e.* liability for all of that operator's miners and their spouses found eligible under the Act regardless of premium payment, collection of which remains the responsibility of the insurer. Finally, the Court rejected the insurer's contention that the McCarran-Ferguson Act precluded coverage, as there was no clear Congressional intent to preempt Illinois state law regulating insurance. Applying the Supreme Court's three-part test in ***U.S. Dep't of Treasury v. Fabe***, 508 U.S. 491, 500-01 (1993) and their own three-part test in ***American Deposit Corp. v. Schacht***, 84 F.3d 834, 839 (7th Cir. 1996), the court

concluded that because the Act specifically relates to the business of insurance it does not implicate the McCarran-Ferguson Act. ***Lovilia Coal Co. v. Williams***, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998), *aff'g*, 20 BLR 1-58 (1996).

Where C&K purchased the assets of Lamp Coal Co. and after the sale a twenty-seven year employee of Lamp continued to work in the same mine as an employee of C&K for only three months before retiring, C&K, as successor operator under 30 U.S.C. §932(i)(1) and 20 C.F.R. §725.493(a)(2)(i), was properly designated as the responsible operator even though the miner worked for C&K for less than one year. The one-year minimum employment rule of 20 C.F.R. §725.493(a)(1) is subject to the special rule for successor operators at 20 C.F.R. §725.493(a)(2)(i) making the successor liable for payment of all benefits which would have been payable by the prior operator to its former employees. Once the miners previously employed by the prior operator are hired by the successor operator following the change of ownership, the successor operator becomes primarily liable for benefits payable to those miners, and the prior operator need not be shown to have ceased all business activity for the successor operator to be held primarily liable. 20 C.F.R. §725.493(a)(2)(ii). ***C&K Coal Co. v. Taylor***, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999).

Despite twenty-three year delay in resolving responsible operator issue, under the facts and circumstances of the case employer suffered no prejudice other than mere delay and thus, was not denied due process. Therefore, the Black Lung Disability Trust Fund was not ordered to pay benefits. ***C&K Coal Co. v. Taylor***, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999).

The Fourth Circuit holds that former federal mine inspector is not required to seek benefits for pneumoconiosis under the Federal Employees Compensation Act (FECA) before pursuing a claim for black lung benefits under the BLBA against former private employer. While FECA would be claimant's exclusive remedy against federal employer for disability due to coal workers' pneumoconiosis, and FECA benefits would offset amount payable claimant by private employer for black lung benefits, claimant is entitled to claim compensation against private employer under the BLBA as well. ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

Fourth Circuit holds that OWCP's protracted delay in processing 1978 claim, consideration of 1981 request for modification, and failure to timely notify employer of earlier pending claim, were direct causes of employer's inability to gather rebuttal evidence and mount a meaningful defense. Touchstone for finding of due process violation is prejudice and remedy for resulting due process violation is transfer of liability to Black Lung Disability Trust Fund. ***Consolidation Coal Company v. Borda***, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

The Fourth Circuit recognized that for purposes of identifying a responsible operator, it must be shown that (1) the miner worked for the coal mine operator for one year and (2)

the miner worked regularly during that one year period. To fulfill the requirement of working "regularly," the miner must have worked a minimum of 125 working days. Thus, 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 work days. ***Armco, Inc. v. Martin***, 277 BLR 468, 22 BLR 2-334 (4th Cir. 2002).

Under the successor operator provisions of 30 U.S.C. §932(i) and 725.493(a)(2)(ii) "moving all of the equipment from one mine to another to another mine, and operating it under a different name or corporate structure, would qualify as a 'transfer of assets,' even if there were no written purchase agreement or other documentation facilitating this transfer." Time periods that the miner worked at each mine could be aggregated for purposes of meeting minimum time regulations, i.e. at least 125 days of work as a miner in a calendar year. 20 C.F.R. §725.493(b). ***Kentland Elkhorn Coal Corp. v. Hall***, 287 F.3d 555, 22 BLR 2-349 (6th Cir. 2002).

Following the holding of the Board in***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984), the Sixth Circuit Court concluded that once a claim has been fully litigated, a remand for further investigation as to what party constitutes the responsible operator is inappropriate. ***Kentland Elkhorn Coal Corp. v. Hall***, 287 F.3d 555, 22 BLR 2-340 (6th Cir. 2002).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.495(c), regarding the criteria for determining the identity of a responsible operator, is not unreasonable or inconsistent with a federal statute. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 871-872, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The Fourth Circuit held that a reinsurer created under Virginia law to pay claims on policies issued by an insolvent insurer was required to cover the survivor's claim, even though it was filed after a deadline for making claims against the insolvent insurer. Applying Virginia law as it pertains to insurance contracts, the court relied upon the principle that conditions precedent which are impossible to perform are void. The court held that in this case, it was impossible for the widow to file a claim for survivor's benefits by the 1992 deadline for filing claims against the insolvent insurer because her husband did not die until 1999. The court also applied the principle that exclusionary language in an insurance contract is construed against the insurer and in favor of granting coverage. The relevant language in the liquidation notice provided that "[i]f you . . . are currently receiving workers compensation benefits, you need not file a proof of claim form with the liquidator." Slip op. at 4. Reading this provision against the insurer, the court declined to follow DOL's position that the widow's 1999 claim was separate and distinct from the miner's claim "because survivor's claims arise out of the same facts and are derivative of the original claim." Slip op. at 4. The court also concluded that the plain language of the liquidation notice did not require the widow to file a proof

of claim because at the time the notice was sent, the miner was receiving black lung benefits from the insurer. ***Boyd and Stephenson Coal Co. v. Director, OWCP* [*Slone*]**, 407 F.3d 663 (4th Cir. 2005).

In a case arising under the prior regulations, the Fourth Circuit held that, for purposes of identifying a responsible operator, the miner must have been employed by the operator for "one calendar year" during which the miner regularly worked for that operator, defining "regularly worked" to be a minimum of 125 days. 20 C.F.R. §725.493(a)(1), (b)(2000). In this case, claimant was employed by Daniels, a steel fabricating company, for approximately twelve years. During his twelve years with Daniels, claimant was sporadically dispatched to repair and maintain the tipple at Mesa, a coal mine operator and subsidiary of Daniels. The court held that it was error to add up each separate day of coal mine employment over a miner's entire period of employment (in this case twelve years) to reach 125 days for the purpose of determining whether he was regularly employed in coal mine employment. Thus, the court held that Daniels was not liable as the responsible operator pursuant to 20 C.F.R. §725.493 (2000). ***Daniels Co. v. Mitchell***, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Transfer of Liability

In a case where the Office of Workers' Compensation Programs lost the record during the pendency of employer's motion for reconsideration of an administrative law judge's award of benefits, the United States Court of Appeals for the Sixth Circuit affirmed the initial administrative law judge's award of benefits and held that liability transferred from the putative responsible operator to the Trust Fund. Citing the decision of the United States Court of Appeals for the Fourth Circuit in ***Lane Hollow Coal Co. v. Director, OWCP [Lockhart]***, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), the Sixth Circuit stated that in this instance, employer was not required to make a showing of actual prejudice, *i.e.*, that benefits would have been denied if the record had not been lost, inasmuch as employer was deprived of a fair day in court, thereby suffering a core violation of its due process rights. ***Island Creek Coal Co. v. Holdman***, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

PART I

DEFINITIONS

I. BENEFITS

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.101(a)(6) is not "impermissibly retroactive," and, therefore, may be applied to all claims pending on January 19, 2001. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 865-866, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at Section 725.101(a)(6), which expands the definition of benefits to include any expenses related to the medical examination and testing authorized by the district director pursuant to Section 725.406, is valid as the Longshore Act, 33 U.S.C. §907(e), expressly authorizes the Secretary of Labor to charge the cost of examination to the employer. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 875, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

PART I

DEFINITIONS

J WORKERS' COMPENSATION LAW

DIGESTS

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.101(a)(31) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 866, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

06/09