

PART II
DEFINITIONS

L. RESPONSIBLE OPERATOR

2. SUCCESSOR OPERATOR

Section 422(i) of the Act provides that any operator who acquired a mine, or substantially all its assets, on or after January 1, 1970, from a mine operator who was an operator on or after that date, will be liable for payment of all benefits which would have been payable to miners previously employed by such prior operator, as if the acquisition had not occurred. 30 U.S.C. §932(i). The most recent successor operator to have acquired the employment site on or after January 1, 1970, shall be found liable for benefit payments. See 20 C.F.R. §725.493(a)(2), (3).

CASE LISTINGS

[owner who acquired company post-1969 held liable for benefits as successor operator] ***Haer v. Penn Pocahontas Coal Co.***, 1 BLR 1-579, 1-585 (1978).

[where three owners of company potentially liable, Board concludes chain of ownership was not properly traced by the Director and therefore Trust Fund was ultimately liable for payment of benefits] ***Truitt v. North American Coal Corp.***, 2 BLR 1-199 (1979).

[putative responsible operator must carry the burden of producing evidence to support its theory that it was not successor to miner's earlier employer where information is within its exclusive control] ***Ridings v. C & C Coal Co.***, 6 BLR 1-227, 1-231 (1983).

DIGESTS

The Board held that pursuant to 20 C.F.R. §725.493(a)(2)(ii) and 20 C.F.R. §725.492(a)(2) the prior operator rather than the successor operator was the responsible operator, as it was operating a coal mine after June 30, 1973. ***Ariotti v. North American Coal Corp.***, 9 BLR 1-113 (1986), *aff'd sub nom. North American Coal Corp. v. Director, OWCP*, 854 F.2d 386, 11 BLR 2-216 (10th Cir. 1988).

The Board affirmed the administrative law judge's finding that the prior operator ceased to exist as a business entity and was therefore not the responsible operator under 20 C.F.R. §725.493. **Worley, et al. v. Blue Diamond Coal Co.**, 12 BLR 1-20 (1988), *aff'd*, No. 88-3638 (6th Cir., May 23, 1989)(unpublished).

The Board reversed the administrative law judge's dismissal of the responsible operator, a company which operated coal mines prior to June 1973 but thereafter ceased mining operations, leased its coal mine property and retained ownership of its coal mining permits. Following **Long v. Clearfield Bituminous Coal Corp.**, 1 BLR 1-149 (1977), the Board concluded that the lessor retained sufficient right of control and supervision of mining operations after June 30, 1973, to meet the definition of an operator. The significant indicia of retention of control included the lessor's possession, under certain lease agreements, of the right of inspection, the right of ejectment and confession of judgment, and the right to direct the manner and amount of coal extraction. **Yebernetsky v. Elliot Coal Mining Co., Inc.**, BRB No. 84-2560 BLA (June 30, 1988) (unpublished), *aff'd on reconsideration*, (1988)(unpublished).

The degree of control exercised by the successor corporation is determinative in resolving the issue of whether a company is liable as a successor responsible operator. **Williams v. Humphreys Enterprises, Inc.**, 17 BLR 1-126 (1993).

Mere majority ownership of stock does not, in itself, constitute control of daily coal mining operations. **Williams v. Humphreys Enterprises, Inc.**, 17 BLR 1-126 (1993).

In determining whether a successor corporation should be liable as a successor responsible operator, the presence of common officers and directors between the prior corporation and the successor corporation is not a determinative indicator of exercise of control by the successor corporation where the record does not establish that the common officers, if they were making decisions regarding the day to day coal mining operations of the prior corporation, were acting in their capacities as officers of the successor corporation. **Williams v. Humphreys Enterprises, Inc.**, 17 BLR 1-126 (1993).

In a successor operator situation, primary liability of the prior corporation must be established for derivative liability of the successor corporation to be established. **Williams v. Humphreys Enterprises, Inc.**, 17 BLR 1-126 (1993).

Where primary liability of the prior corporation was not established prior to the case reaching the Benefits Review Board, a successor corporation cannot be held liable as a successor responsible operator, since to make a finding of primary liability at this juncture in the proceeding would offend due process and would not enhance efficient administration of the Act and expeditious processing of claims. **Williams v. Humphreys Enterprises, Inc.**, 17 BLR 1-126 (1993).

The Board rejects the Director's interpretation under 20 C.F.R. §725.493(a)(4) that if a responsible operator, identified pursuant to 20 C.F.R. §725.493(a)(1), subsequently goes out of business or loses the capacity to assume obligations, liability falls to the second or third most recent qualifying operator, which meets the requirements of 20 C.F.R. §725.492, since Section 725.493(a)(4) is "subject to the provisions of paragraph (a)(2)." Paragraph (a)(2) sets forth the criteria for determining a *successor* operator. See 20 C.F.R. §725.493(a)(4). In contrast, the instant case is not a situation involving a successor operator covered by 20 C.F.R. §725.493(a)(2)(i), (ii), since there is no evidence that an operator purchased or leased the mine and/or assets of any employer of claimant, or that any employer had reorganized or was liquidated. See 20 C.F.R. §725.493(a)(2), (3); **Matney v. Trace Fork Coal Co.**, 17 BLR 1-145 (1993).

The Board interprets the regulations to require that if the operator named pursuant to Section 725.493(a)(1) is no longer in business and is incapable of assuming liability, responsibility for liability falls to the Black Lung Disability Trust Fund, unless the operator is subject to the successor operator provision set out in Section 725.493(a)(2)-(4). **Matney v. Trace Fork Coal Co.**, 17 BLR 1-145 (1993).

In the situation involving a successor operator, liability follows the sale or transfer of the mine or mines or substantially all of the assets thereof, or the reorganization or liquidation, to a second or perhaps even a third operator, who shall be liable for and shall secure the payment of all benefits which would have been payable by the prior operator(s). 20 C.F.R. §725.493(a)(2)-(4). **Matney v. Trace Fork Coal Co.**, 17 BLR 1-145 (1993).

The Board held that the Black Lung Benefits Act and the Kentucky insurance statutes in question in the instant case are not in conflict since the former concerns federal benefits, while the latter concerns state benefits. Consequently, the Board held that the McCarran-Ferguson Act, which in pertinent part states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by the State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance," 15 U.S.C. §1012(b), is inapplicable to the instant case. **Bates v. Creek Coal Co., Inc.**, 18 BLR 1-1 (1993), *aff'd on recon.*, 20 BLR 1-36 (1996). [NOTE: On appeal, the Sixth Circuit reversed the Board's holding and remanded on the basis that all of the self-employed mine owner's covered employment pre-dated March 1, 1978 and therefore was not yet covered as the 1978 Amendments, which later covered this type of situation, were not yet in force. This argument was not made to the Board. For further caselaw on the issue of insurance coverage/McCarran-Ferguson Act, see **Lovilia Coal Co. v. Williams**, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998).]

The Board will not consider additional information regarding successor operators in a motion for reconsideration which was not before the administrative law judge or the Board in its previous decision on appeal. **Williams v. Humphreys Enterprises, Inc.**, 19 BLR 1-111 (1995).

Section 725.493 does not preclude consideration of the degree of control as a determinative factor as to whether a corporation is a successor operator. Section 725.493 specifies that where the responsible operator of a mine transfers assets to another operator, the successor operator is liable for benefits, but does not specify whether a mere sale of a majority of stock constitutes a transfer of assets. To demonstrate whether an actual transfer of assets has occurred under Section 725.493 where a stock purchase has been made, the evidence must establish that the operator purchasing the stock had control of the daily mining operations. The administrative law judge should consider the degree of control factor to interpret whether the regulatory requirement that a transfer of assets has occurred pursuant to the provisions articulated under Section 725.493 has been satisfied. ***Williams v. Humphreys Enterprises, Inc.***, 19 BLR 1-111 (1995).

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