

CHAPTER 2-800, RESPONSIBLE OPERATOR DETERMINATIONTABLE OF CONTENTS

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1. Purpose and Scope.

This Procedure Manual (PM) chapter provides guidelines and procedures followed by the Division of Coal Mine Workers' Compensation (DCMWC) Program for the investigation and identification of coal mine operators and insurance carriers potentially, and ultimately, responsible for payment of benefits in Black Lung claims. This chapter also provides guidelines for when to notify operators and carriers of their potential liability. The procedures for notifying operators and carriers are contained in PM Chapter 2-801, Responsible Operator Notification.

2. Authority.

[Section 422\(a\), \(c\), and \(i\) of the Black Lung Benefits Act](#) (BLBA); 20 CFR [725.407](#); and [20 CFR 725.490 through 495](#).

3. Policy.

One of the objectives of Congress in enacting the Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977, was to provide a more effective means of shifting responsibility for black lung benefit payments from the Federal Government to the coal industry. Under that legislation, a coal mine operator may be liable for benefit payments on claims filed by a miner whose coal mine employment ended after December 31, 1969. The legislation also established the Black Lung Disability Trust Fund (Trust Fund) from which benefits are paid when no viable employer or insurance carrier can be identified or when the miner ceased employment prior to January 1, 1970. The [revised 2000 regulations](#), which became effective January 19, 2001, placed an increased emphasis on accurate identification and notification of a responsible operator (RO) in that all operators, except the one that has been "designated" as the liable operator, must be dismissed prior to referral of a claim to the Office of Administrative Law Judges (OALJ). Furthermore, if the ALJ determines that the designated operator is not the RO, the claim will not be remanded to allow the district director (DD) a second chance to name another operator - the Trust Fund must assume responsibility for the payment of all benefits.

4. References.

[30 U.S.C. 802\(d\)](#).

5. Definitions.

- a. Designated Responsible Operator. The designated RO for each claim is the operator that the DD identifies as liable for the payment of benefits in the Schedule for the Submission of Additional Evidence (SSAE) and the Proposed Decision and Order (PDO). After the DD completes development of medical evidence under [725.405](#) and receives responses and evidence submitted by the potentially liable operator(s),

the claims staff should issue an SSAE. The SSAE contains the DD's designation of one RO liable for the payment of benefits. The DD may, at his/her discretion, dismiss as parties any of the remaining operators that had been notified of their potential liability or may keep additional operators on notice as parties to the claim. Once the PDO is issued, however, all but the designated operator and its insurance carrier must be dismissed. If the DD dismisses a party but later determines that the dismissal was erroneous, he/she may once again notify the operator in accordance with [725.407\(d\)](#), so long as the PDO has not been issued.

b. "Employ" and "Employment". These terms are construed as broadly as possible for the purposes of identifying an RO. The terminology includes any relationship under which an operator retains the right to direct, control or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner. Any individuals who participate with one or more persons in the mining of coal, such as owners, proprietors, partners, and joint ventures, whether they are compensated by wages, salaries, piece rates, shares, profits, or by any other means, shall be deemed employees. These terms are defined expansively so that employees of an enterprise can be identified based on the economic reality of their relationship to the enterprise and regardless of any financial arrangement or business entity devised by the actual owners or operators of a coal mine or coal mine-related enterprise to avoid the payment of benefits to those employees.

The payment of wages or salary is prima facie evidence of the right to direct, control or supervise an individual's work. Where the operator who paid a miner's wages or salary meets the criteria for a potentially liable operator, that operator or its insurance carrier shall be liable for the payment of any benefits due the miner as a result of the employment. The absence of payment, however, will not negate the existence of an employment relationship. Thus, even if the person who paid a miner's wages may not be considered a potentially liable operator, any other operator who retained the right to direct, control, or supervise the work performed by the miner, or who benefited from such work, may be considered a potentially liable operator.

A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity that substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

Examples of employment relationships include, but are not limited to the following:

(1) Successor Operator. In any case in which an operator may be considered a successor operator, any employment with a prior operator shall also be deemed to be employment with the successor operator. In a case in which the miner was not independently employed by the successor operator, the prior operator shall remain primarily liable for the payment of any benefits based on the miner's employment with the prior operator. In a case in which the miner was independently employed by the successor operator after the transaction giving rise to successor operator liability, the successor operator shall be primarily liable for the payment of any benefits. If the miner worked only for the prior operator, but that operator and its insurance carrier are unable to assume liability, then the successor operator is liable.

(2) Control of Work Assignment. In any case in which the operator that directed, controlled or supervised the miner is no longer in business and such operator was a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or was substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered the employer of any employees of such operator.

(3) Leased Mine. In any claim in which the operator that directed, controlled or supervised the miner is a lessee, the lessee shall be considered primarily liable for the claim. The liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. Refer to Section 16 below.

c. Identification. The identification is the process by which the DD, or his/her designee, based on the results of investigation, recognizes an operator or operators as potentially liable operators in a claim. The term "identification" also refers to the process by which the DD designates an insurance carrier as a party that is potentially liable for benefits on behalf of an operator. The DD's identification of a potentially liable operator is not necessarily final; it must first be designated as the operator in the SSAE and becomes final when it is conclusively designated as responsible in the PDO and all other potentially liable operators and insurance carriers (if any have been put on notice) are dismissed. Care must be taken to identify and name the correct designated RO in the PDO because there is only one chance to do so.

d. Investigation. The investigation is the process of obtaining and reviewing evidence relevant to identification of the coal mine operator, or operators, which may be liable for benefits paid to a

miner or his/her survivors. Relevant evidence includes, but is not limited to, documentation concerning the miner's coal mine employment history, the nature of the miner's employment with an operator, the history and current status of the operator and the financial capacity of the operator to provide for benefits. The term "investigation" also refers to the process of obtaining and reviewing evidence relevant to identification of any insurance carrier which may be liable for benefits on behalf of a coal mine operator.

e. Notification. The notification is the process by which the DD or his/her designee informs the operators and insurance carriers, in writing, of their potential liability for benefits via a 'Notice of Claim, Form CM-971a,' as described in [PM Chapter 2-801](#). In cases in which the operator is insured by a commercial carrier, the insurance policy number must be included on the form; if necessary, the RO and Self Insurance Section should be contacted to obtain it. If the operator is covered by self-insurance, the entity authorized to provide self-insurance coverage must be identified on the form. When notifying an operator of its potential liability, the DD must include copies of the claim form(s) and the available employment evidence.

f. Operator. The term operator means "any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." This also includes a successor operator as defined in section 422 of the Act. Certain other employers, including those engaged in coal mine construction, maintenance, and transportation may also be considered operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator. Any employer of a miner may be considered a coal mine operator, based on the circumstances in the particular case. For additional information describing coal miners and coal mine employment, see [20 CFR 725.202](#), [725.491 - 493](#) and [PM Chapters 2-600 and 2-700](#).

g. Potentially Liable Operator. A potentially liable operator is any operator that meets the criteria set out in [725.494](#). The following conditions must be satisfied for an operator to fulfill the definition of a potentially liable operator:

- (1) Cause of Disability. The miner's disability or death shall have arisen, at least in part, out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, or by a person with respect to which the operator may be considered a successor operator.

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(2) Company was involved in the Mining of Coal after June 30, 1973. The operator was an operator for any period after June 30, 1973.

(3) Duration of Employment Relationship. The miner must have been employed by that operator for a cumulative period of not less than one year. (See Section 9 below, for additional information regarding this "one-year" computation.)

(4) Last Working Day. The operator employed the miner for at least one working day after December 31, 1969.

(5) Operator is Financially Viable. The operator must be capable of assuming its liability for the payment of continuing benefits through:

(a) Insurance. Obtaining a policy or contract of insurance under Section 423 of the Act and [20 CFR Part 726](#);
or

(b) Approved to Self-Insure. Qualifying as a self-insurer under Section 423 of the Act and [20 CFR Part 726](#);
or

(c) Documentation of Assets. Possessing sufficient assets to secure the payment of benefits in the event a claim is awarded.

More than one potentially liable operator may be notified of a claim if it is uncertain which of the miner's employers is liable. Note: If no operator is found to be potentially liable, any benefits awarded will be paid by the Trust Fund.

h. Responsible Operator. Responsible Operator (RO) means an operator that has been determined to be liable for the payment of benefits to an eligible claimant for any period of eligibility after December 31, 1973 with respect to a claim filed under Part C of the Act.

i. RO Screens. The various on-line automated system's screens, namely ROIC Master, ROIC Policy, NCCI (Policies and Carriers) and Blue Cards Master, provide information regarding operators and their insurance coverage, such as names, addresses, coverage dates, policy numbers and names of service agents. The screens are not only helpful when conducting an investigation for a specific claim, but also when researching a coal company or insurance carrier, in general. Detailed instructions regarding what information is on the screens and how to maneuver through each are contained in the Client/Server CAPS Training

Guide.

(1) ROIC Master Screen. This screen contains the operator's name and insurance information. In-depth information for each is available by clicking on the ROIC Details tab where information regarding insurance coverage and other particulars may be found under the Policy, NCCI Policy and Notes tabs. This main screen is the staff person's first source of information about both RO information and insurance companies.

(2) ROIC Policy Screen. This screen includes in-depth insurance information.

(3) NCCI Policy Screen. This screen, which contains information sourced from the National Council on Compensation Insurance (NCCI), comprises both historical (beginning January 1, 2000) and up-to-date information regarding insurance coverage for each operator covered by a commercial insurance policy.

(4) Blue Card Master Screen. This screen contains actual scanned copies of the blue cards (CM-921) that the RO and Self Insurance Section received from insurance carriers since the program's inception. RO and Self Insurance Section staff previously recorded the information from each card on the appropriate RO and IC screens. However with the advent of NCCI, it became unnecessary for insurers to submit the cards to be maintained in the RO and Self Insurance Section or for the information to be manually recorded on the screens. The scanned cards are available for historical purposes.

j. Successor Operator. A successor operator is any "person" who, on or after January 1, 1970, acquired a coal mine or mines, or substantially all of the assets of a mine, from a prior operator, or acquired the coal mining business or substantially all of the assets of the business of a prior operator. Acquisition includes any transaction that transfers the right to extract or prepare coal at a mine. To become liable as a successor operator, the acquirer of mining property must continue to derive an economic benefit from the coal on the property. NOTE: The mere acquisition of mineral rights alone, without the actual extraction, preparation or transportation of coal, or coal mine construction, will not subject the acquirer to successor operator liability. Refer to Sections 9 and 15 below for further information.

k. Working Day. A working day means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation, sick, or holiday leave.

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1. Year. For this purpose, a year is a period of one calendar year (365 days or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked at least 125 "working days."

6. Responsibilities.

a. District Offices (and National Office for Foreign Claims). Responsibility for investigation, identification and notification of ROs rests with the DD having jurisdiction over the claim, and to claims staff designated by the DD. The DD acts on the basis of information provided by the claimant, including the application; Form CM-911a, Employment History, and evidence submitted, if any; his/her Social Security earnings record; evidence submitted by or on behalf of employers; RO and Self Insurance Section of the Branch of Policy Analysis and Program Standards (BPAPS); information available from the on-line ROIC Master, ROIC Policy, NCCI, and Blue Card Master screens; and the individual claim file. The DD is responsible for fully developing the miner's work history, including the dates, nature and location of all employment. The DD must also be certain of the identity of all employers of the miner to insure proper RO identification. It is important that the staff member verifies with each operator the dates, nature and location of employment alleged by the miner to the extent possible.

It is imperative that a thorough investigation and designation of the correct RO is done while the claim is pending before the DD because this is DCMWC's sole opportunity to obtain evidence and investigate the issue. If the claim should be forwarded to the OALJ for a formal hearing, the judge assigned to the case will determine whether the DD designated the proper RO. If the judge determines that the incorrect operator was designated, liability will fall to the Trust Fund.

b. RO and Self-Insurance Section (BPAPS, National Office). The RO and Self-Insurance Section is responsible for:

- (1) Identify. Identifying coal mine operators and insurance carriers and assigning ID numbers.
- (2) Document Insurance Coverage. Receiving insurance carrier reports of insurance coverage via NCCI.
- (3) Update Records. Updating the computer system to reflect up-to-date information and coverage about all operators and insurers.
- (4) Identify Non-Compliance. Identifying operators that fail to secure benefit payments.

(5) Process Self-Insurance Request. Receiving and processing operators' requests to self-insure.

(6) Review Self-Insurance Status. Assessing self-insurance authorizations and coverage amounts on a yearly basis.

(7) Provide Information. Responding to requests for information regarding operators and carriers.

(8) Research. Researching new and existing sources of data on coal miners, coal mine operators and insurance carriers.

(9) District Office Inquiries. Providing insurance policy numbers to claims staff if not available on the various computer screens.

(10) Provide Research Assistance to District Office Staff. Assisting claims staff in investigating and identifying ROs and/or an insurance carrier if he/she is unable to do so. Sources include Dun and Bradstreet, CAP IQ, MSHA records, A. M. Best Company, Secretary of State records and state mining reports. NOTE: All staff can access A. M. Best Company at www.ambest.com and create a free account; it is a good source of information, especially addresses.

(11) Evidentiary Packages. Providing evidentiary packages from various sources concerning specific companies as needed.

(12) Bankruptcy Proceedings. Serving as the focal point for all information regarding RO bankruptcy proceedings.

c. Office of the Solicitor - Regional Offices. Consult with your Regional Solicitor (SOL) Office, if necessary, for assistance in sorting out incomplete or conflicting allegations or evidence relating to coal mine employment with potential ROs. This is critical because the Regional SOL office will have to defend the DD's RO designation. The SOL may be able to draft claimant or employer interrogatories to assist in gathering evidence concerning the miner's employment history. Such interrogatories may help to confirm periods of self-employment or shed light on otherwise unsupported allegations. For example, an interrogatory could request a detailed explanation for an operator's allegation that the miner was not exposed to coal mine dust after December 31, 1969 although employed by the operator after that date.

7. Potentially Liable Versus Designated Responsible Operator.

Throughout the course of a claim's adjudication, the RO will be referred to as either a potentially liable operator or the designated RO. Each coal

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company begins as a potentially liable operator, but at the conclusion of the investigation, one will ultimately become the designated RO.

a. Potentially Liable Operator. This is an operator that meets the five criteria set forth in [20 CFR 725.494](#) and may be responsible for the payment of benefits. Upon receipt of an application for benefits, the claims staff investigates whether any operator may be held liable for the payment of benefits as an RO in accordance with the criteria contained in [Subpart G of Section 725](#) of the regulations. One or more operators may be identified as potentially liable. A potentially liable operator becomes a party when it is issued a Notice of Claim.

b. Designated RO. This is the operator that the DD identifies as liable for the payment of benefits in the SSAE and PDO. The designation is made based upon a thorough investigation of coal mine employment allegations and evidence. If more than one potentially liable operator was notified, the DD, at his/her discretion, may dismiss any of the remaining operators when the SSAE is issued. **All** remaining notified operators, except the 'designated RO', must be dismissed before the PDO is issued.

8. Responsible Operator Investigation.

Investigation begins with receipt of the claimant's application for benefits. A survivor's application ([Form CM-912](#)), unfortunately, yields no information regarding the miner's coal mine employment. A miner's application ([Form CM-911](#)) may contain useful information, however. In particular, block 11 may reflect the miner's last coal mine employment if it occurred within the calendar year preceding the application's filing. The application form should be accompanied by [Form CM-911a](#), Employment History, which should reveal more information. If the Employment History form is not submitted and there is no accompanying listing of employment, this information should be requested immediately.

a. Review Coal Mine Employment Evidence Submitted with Application.

(1) Review Claim History. Determine if a prior claim exists; a survivor's claim may follow a previous miner's claim.

(a) Prior Claim. If a prior claim(s) exists, retrieve and review the record for coal mine employment allegations; allegations in a miner's first claim after he/she ended his/her coal mine employment may be more accurate because they are closer in time to the miner's employment. Also review prior claims for coal mine employment or RO evidence and bronze it into the current claim. Do NOT name the RO identified in the prior claim without first independently reviewing all the available evidence. The prior identification may have been

incorrect, or circumstances may have changed. Your identification should be based on all available evidence.

- (b) No Prior Claim. If no prior claims exist, investigation will begin with the application and employment history forms.

(2) Form CM-911. Review the miner's application, paying close attention to the applicant's answers to questions regarding coal mine employment and workers' compensation (Questions 7, 8, 10 and 11). Names and dates provided will assist in your investigation.

(3) Form CM-911a, Employment History. Review history form completed by the miner or survivor. Claimants may not remember precise beginning and ending dates of employment, may not know the correct spelling of a coal company's name or may not include addresses. Claims staff should contact the claimant to ascertain needed names, dates, etc. to make the vital decision regarding liability. Contact via telephone is recommended so that additional questions can be asked based upon the claimant's answers. When attempting to determine beginning and ending dates of employment, questions such as "Was it around the holidays?", "Was it close to your birthday/anniversary/your daughter's birthday?", "Was the weather cold or hot?", "Were your kids in school?", etc. are helpful. An additional resource is the miner's spouse - who may remember dates and names more readily than the miner. Always document (bronze) your telephone contacts with the claimant in the claim record.

b. Determine if there is at Least One Day of Coal Mine Employment after December 31, 1969. Claims staff should examine both the alleged and (if any at this time) proven coal mine employment for the most recent date of claimed employment.

(1) No Coal Mine Employment after December 31, 1969. If there are no allegations or proof that the miner worked at least one day in coal mine employment after December 31, 1969, the claim becomes the responsibility of the Trust Fund and no further investigation regarding an RO is necessary. NOTE: If, prior to the PDO, proof is received verifying even one day of coal mine employment on or after January 1, 1970, investigation into possible ROs must be initiated.

(2) Coal Mine Employment after December 31, 1969. If there is an allegation or proof of coal mine employment after December 31, 1969, further investigation must be made to determine what company or companies may be "potentially liable" operators.

- (a) Social Security Earnings Record. Request Social Security Earnings Records (SSER) via the correct method, being sure to include all years of alleged coal mine employment. If an SSER is available in the prior claim, bronze it into the current claim. If a prior SSER covers all alleged years of employment, it is not necessary to request a new SSER. However, if additional years of employment have been claimed that were not previously included in the SSER, a new request should be sent only for the additional years.
- (b) Employer's Records. Request coal mine employment evidence directly from the coal company if still operating or if records are in the possession of a bookkeeper, company representative, etc. If unknown or unsure, send the request letter to the company's last known address. This address is likely on the ROIC screen, but may be on the SSER. The A. M. Best Company's website at www.ambest.com is also a good source of addresses. All staff can access this free website and create an account.
- (c) Claimant's Records. Request coal mine employment evidence from the claimant. This may take many forms, including pay stubs, letters from companies, UMWA records, W-2s, mining papers and workers' compensation.

c. Review claim to determine if the Sixth Circuit Rules Apply. All newly filed claims for benefits must be reviewed to determine if the case is under the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Anytime the Sixth Circuit rules apply, this must be noted appropriately in CAPS as the Sixth Circuit's interpretation of a year will apply (see Section 9 below for explanation on the Sixth Circuit interpretation of a year).

(1) Review Claimed Employment to Determine the State in Which the Miner Last Worked. The claims staff should review the last claimed coal mine employment to determine if that employment is in a Sixth Circuit State: Tennessee, Kentucky, Ohio and Michigan. The initial review should occur when the Form 911a has been received. If the Form 911a is received with the initial filing documentation this will be done at the same time as the rest of the initial development on the case. However, if the 911a is not received with the initial documentation the form should be requested and this review should occur as soon as possible after receipt.

- (a) If the last claimed employment is in the Sixth Circuit, add the Diary Action Code (DAC) "SIXTH" into

CAPS. The start date should be entered as the date the case was reviewed and determined to potentially be under Sixth Circuit rules.

- (b) If the last claimed employment is outside of the Sixth Circuit, no action is required.

(2) Review Proven Employment Evidence to Determine the Actual Last State Where the Miner Worked. Once all employment development is complete and evidence of coal mine employment has been received, all the evidence must be re-evaluated to determine the state in which the miner last worked in covered coal mine employment. This determination must be made first, before any other liability evidence is evaluated. The state in which the miner most recently engaged in coal mine work determines which circuit's rules must be applied in calculating employment length, and thus whether any particular employer meets the requirements of a potentially liable operator.

If the last day (even if it is a single day) of covered coal mine employment was in Tennessee, Kentucky, Ohio, or Michigan then the case is in the Sixth Circuit. Note that the miner's last coal mine employment may have been for an entity that does not meet the requirements of a potentially liable operator.

- (a) Case in Sixth Circuit. If the last day of proven coal mine employment is in a state inside the Sixth Circuit, the claims staff will need to apply the Sixth Circuit interpretation of a year when determining the potentially liable operator(s) (see Section 9.c. below for explanation). The claims staff will also need to update CAPS accordingly.

i. If the DAC "SIXTH" has previously been entered the claims staff should enter the end date. The end date should be the date the case was received and determined to definitely be under the jurisdiction of the Sixth Circuit.

ii. If the start date had not previously been entered on a case under the Sixth Circuit rules, the claims staff should enter the DAC "SIXTH" with the start and end date both equal to the date of review.

- (b) Case Outside of the Sixth Circuit. If the last day of proven coal mine employment is in a state outside of the Sixth Circuit, the claims staff will need to apply the traditional DCMWC interpretation of a year when

determining the potentially liable operator(s) (see section 9.c. below for explanation). The claims staff will also need to update CAPS accordingly.

i. If the DAC "SIXTH" has been previously entered on the case, the claims staff should delete the DAC "SIXTH" from CAPS. The claims staff must also enter a Claim Note in CAPS stating "DAC Sixth deleted from CAPS on XX/XX/XXXX because case outside of Sixth Circuit jurisdiction." Instead of XX/XX/XXXX the claims staff should enter the date the DAC was deleted.

d. Review Employment Allegations and Evidence for Potentially Liable Operators. It is the DD's responsibility to put the potentially liable operator(s) and its insurance carrier(s) on notice as early as possible after the claim is received. Review all allegations and evidence to determine if there is sufficient information to name a potentially liable operator(s) and insurance carrier(s) based on Sections 9 - 13 (below) of this chapter. Allegations are adequate to put a company on notice when no evidence is available during the initial investigation. In addition to asking the operator for dates of employment and job titles/duties, claims staff should, when necessary, ask the operator to answer specific questions related to the nature of its operations; its relationship to the miner; its financial status, including any insurance obtained to secure its obligations under the Act; and its relationship with other potentially liable operators.

NOTE: When coal mine employment evidence is received, it should be reviewed immediately to determine that the correct company and insurer are on notice and, if not, the proper potentially liable operator should be named. Furthermore, the DD may identify more than one operator potentially liable for the payment of benefits. 20 CFR 725.407(b); 725.495. Upon final investigation and issuance of the SSAE, one of the companies will be chosen as the designated RO.

Immediately upon receipt of all available coal mine employment evidence, the claims staff will evaluate it and make a determination regarding the potentially liable RO, and its insurance carrier for the period of last employment. If the proper RO and insurer were previously put on notice, no further action is necessary and the operator can be designated in the SSAE. However, if evidence indicates that an operator and/or insurer not previously notified of the claim should be named, a new notice of claim should be sent as quickly as possible because the time-frames for responding to the NOC begin anew.

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9. Responsible Operator Identification.

In order to determine if any of the coal companies may be potentially liable operators ([20 CFR 725.494](#)), claims staff reviews the allegations and available evidence (if any is available during the initial investigation or upon receipt throughout the course of the claim) looking for the following: (a) evidence that the company was an operator after June 30, 1973; (b) verification that the miner worked at least one day for the company after December 31, 1969; (c) evidence the miner worked for the operator for at least a year; (d) confirmation that the miner was engaged in covered coal mine employment during that period; (e) verification that the operator employed the miner more recently than any other operator meeting the above requirements; and (f) determination that the operator was covered by self-insurance or a commercial insurance policy for the miner's last date of exposure. These criteria are covered in more detailed below.

a. Operator after June 30, 1973. Per [20 CFR 725.494](#)(b), the coal company must have been an operator for any period after June 30, 1973. Any owner, lessee, or other person operating, controlling or supervising a coal mine, any independent contractor performing services or construction at such a mine, or any other person who employs an individual in the transportation of coal or in coal mine construction in or around a coal mine for even one day after June 30, 1973 may be determined to be an operator. This also includes any person who paid wages, or a salary, or provided other benefits, to a person in exchange for work as a miner or who may be considered a successor operator ([20 CFR 725.491](#)).

(1) Owner/Lessee/Person. These terms are broadly defined to ensure that any company, partnership or individual that employs a "miner" can be held liable under the Act. They include any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization as appropriate. Officers of an uninsured corporate coal mine operator will not be considered coal miner operators in their own right. However, if a corporation has not secured payment for benefits as required and an effective order awarding benefits is issued, the order may be enforced against the president, secretary, or treasurer of the corporation. ([20 CFR 725.491](#))

(2) Independent Contractor. This term includes any person who contracts to perform services at a coal mine. The contractor's status as an operator is not contingent upon the amount or percentage of its work or business that is related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(3) Operation/Control/Supervision. The operation, control or supervision may be exercised directly or indirectly. Where a

coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator. Similarly, any parent entity or other controlling business entity may be considered an operator regardless of the nature of its business activities.

(4) State and Federal Governments as Operators. 20 CFR 725.491(f) excludes both the United States and any State from the term operator. In any case in which the miner worked for one or more coal mine operators and the federal or a state government, the potentially liable coal mine operator that most recently employed the miner will be liable for benefits.

(5) Successor Operator. A successor operator is any "person" who, on or after January 1, 1970, acquired a coal mine or mines, or substantially all of the assets of a mine, from a prior operator or acquired the coal mining business or substantially all of the assets of the business of a prior operator. Acquisition includes any transaction by which title to a mine or mines, or substantially all of the assets thereof, or the right to extract or prepare coal at such mine or mines, becomes vested in a person other than the prior operator. In order to become liable as a successor operator, the acquirer of mining property must continue to derive an economic benefit from the coal on the property.

NOTE: The mere acquisition of mineral rights alone, without the actual extraction, preparation or transportation of coal, or coal mine construction, will not subject the acquirer to successor operator liability.

The resulting entity will be considered a "successor operator" with respect to any miner previously employed by the prior operator. The following transactions will be deemed to create successor operator liability:

- (a) If an operator ceases to exist by reason of reorganization which involves a change in identity, form, or place of business or organization;
- (b) If an operator ceases to exist by reason of liquidation into a parent or successor corporation; or

(c) If an operator ceases to exist by reason of a sale of substantially all its assets, or as a result of merger, consolidation, or division.

The prior operator may not, however, be relieved of liability if it meets the conditions set forth in [20 CFR 725.494](#) (refer to above). If it does not meet those conditions, the following apply:

(d) When a prior operator transferred a mine or mines, or substantially all of the assets thereof, to a successor operator and then ceased to exist, the successor operator shall be primarily liable for the payment of benefits to any miners previously employed by the prior operator.

(e) When a prior operator transferred a mine or mines, or substantially all of the assets thereof, to more than one successor operator, the successor operator that most recently acquired the mine, or mines, or assets from the prior operator will be primarily liable for the payment of benefits to any miners previously employed by the prior operator.

(f) In any case in which a mine or mines, or substantially all of the assets thereof, have been transferred more than once, the successor operator that most recently acquired such mine, mines or assets will be primarily liable for the payment of benefits to any miners previously employed by the original prior operator. If the most recent successor operator does not meet the criteria for a potentially liable operator set forth in [725.494](#), the next most recent successor operator shall be liable.

(g) If the successor operator independently employed the miner, and meets the requirements of a potentially liable operator, it will be primarily liable for benefits over the prior operator.

b. One Day of Employment after December 31, 1969. There are two important points to this concept. First, the miner must have worked for the operator after December 31, 1969 - that is to say, the miner must have been employed by the operator on or after January 1, 1970 because that is the date on which the BLBA became effective. The second important point is "one day" of employment. One day denotes a working day, which means any day, or part of a day, for which the miner received pay for work as a miner. A working day does not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. Thus the one day of employment on or after

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January 1, 1970 must be a day on which the miner actually worked, all or part, of the day.

c. One Year of Employment. For an employer to be a potentially liable operator the miner must have been employed by the operator for a cumulative period of not less than one year as defined by 725.101(a)(32). A year is defined by 725.101(a)(32) as a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days.

NOTE: For the rest of Section 9 of this chapter any reference to 365 days means either 365 days or 366 days if one of the days is February 29 during a leap year.

- (1) General Concepts in the Calculation of a Year. Both the Traditional DCMWC Interpretation of a Year and the Sixth Circuit Interpretation of a Year (discussed in Section 9.c. below) require that the miner have worked in or around a coal mine or mines for at least 125 working days.
 - (a) Working Days. A working day means any day or part of a day for which a miner received pay for work as a miner. Working days do not include any day when a miner received pay for an approved absence such as vacation, sick leave, or a holiday. Working days also do not include periods where a miner was in layoff status, out due to a workplace injury (whether or not the miner was receiving workers' compensation payments), or on strike.
 - (b) Cumulative periods of employment. For purposes of identifying an operator who may be liable for payment of black lung benefits, a year of coal mine employment may be established by accumulating intermittent periods of coal mine employment that add up to a year. The periods of employment need not be continuous to add up to a year. Multiple periods of employment may be added up to establish the year.
- (2) Traditional DCMWC Interpretation of a Year. Since 725.101(32) was promulgated in 2001, the DCMWC has interpreted it as requiring that the miner be able to show both an employment relationship of at least one calendar year (365 days) and 125 working days during that year. This continues to be the Department's interpretation of a year for all miners whose claims are outside the jurisdiction of the Sixth Circuit (i.e., claims where the last day of coal mine employment was

in any state other than Tennessee, Kentucky, Ohio or Michigan).

- (a) Employment Relationship of 365 days. For all cases following the traditional DCMWC interpretation of a year, the initial requirement is to verify an employment relationship between the miner and operator lasting at least 365 days. Employment relationship in this context refers to the association the miner has with an operator by which the miner provides labor or services in return for financial remuneration. The 365 days need not be continuous as intermittent periods of employment may be added together to determine the total length of employment. Any cumulative period of regular employment with the subject employer for a total of 365 days is sufficient to meet the requirement for a cumulative year of employment.

i. Approved Absences. The 365 day employment relationship is not interrupted by approved absence days such as holidays, vacation days, and approved and paid sick leave days. These periods of approved absences from the workforce are still counted as part of the miner's employment relationship of 365 days because the employer-employee relationship remains intact.

ii. Strike. The 365 day employment relationship is interrupted during days the miner was on strike. Any days on strike do not count towards the miner's 365 days of employment.

iii. Layoff Status. The 365 day employment relationship may or may not be interrupted for periods of time a miner was in layoff status. Days that a miner was in layoff status need to be examined closely to determine if they should be counted in the one year of employment calculation. In most cases, "layoff" may indicate that the employment relationship was severed with no expectation that the job would be available at some point in the future. However, in some cases, a miner may use the term "layoff" to indicate a period of time in which he/she was sent home temporarily with the expectation that he/she would be recalled to work (for example, if the operator was expecting a short-term downturn in business or shutting down some machinery for repair). That type of scenario more closely resembles an excused absence from work rather than a severing of

the employment relationship. The Regional SOL must be contacted for guidance, if after careful fact gathering and analysis, the claims staff still has questions about whether time in layoff status should be considered in the employment relationship of 365 days.

iv. Workers' Compensation/Workplace Injury. The 365 day employment relationship may or may not be interrupted for periods that a miner was receiving workers' compensation benefits for a workplace injury. Days that a miner was out of work due to a workplace injury need to be examined closely to determine if they should be counted in the 365 day employment relationship calculation. The mere receipt of workers' compensation benefits says nothing about whether there is an employment relationship and does not necessarily constitute an excused absence. Time off on sick leave for a work related injury is considered coal mine employment because sick leave evidences a continuing employment relationship and there is an expectation that the miner will return to work after he/she recovers. However, workers' compensation is different from sick leave. It may not always be "employment" and the facts and circumstances of each case need to be investigated and developed before a determination can be made. The claims staff should develop additional information about the situation, including if the miner: remained on the employer's payroll; retained seniority; retained the right to return to work following the injury; and returned to work after recovery. The Regional SOL must always be contacted for guidance in these circumstances.

If an employment relationship of less than 365 days is established with an employer, do not identify the employer as the RO regardless of the actual number of days worked.

- (b) At least 125 Working Days during the Employment Relationship of 365 days. For all cases following the traditional DCMWC interpretation of a year, only after the employment relationship of 365 days threshold is met, should the fact-finder examine the second requirement. The second requirement looks at whether the miner spent at least 125 days working as a coal miner during that year period. If the one year

employment relationship is established, it is presumed that the miner worked 125 days during that period. Further information covering the determination of 125 working days is covered in Section 9(c)(1) above.

Example 1: A miner was employed as follows:

- MCM Coal Corporation 01/01/2006 to 03/31/2012
- JDM Coal Corporation 04/01/2012 to 05/31/2012
- MPR Coke and Coal 09/01/2012 to 12/31/2012
- MCM Coal Corporation 01/01/2013 to 04/03/2013
- JDM Coal Corporation 05/01/2013 to 12/31/2013

Under the traditional DCMWC interpretation of a year, MCM Coal Corporation is the potentially liable operator because they are the only operator that had an employment relationship of 365 days (01/01/2006 to 03/31/2012 combined with 01/01/2013 to 04/30/2013). JDM Coal Corporation would not be a potentially liable operator because there was not an employment relationship of 365 days even when combining the employment from 04/01/2012 to 05/31/2012 and 05/01/2013 to 12/31/2013.

If the evidence shows that the operator which employed the miner most recently employed him or her for less than 365 days, cumulatively, that operator cannot be identified as potentially liable or, if already identified, must be released when the PDO is issued, if not before. In this event, include in the Director's exhibits documentary evidence supporting the finding of an employment relationship of less than 365 days. Furthermore, if other potentially liable operators have not been previously identified and put on notice, send appropriate notice to the next potential operator - the operator which employed the miner most recently for a cumulative period of 365 days. Continue this process until an operator is found that had an employment relationship of 365 days. If the evidence is unclear concerning the length of employment with an operator, that is, if the evidence does not definitively demonstrate employment for less than 365 days, identify and notify both that operator and the operator which employed the miner for the next most recent period of 365 days. One of the companies will be designated at the conclusion of the investigation and when the SSAE is issued, where a full discussion will be included. The others may be dismissed at this time or remain as parties to the claim until the PDO is issued.

If a one-year employment relationship is proven, but the evidence suggests the miner may not have worked 125 days with the operator (i.e., there is evidence that would tend to rebut

the 20 CFR 725.101(a)(32)(ii) presumption of 125 working days when a year's employment is established), identify and notify both that operator and the operator which employed the miner for the next most recent period of one year and at least 125 working days. One of the companies will be designated at the conclusion of the investigation and when the SSAE is issued, where a full discussion will be included. The others may be dismissed at this time or remain as parties to the claim until the PDO is issued.

- (3) Sixth Circuit Interpretation of a Year. The Sixth Circuit Court of Appeals decision in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), has changed the interpretation of a "year" for cases under the jurisdiction of the Sixth Circuit. As a reminder, the Sixth Circuit law applies to all cases where the miner most recently performed coal mine employment in the states of Tennessee, Kentucky, Ohio or Michigan. The Sixth Circuit in *Shepherd* disagreed with the traditional DCMWC interpretation of a year. The court found that the regulations allow a year of employment to be established without establishing that the miner and the operator had an employment relationship of 365 days. For all cases that fall under the Sixth Circuit, if a miner had 125 working days during a year, the miner gets credit for having worked for the operator for one year. In the Sixth Circuit, to fulfill the requirement of a cumulative period of not less than one "year" it may be shown that the miner was employed by the operator in the following ways:

- (a) If the miner worked for 125 working days during a 365 day period, the miner gets credit for one year of work, whether or not the miner was employed for the full 365 days.
- (b) If the miner cannot prove 125 working days, but can prove 365 days of employment, the miner gets credit for one year of work unless there is other proof that the miner worked for fewer than 125 working days.

Example 1. To illustrate the impact of the Sixth Circuit's interpretation of a year, let's look again at the same example cited above under the section on the traditional DCMWC interpretation of a year. In this example, we presume that the evidence shows the miner worked five days a week, without interruption, during all periods of employment. The miner was employed as follows:

- MCM Coal Corporation 01/01/2006 to 03/31/2012

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- JDM Coal Corporation 04/01/2012 to 05/31/2012
- MPR Coke and Coal 09/01/2012 to 12/31/2012
- MCM Coal Corporation 01/01/2013 to 04/03/2013
- JDM Coal Corporation 05/01/2013 to 12/31/2013

If this miner's last day of coal mine employment on 12/31/2013 was in one of the Sixth Circuit states of Tennessee, Kentucky, Ohio or Michigan, JDM Coal Corporation would be the potentially liable operator. JDM Coal Corporation employed the miner for a total of ten months, which equates to at least 40 five-day work weeks, or at least 200 days worked. It was therefore the operator that most recently employed the miner for 125 working days, even though the miner and JDM Coal Corporation did not have an employment relationship of 365 days.

While not directly related to the identification of the potentially liable operator(s) there is one thing important to observe when calculating the total number of years of coal mine employment: a miner who works 250 days during a 365 day period is not entitled to credit for two years of work. A total of 250 days during a 365 day period still only counts as one year of coal mine employment for the purpose of calculating total years, even though there are two periods of 125 days within the 365 day period. It therefore may be necessary to count the length of a miner's coal mine employment separately for presumption (total years of coal mine employment) and liability purposes.

Example: A miner's last coal mine employment was in 2010 in Kentucky. In 2010, the miner worked 125 days for Operator F and 125 days for Operator G. For liability purposes, the miner has a year of coal mine employment with each company, so the company that last employed the miner is the potentially liable operator (assuming that operator meets the other necessary requirements.) However, for presumption (total number of years of coal mine employment) purposes, the miner's work in 2010 with both operators only counts as one year of employment.

d. Miner Was Engaged in Covered Coal Mine Employment. Claims staff must review the coal mine employment allegations and evidence to confirm that the miner engaged in covered coal mine employment for at least 125 working days. In general terms, a miner is an individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. It also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine to the extent that such person

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was exposed to coal mine dust as a result of said employment.

(Construction and transportation workers are presumed to be exposed to coal mine dust while employed at a coal mine.) A two-step test of coverage (situs and function test) based upon the location and function of the work is applied and the individual must meet both to be considered employed in covered coal mine employment. [PM Chapter 2-600](#) provides an in-depth discussion of covered and non-covered coal mine employment.

e. Operator Employed the Miner More Recently Than Any Other Operator. Employment evidence must be reviewed to verify that the operator employed the miner more recently than any other operator meeting the above requirements. Allegations may be used during the initial investigation and naming of a potentially liable operator; however, upon receipt of actual evidence, the prior determination should be reviewed to confirm that the designated operator meets the Section 725.494 requirements.

f. Determine Operator's Insurance Status. Each operator who is operating or has operated a coal mine is required to secure the payment of benefits for which it may be found liable by either qualifying as a self-insurer or by subscribing to and maintaining a commercial insurance contract. Coal mine construction and coal transportation employers are not required to comply with the insurance requirement, but may be required to secure the payment of all benefits ultimately payable on a claim if found liable.

NOTE: If claims staff receives an inquiry from a coal mine construction, transportation or other non-traditional coal-related entity or company not required to be covered by insurance (such as a surveying company) regarding Federal Black Lung insurance, please refer the caller or correspondence to the RO and Self-Insurance Section.

An operator may be insured by two different methods:

- (1) Self-Insurance. The National Office's RO and Self-Insurance Section receives applications from companies who wish to self-insure. Authorization is granted or denied after a thorough evaluation of the information submitted. Each self-insured company undergoes a reauthorization on an annual basis to confirm the company's current ability to self-insure.
- (2) Commercial Insurance. If an operator does not want to self-insure, or does not meet self-insurance criteria, it must purchase and maintain a commercial insurance policy (including a policy or contract procured from a State agency). A Federal Black Lung endorsement must be attached to a company's standard workers' compensation and employer's liability policy

to ensure coverage for Black Lung claims under the Federal Coal Mine Health and Safety Act of 1969, as amended.

[20 C.F.R. §726.203](#)

If an operator fails to self-insure or obtain a commercial insurance policy, it shall be subject to a civil penalty. If the operator is a corporation, the president, secretary and treasurer of the operator may also be severally liable for the penalty.

Similarly, per [20 CFR 725.491\(b\)](#), following issuance of an order awarding benefits against an uninsured corporation, the order may be enforced against the president, secretary and treasurer. Take note that an officer or officers of an uninsured coal company can never be identified as an RO - the coal company will always be named as the potentially liable operator. If the DD determines that it is proper to name the uninsured company, the officers will be cc'd on the Notice of Claim and subsequent documents. However, per [20 CFR 725.495\(d\)](#), when determining whether to identify an operator as a potentially liable operator, OWCP is not required to do anything other than search its files for proof of insurance or self-insurance and certify in the claim record that it has taken that action and found nothing. For that reason, there should not be many occasions when an uninsured corporation should be named as a potentially liable operator. Likewise, there are no circumstances in which OWCP would be required to independently investigate the finances of a corporate officer in the course of claims proceedings. That being said, it is possible that the identified RO could attempt to challenge its liability by proving that the officers of an uninsured corporation which more recently employed the miner can pay benefits per [20 CFR 725.495 \(c\) \(2\)](#). In such cases, OWCP should verify any evidence submitted and/or develop its own evidence regarding the officers' financial capabilities. Contact the Regional SOL for assistance and guidance if this situation occurs.

Claims staff will utilize several CAPS screens to determine whether the operator was self-insured or covered by a commercial policy (and the corresponding policy number) for the applicable date. If both the operator and its insurance carrier are unable to assume liability, the DD should investigate whether a state insurance guarantee association can assume liability.

10. Assignment of Liability.

Section 12 describes the criteria by which an operator may be considered a potentially liable operator based upon the regulations at [20 CFR 725.494](#). [20 CFR 725.495](#) contains the criteria for deciding **which** of the miner's employers that qualify as potentially liable operators under [20 CFR 725.494](#) will be designated as the RO liable for the payment of benefits to the miner and/or his/her survivors. Moreover, the regulation explicitly assigns burdens of proof in the adjudication of the RO issue. The Department bears the initial

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burden of proving that the operator initially found liable for the payment of benefits is a potentially liable operator. It is presumed, absent evidence to the contrary, that the designated RO is financially capable of paying benefits.

Additionally, if the DD designates as the RO any operator other than the miner's most recent employer, the record must contain a statement explaining that designation. This statement must be included in the SSAE (and the PDO). See [PM 2-303](#) Diary Action Codes for system requirements. If one of the reasons for not naming the more recent employer is that it cannot provide for the payment of benefits, the record must also contain a separate statement that OWCP "has searched the files it maintains pursuant to Part 726" and that it "has no record of insurance coverage for [the more recent employer] or of authorization to self-insure that meets the conditions of 725.494(e)1) or (e) (2)." 20 CFR 725. 495(d). The statement, titled "Statement Required by 20 [CFR 725.495\(d\)](#)," is obtained via e-mail from the RO and Self-Insurance Section, bronzed into the file and sent with the SSAE when it is issued. Once in the official claim record, this statement becomes prima facie evidence that the most recent employer is not financially capable of assuming its liability for the claim.

Once an operator is designated as the RO in the SSAE, the burden shifts to that operator to prove either that it is financially incapable of assuming liability for the payment of benefits or that another potentially liable operator that meets the criteria in [725.494](#) employed the miner more recently. If the record contains the appropriate 725.495(d) statement regarding insurance, the designated RO must demonstrate that the more recent employer possesses sufficient assets to pay benefits. This burden may be satisfied by presenting evidence of insurance coverage or that the owner (if a sole proprietorship); partners (if a partnership); or the president, secretary and treasurer (if a corporation) that failed to secure the payment of benefits possess assets sufficient to secure the payment of such. If the 725.495(d) insurance statement is not in the record, the more recent employer is presumed to be capable of providing for benefit payments. For that reason, it is imperative that the statement be included in the record in all cases in which a more recent employer of the miner is uninsured.

If it is determined that the operator identified in the SSAE is not the most recent potentially liable operator to employ the miner, claim staff may take such action as is necessary, including issuing a Notice of Claim to any other potentially liable operator not previously notified and a new SSAE following the time periods provided in the Notice of Claim.

NOTE: If the miner's most recent coal mine employment of at least one year ended while the operator was authorized to self-insure and that operator no longer possesses sufficient assets to secure the payment of benefits, claims staff may not proceed to the next most recent employer/operator; rather, the payment of benefits becomes the responsibility of the Trust Fund. A

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statement to that effect must be included in both the SSAE and PDO. The RO ID and IC ID numbers remain on Claimant Master; however, the RMO Basis Code in the Adjudicative Data Set is changed to 089.

In identifying a potential RO, primary consideration is given to the company directly responsible during the miner's employment for the supervision, operation and control of the mine or mines or other facilities where the miner worked. In the absence of evidence to the contrary, proof that such a controlling business or corporate entity exists is sufficient evidence of its capability of assuming liability.

For cases in which the company most directly connected with the operation of the mine is not capable of assuming liability for the payment of benefits, because it does not meet the requirements listed in section 12, and there exists a parent corporation or partnership, such parent or partner may be held liable for payment.

Generally, we cannot add up the coal mine employment of several subsidiaries to obtain a cumulative period of one year of employment with the parent company. Under [20 CFR 725.493](#)(b)(1), work done with a subsidiary may be attributed to a parent if the parent is a successor operator to the subsidiary. In addition, [20 CFR 725.493](#)(b)(2) provides that work done with a subsidiary may be attributable to the parent if the subsidiary is no longer in business. Neither of these provisions address whether it is permissible to combine employment from several subsidiaries with a single parent, nor do they expressly prohibit it. There have been rare instances in which the parent company was held responsible due to the combined service by the miner with several subsidiaries. If there is ever a question as to whether employment with several subsidiaries should be combined, contact the Regional SOL for additional information and guidance.

In cases involving subcontractor relationships or self-employment, claims staff must develop all relevant information. Contracts made between parties are relevant to the liability issue; copies of such contracts must be obtained and included in the file as a Director's exhibit. A contract or other agreement may help determine the assignment of liability. For example, a contract may specify who has the right to direct control of mining activities. The party with direct control of the mining facility is generally assigned liability, as stated above. (Reference [20 CFR 725.491](#)(a).)

Beginning with the miner's most recent coal mine employer, claims staff should ascertain all companies that may be potentially liable operators and put as many on notice as is deemed necessary. In some cases, it may be necessary to notify only one operator. For example, if the miner alleges (and/or there is proof) that his/her last coal mine employment was from February 11, 2007 through June 15, 2011 with RAJ Coal Company and research confirms coverage by a commercial insurance policy for the last date, it is

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not necessary to continue reviewing for other potentially liable operators.

But if the miner's most recent employer does not clearly meet the potentially liable operator criteria, continued review will be necessary. For example, if the operator mentioned in the above scenario - RAJ Coal - had questionable insurance coverage, review would continue. The miner's next most recent coal mine employer was RCW Coal Company from December 22, 2005 until December 21, 2006; this company was also insured for the last date of work. His/her next most recent coal mine work was with SDB Coal Company from August 27, 1999 to December 20, 2005; this company was covered by a commercial insurance policy for December 20, 2005. In this example, all three companies and their respective insurers should be put on notice - RAJ because of the questions about the insurance; RCW because we are not sure that the miner worked for the company for one year at this point in the investigation; and SDB because the other two companies may not meet the criteria to be designated when the investigation is complete.

11. Financial Capacity to Assume Liability.

Claims staff should investigate the financial capacity of an operator which is not covered by insurance or self-insured, and which has otherwise not provided evidence of its capacity to make benefit payments, regardless of whether the operator has contested its liability on the basis of financial incapacity to provide for benefits. Based on evidence developed, it may be that the operator is capable of providing for the payment of benefits even though not insured.

Note: If the most recent potentially liable operator does not have insurance, a second (or more) potentially liable operator should always be identified and notified. For larger entities, the RO and Self-Insurance Section can obtain financial information from Dun & Bradstreet and other sources. However, in most of these cases there is little or no public information about the entities, and in cases for which the RO and Self-Insurance Section has no information, claims staff must obtain data by conducting his/her own investigation and obtaining information from local sources (such as credit office reports, Secretary of State or other state records, MSHA records, or newspaper articles) AND by requesting the following information from the operator:

- a. Public Company. If it is a public company, a copy of the certified annual financial report for the current year and preceding two years, including the balance sheet, income statement, and statement of changes in financial position.
- b. Private Company. If it is a private company (proprietorship, partnership, closed corporation), a complete financial statement, copies of income tax returns for the prior three years, and an affidavit listing all assets, including coal reserves and disposable property.

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c. Other Documentation. Other relevant evidence may be available such as a certificate from a secretary of state certifying whether a corporation is in good standing, or whether it was involuntarily dissolved due to its failure to file corporate taxes and/or an annual corporate report. Documents filed in support of a bankruptcy petition also constitute evidence relevant to an operator's financial capacity to pay benefits.

The operator must acceptably certify that the data it submits is complete and valid. After review of the complete financial information, the staff member will make a judgment as to whether the RO has the financial capacity to pay benefits. This determination may require consultation with, and input from, the Regional SOL. Regardless of the outcome of the investigation, a second (or more) potentially liable operator should always be identified and notified when the most recent potentially liable operator is not insured and was not approved to self-insure.

12. Last Operator Principle and Applicable Insurance Endorsement.

The following rules govern which insurance carrier provides coverage:

a. Last coal mine employment after December 31, 1969 and ending prior to July 1, 1973. The date of the **first filing** is determinative. Name the operator and insurance carrier which covered the RO on the date that the first claim was filed. This is because no insurance coverage existed prior to July 1, 1973, the first date that operators were required to provide it.

b. Last coal mine employment after June 30, 1973. The date of the miner's **last exposure** is determinative. Name the operator and insurance carrier which had coverage on the day the miner last worked and was exposed to coal mine dust for the RO.

c. Complicated CWP. If evidence establishes that the miner developed complicated CWP, and thus is irrebuttably presumed totally disabled due to pneumoconiosis, the operator and its insurance carrier providing coverage at the time that the miner developed complicated CWP is liable for the payment of benefits. Truitt v. North American Coal Co., 2 BLR 1-199 (1979). The reasoning is that the miner's later employment with another operator or operators could not have contributed, in any part, to his/her disabling black lung disease. Consequently, if the evidence suggests that the miner developed complicated pneumoconiosis prior to working for the most recent one-year employer, the operator employing the miner when he/she developed the disease, so long as it otherwise meets the necessary requirements, should be identified and notified in addition to the most recent one-year employer.

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The operator with which the miner had the most recent periods of cumulative employment of not less than one year is to be designated the RO subject to the conditions stated above and in Section 12 in this chapter.

d. Naming More Than One Insurance Carrier in Cases Where the Miner has Developed Complicated Pneumoconiosis. Consistent with its holding in *Truitt*, the Board has held that the carrier which covered an RO on the date the miner developed complicated pneumoconiosis is liable for payment of the miner's benefits, even though the operator was covered by another carrier on the date the miner was last exposed to coal mine dust with that operator, *Swanson v. R.G. Johnson Company*, 15 BLR 1-49 (1991). Consequently, if medical evidence suggests that the miner developed complicated pneumoconiosis while employed with the operator, and if the carrier providing coverage at the time the miner last worked for the operator is different from the carrier providing coverage at the time the miner first showed evidence of complicated pneumoconiosis, both carriers should be identified and notified.

Note: We have long taken the position that the one operator rule applies equally to operators and carriers. This has to be the case. Otherwise both insurance carriers would be allowed to develop their own medical evidence to defend the claim. And that would both circumvent the evidentiary limitations (by allowing the operator to develop two sets of evaluations) and would be unfair to claimants (by tilting the playing field to the employer's side).

e. Naming More Than One Insurance Carrier in Cases Where Insurance Coverage is Unclear. The principle discussed above in 15.d applies to all cases where there is overlapping insurance coverage or when insurance coverage is unclear, not just those that involve complicated pneumoconiosis. Again, as stated above, the Regional SOL should be contacted for further guidance in cases in which insurance coverage is unclear and more than one insurance carrier may need to be, or has been, named for an operator.

NOTE: Whenever an incorrect insurance carrier has been named, a new Notice of Claim will be issued naming the correct operator and carrier; all parties will be given new time frames to respond and submit evidence. If an SSAE has already been issued, a new SSAE will need to be issued following the new time periods provided in the new Notice of Claim.

No other factors enter into the identification of the insurance company, such as the re-filing date by the widow. **Unless complicated pneumoconiosis is suggested, identification is always based solely on first filing or last exposure.** In refiled miners' claims, though, be sure to check for intervening coal mine employment which may require identification and notification of a different RO and/or insurance

carrier than in the prior claim(s).

f. Liability of Successor Operators. A prior operator which transfers a mine or mines or substantially all the assets thereof on or after January 1, 1970, remains primarily liable for payment of benefits predicated on the miner's employment with the prior operator, assuming the prior operator meets the requirements for being a potentially liable operator set out in 20 CFR 725.494. If the prior operator does not meet these conditions, the successor is liable for and should secure the payment of benefits for which the prior operator was liable ([20 CFR 725.492](#)). If the miner was independently employed by the successor operator, however, the successor is then considered to be primarily liable. 20 CFR 725.493(b)(1).

g. Operator Ceases to Exist. The following events, if occurring on or after January 1, 1970, and resulting in an operator ceasing to exist, affect RO identifications as described below:

(1) Reorganization Involving Change in Identity, Form, or Place of Business or Organization. The resulting entity is the RO.

(2) Liquidation into a Parent or Successor Corporation. The parent or the successor corporation is the RO.

(3) Sale of Substantially All Assets, Merger, Consolidation or Division. The resulting operator, corporation or business entity is considered a successor operator.

NOTE: This situation does not automatically impose liability on the successor. The prior operator remains primarily liable if it can pay benefits, which in most cases means that it had insurance.

Note that in each case the resulting entity must independently meet the requirements of [20 CFR 725.494](#) to be considered a potentially liable operator. In addition, if an entity which did not employ the miner is identified as the RO, the record must contain evidence supporting the DD's identification, i.e., documents demonstrating that the reorganization, liquidation, sale or merger took place.

h. Operator Continues to Exist but is Incapable of Assuming Liability. If such an "incapable" operator is a subsidiary of a parent company, member of a joint venture, partner in a partnership, or is substantially owned or controlled by another business entity, such parent company, joint venture, partnership or controlling entity may be considered an RO regardless of the nature of its business. This is subject to the circumstances and conditions in each case. (For additional details, refer to this Section and Section 13.)

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13. Responsible Operator under Leasing Arrangements.

In any case in which the operator that directed, controlled or supervised the miner is a lessee, the lessee is considered primarily liable for the claimant's benefits. As a general rule, lessee liability is primary and lessor liability secondary. If the lessee is unable to provide for the payment of benefits to a successful claimant, the lessor may be considered an operator with respect to employees of the lessee depending upon the terms and conditions of the lease which deal with the exercise of control of the coal mine operation.

Section 423(a) of the Act, 30 U.S.C. 933(a), requires "each operator of a coal mine" to secure the payment of benefits by qualifying as a self-insurer or purchasing insurance. The term "operator" includes "independent contractors who perform services or construction at such mines." This definition of "operator" thus includes companies that provide employees under a leasing arrangement.

The Act authorizes the Department to ensure that all of the individuals performing mining work under that operator's direction are covered by appropriate security. In addition, those coal mine operators who use leased employees are in the best position to ensure that those employees are covered by the necessary insurance. The Department does not intend to require that the traditional coal mine operator purchase insurance when the leasing company has done so, but it does intend the regulations to provide an incentive for coal mine operators to deal only with those leasing companies that have purchased insurance meeting federal standards for black lung benefits coverage. The traditional coal mine operator is simply on notice that it may be held liable for the benefits of leased employees if the leasing company fails to procure the necessary insurance coverage, or for any civil money penalties arising as a result of that failure.

It is critical that claims staff obtain documentation, including a copy of the lease agreement, in the early stages of the development of such cases. All such documentation must be included in the formal record.

14. Identification of More Than One Operator.

Under the Act and regulations, only one operator can ultimately be designated liable for benefits in a given claim. If the evidence presented in a claim does not permit claims staff to determine which of two or more operators is the designated operator during the initial development of the claim, all such operators and their insurers must be notified and afforded the same rights with respect to the claim, excluding the development of medical evidence during the initial phases of the claim. Claims staff must designate one operator in the SSAE but other operators and insurers may remain parties to the claim until the PDO is issued. At that time all potentially liable operators and insurance carriers except the designated operator and its insurer must be dismissed. It is recommended that other operators and insurers not be dismissed as parties to the claim until such time as evidence

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establishes that it cannot be an operator. By remaining on notice, a new SSAE designating another operator can be issued without having to issue a new Notice of Claim and waiting for the 90 day time frame to expire before the SSAE can be issued.

A full discussion reflecting the rationale behind the decision of which operator was designated and its insurance coverage should be included in the SSAE and PDO and any evidence relevant to that decision will be included in the claim record as a 'Director's exhibit'. The claims staff must ensure that all SSAE and PDO documents are well written, use appropriate language to clearly communicate information, and address the evidence that led to the conclusion. The claims staff is to provide a robust, descriptive explanation of the evidence in the case and how that evidence has been interpreted to determine the designated operator. Simply making a factual statement in these situations without providing the underlying rationale for making such a conclusion is not sufficient.

15. Bankruptcies.

The term "bankrupt" is used informally to indicate that an entity is insolvent or out of business. Formal bankruptcy proceedings occur in federal court pursuant to the United States Bankruptcy Code. Typically, coal mine operators who file for bankruptcy do so under chapter 7 or chapter 11 of the Bankruptcy Code. Chapter 7 provides for the liquidation of a debtor's assets for the benefit of its creditors. Chapter 11 can provide for liquidation or financial reorganization, which can include a discharge of debts.

The RO and Self-Insurance Section is responsible for updating the RO screens to reflect the bankruptcy status of the operator; however no data can be input until a bankruptcy petition has, in fact, been filed. The National Office (NO) Solicitor notifies the RO and Self-Insurance Section when it learns of an operator bankruptcy. However, it is imperative that claims staff notify the RO and Self-Insurance Section immediately when they become aware of a bankruptcy (and forward a copy of the bankruptcy petition, if available). The RO and Self-Insurance Section will, in turn, transmit the information to the NO SOL without delay so that SOL may advise DCMWC on the bankruptcy and take timely action to protect the Department's interests, such as by filing a proof of claim. All bankruptcy filings are handled by the NO SOL rather than the Regional SOL.

The RO and Self-Insurance Section maintains a list of entities which have filed for reorganization or liquidation through the bankruptcy courts and has also recorded the information on the ROIC screens. The RO and Self-Insurance Section issues e-mails and bulletins with instructions concerning how to handle claims that are part of each bankruptcy.

16. Responsible Operator Determination in Cases of Self-Employment.

Self-employed miners may be considered operators for the purpose of

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determining liability. However, the intent of the Act is defeated if an individual who is a self-employed miner is identified as the RO in his/her own claim for black lung benefits, and thus would realize no net benefit as a result of the approval of his/her claim. Of course, if the self-employed miner carried insurance, the miner may be identified as an RO without defeating the Act's intent. In addition, the regulations ([725.493\(b\)\(3\)\(ii\)\(4\)](#)) provide that the self-employed miner may be considered the employee of:

- a. A Lessor. Any lessor, if the lease or agreement is executed or renewed after August 18, 1978 and does not require the lessee to guarantee the payment of black lung benefits; or
- b. An Operator. Any other operator, person, or business entity which substantially controls, supervises or is financially responsible for the activities of the self-employed miner.

Note, however, that a self-employed miner may be liable for the claims of any of his/her employees provided the miner qualifies as an operator or other employer of a miner.

17. Insurer is "Out of Business".

In some states, there is a back-up insurance plan consisting of re-insurance arrangements or insurance guarantee associations. In those states that have such plans, the back-up fund will pay the obligations of the defunct insurance company under certain specified conditions. This situation has occurred in Pennsylvania, Alabama, Virginia, and Kentucky. Back-up groups have honored the defaulting insurers' obligations but the RO and Self-Insurance Section **must notify them very quickly** in order to file. Guarantee funds have strict bar dates and claims must be timely filed against them or they will not be accepted.

If a DO becomes aware that an insurer is out of business, the RO and Self-Insurance Section should be contacted **immediately**, and they, in turn, will notify the NO SOL. They will determine if the state has a back-up arrangement and will advise whether the DO should request that the back-up plan take over the obligations of the defaulting insurer. If this action is not done quickly, the time for notifying the state plan will expire and the claim may become a Trust Fund liability case.

18. Responsible Operator and Self-Insurance Section Involvement in Liability Determinations.

When claims staff determines that the last coal mine employment occurred after December 31, 1969, an RO investigation must be made. There are three phases to the determination: Preliminary (Sections 8 and 9); Concluding (Section 10); and Final (Section 11). The RO and Self-Insurance Section may become involved at any point during the investigation.

a. RO and Self-Insurance Section is Responsible for the Following in RO Determination:

(1) Assign Identifying Numbers. Assigning ID numbers to new coal mine operators and insurance carriers, establishing new ROIC Screens with the applicable information, including the ID numbers and providing the numbers to claims staff as needed.

The vast majority of coal mine operators and insurance carriers are listed in the Department's database which is located on the ROIC screens. However, if a company which is not recorded in the database comes to a staff member's attention, the RO and Self-Insurance Section should be advised so staff can research it, assign an ID number and add pertinent information to the ROIC screens.

The regulations require the Department to provide the applicable insurance policy number on the Notice of Claim if that number is available. This information is maintained by the RO and Self-Insurance Section and is available on the ROIC screens. However, in cases for which claims staff is unable to locate a policy number, an e-mail should be sent to RO and Self-Insurance Section staff so it can be provided.

(2) Provide Information. Responding to requests for information regarding operators and carriers from DO staff to identify a potentially liable operator.

There may be instances when DO staff will rely upon the assistance of the RO and Self-Insurance Section to help identify the RO and/or insurance carrier. The RO and Self-Insurance Section has various sources of information to identify ROs and their current statuses, such as Dun and Bradstreet reports, MSHA Legal Identification Reports, A. M. Best Company Reports, State Mining Reports and contacts with state regulatory agencies. Upon receipt of the RO determination request with supporting data via e-mail and OIS, the RO and Self-Insurance Section will complete the necessary research and independently identify the RO. The RO and Self-Insurance Section will respond via e-mail with a completed report as to the identification of the RO. The report will identify the RO(s) and the insurance carrier(s); will provide a rationale for the selection; and will include the identity of the source of information and copies of the source document(s) wherever possible. The RO and Self-Insurance Section's report, as well as any accompanying evidence, should be included in the claim record as a 'Director's Exhibit'.

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On the basis of the identification made - either by referral to the ROIC screens or to the RO and Self-Insurance Section - claims staff proceeds with notification of the operator or with adjudication as a Trust Fund claim if no operator can be identified.

(3) Assist District Office Staff. Responding to requests for information regarding operators and carriers from DO staff.

The RO and Self-Insurance Section may also assist DO staff in tasks such as providing current addresses for companies, corporate tree information, and names and contact information of principals involved in companies.

b. Re-Identifications. In the event additional documentation is received that calls into question the original RO identification, DO staff may contact the RO and Self-Insurance Section for assistance in making a re-identification if unable to do so based on available information and resources. The e-mail to the RO and Self-Insurance Section should contain all pertinent information either attached or referenced in OIS, including any new or subsequent information or documents such as controversions or additional information not previously on record, which gave rise to the re-identification. The RO and Self-Insurance Section will research its sources along with all evidence received and return a report with accompanying rationale via e-mail. All pertinent information received will be noted on the appropriate ROIC screens for relevance to future RO identifications.

c. DO Tips for Making RO and Self-Insurance Section Contacts.

(1) Provide Documentation. Provide at least an allegation regarding the name of the insurer and the period of insurance so the policy number can be more easily located.

(2) Contact Corporate Officers. The RO and Self-Insurance Section can provide names, phone numbers and addresses of corporate officers many times, but claims staff remains responsible for requesting the information that is needed from them once they are located.

(3) Document Ownership. If the claimant is the owner of a company and claims staff has the name and address or phone number of the claimant, that staff member should call or write to the claimant before contacting the RO and Self-Insurance Section.

(4) Research. Claims staff should attempt to locate operators, names of officers and other information from the internet or by

calling the county seat or the Secretary of State's office before contacting the RO and Self-Insurance Section.

(5) Provide Available Information. Claims staff should always provide as much information as possible when contacting the RO and Self-Insurance Section. Information may include, but is not limited to, miner's last name, the last four numbers of the miner's SSN, his/her case ID number, state of last coal mine employment, and copies of available coal mine employment allegations and evidence. This information will allow RO and Self-Insurance Section staff to conduct their research, add companies to the ROIC screens, add policy numbers, and provide [725.495\(d\)](#) statements or other requested information.

19. Action Prior to Office of Administrative Law Judge Referral.

All evidence to make the RO determination is in the DD's possession prior to issuance of the PDO. The DD has an opportunity to review and evaluate said evidence and a single opportunity to designate one operator as the RO in the PDO. That RO designation is the DD's final decision on operator liability and no further action concerning the RO may be taken following issuance of the PDO. If the ALJ determines that the DD did not designate the proper RO, liability will fall on the Trust Fund because there are no provisions for a claim to be remanded for further development of the RO issue.