[BLR cite: *Matney v. Trace Fork Coal Co.*, 17 BLR 1-145 (1993)]
BRB No. 89-3229 BLA

FREELAN MATNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRACE FORK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of John H. Bedford, Administrative Law Judge, United States Department of Labor.

John H. Shott, Bluefield, West Virginia, for employer.

Eileen McCarthy (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (87-BLA-3386) of Administrative Law Judge John H. Bedford awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed his claim for benefits on November 6, 1986, Director's Exhibit 1, which was initially denied by the district director[1] on April 6, 1987. Director's Exhibit 19. By letter dated April 20, 1987, claimant requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 20. On June 5, 1987, Trace Fork Coal Company (Trace Fork, employer) was notified by the Department of Labor that it had been designated the putative responsible operator in this claim. Director's Exhibit 21.

Employer contested its designation as responsible operator and controverted liability by letter dated June 25, 1987. Director's Exhibit 22. In a motion to dismiss dated July 9, 1987, employer contended that claimant had been employed by Arizona Fuel Company (Arizona) and Vernon Mining, Incorporated (Vernon Mining), both of whom were insured by the West Virginia

[1] The district director was formerly titled the deputy commissioner. *See* 20 C.F.R. §725.101(a)(11); 55 *Fed. Reg.* 28606 (July 12, 1990).

Coal Workers' Pneumoconiosis Fund (the CWP Fund), subsequent to claimant's work with employer. Director's Exhibit 23. Employer, thus, asserted that since both of those companies satisfy the criteria for a responsible operator under the Act, Trace Fork should be dismissed from any possible liability in this claim. *Id.* On July 24, 1987, the matter was referred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 27.

On September 8, 1987, employer requested that the Office of Administrative Law Judges remand this case to the Department of Labor for dismissal of Trace Fork as the responsible operator based upon claimant's subsequent employment with Arizona and Vernon Mining.[2] Employer's Exhibit 1. The Director objected, arguing that neither Arizona nor Vernon Mining was in business and that although both companies were at one point insured by the CWP Fund, the policy periods do not cover this particular claim. The Director, therefore, argued that Trace Fork was correctly designated as the responsible operator in this case. No action was ever taken on employer's request.

[2] Claimant, by letter dated October 7, 1987, agreed with employer and asked to be joined in employer's motion to remand the case to the district director for resolution of the responsible operator issue. Claimant's Exhibit 3.

At the hearing,[3] held on January 10, 1989, Trace Fork introduced into evidence all existing documents held by the CWP Fund regarding Arizona and argued that liability should transfer to the CWP Fund. Employer's Exhibit 2. Trace Fork also requested that the administrative law judge deny the Director's motion to limit the issues, but did not respond to the Director's alternative request for remand, aside from noting that no action had been taken on its own request for remand. Hearing Transcript at 28.

On March 1, 1989, the Director asked the administrative law judge for additional time to respond to the documents submitted by Trace Fork at the hearing. In conjunction with that request, the Director submitted a letter from William Mitchell, Senior Counsel for the West Virginia Workers' Compensation Commissioner, explaining that the CWP Fund had only provided "provisional" insurance coverage to Arizona which effectively rendered the thirty-day cancellation provision inapplicable to this case. At this time, the Director once again requested that the administrative law judge limit the issues to be considered or that the case be remanded. On March 31, 1989, claimant objected to the Director's request for remand to the district director.

A Decision and Order was issued on August 25, 1989. The administrative law judge found that Trace Fork's controversion of its designation as responsible operator sufficiently preserved the issue of the CWP Fund's insurance of Arizona, and thus, rejected the Director's motion to limit the issues. Decision and Order at 2, n. 1. Additionally, the administrative law judge dismissed Trace Fork as the responsible operator based, in part, upon employer's argument that the CWP Fund had improperly terminated Arizona's insurance coverage and because the evidence was "inadequately developed" regarding the responsible operator issue. The administrative law judge also declined to remand the case to the district director in order to name another possible responsible operator, since he determined that such action would contradict the Board's holding in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Evaluating the merits of the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant established "by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of his coal mine employment." Decision and Order at 13; 20 C.F.R. §§718.202(a)(1), 718.203(b) and 718.204(c)(4). Accordingly, the administrative law judge awarded benefits[4] to be paid through the Black

[3] Prior to the hearing, employer presented a copy of a letter dated December 19, 1988, addressed to the CWP Fund, wherein it requested that the CWP Fund accept responsibility for defending the claim and indicated that it would move at the formal hearing for inclusion of the CWP Fund as the responsible operator in this claim. Employer's Exhibit 1. Trace Fork argued that the CWP Fund had violated its own regulations by making its cancellation of Arizona's insurance coverage effective fewer than thirty days following its notification to Arizona and the Department of Labor of its intent to cancel coverage.

On January 3, 1989, the Director moved that the administrative law judge limit the issues to be considered in the instant case, arguing that Trace Fork should be precluded from advancing any of the issues raised in its December 1988 letter, Employer's Exhibit 1, since the Director had no opportunity to investigate the arguments made, and therefore, had not considered those issues. Alternatively, the Director requested the administrative law judge to remand the case to the district director for further investigation. Director's Exhibit 28.

[4] We affirm the administrative law judge's award of benefits as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Lung Disability Trust Fund (the Trust Fund). On appeal, the Director contests the administrative law judge's finding that the Trust Fund is liable for payment of benefits in this claim. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Claimant has declined to respond in this appeal.

The Board's scope of review is limited. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.* , 380 U.S. 359 (1965).

The Director contends that the administrative law judge erred in dismissing employer as responsible operator in this case. The Director specifically asserts that Trace Fork's contentions concerning the propriety of the CWP Fund's cancellation of Arizona's insurance coverage should have been rejected, and therefore, requests that the Board reverse the administrative law judge's dismissal of Trace Fork as the responsible operator in this case. Alternatively, the Director requests that the Board remand this case for designation of Arizona as a potential responsible operator.[5]

[5] Initially, we note that no authority exists which would require Trace Fork to prove either Arizona's and/or Vernon Mining's ability to pay under the Act. *Cf. Borders v. A.G.P. Coal Co.,* 9 BLR 1-32 (1986) *citing Gilbert v. Williamson Coal Co.,* 7 BLR 1-289 (1984). We, thus, will not address the propriety of the CWP Fund's cancellation of the Arizona insurance coverage.

We hold that, contrary to the Director's contention, the administrative law judge properly found that "the evidence is inadequate in this case to definitively identify the proper responsible operator" and thus, insufficient to find employer liable as responsible operator. Decision and Order at 7. The record establishes that claimant was employed by Trace Fork from 1968 through 1973, and **subsequently employed** by Arizona from February 4, 1977 to March 6, 1981, and Vernon Mining from August, 1981 to August of 1984. Director's Exhibits 25, 26. The regulations require that the operator for which the miner had the **most recent** periods of cumulative employment of not less than one year be named responsible operator provided the conditions of 20 C.F.R. §725.492(a)(2) through (a)(4) are met.[6] 20 C.F.R. §725.493(a)(1). Inasmuch as claimant was last employed as a coal miner by Vernon Mining, and that employment took place from 1981 through 1984, Vernon Mining would be liable as responsible operator, if it is capable of assuming liability pursuant to 20 C.F.R. §725.492(a)(4). The only indication of the ability of Vernon Mining to assume liability, *see* 20 C.F.R. §725.492(a)(4), is an inter-office memorandum regarding the identification of Trace Fork as the putative responsible operator.[7] Director's Exhibit 26. We note, however, that this letter and the subsequent notes are not evidence; rather, the letter is merely a preliminary determination by the district director. *See Krysik v. Harmar Coal Co.*, 7 BLR 1-586 (1984).

The regulations dictate that the Director identify, notify and obtain evidence from all of the responsible operator(s) who may be liable in any given claim. *See* 20 C.F.R. §§725.410(b), 725.412. In the instant case, this would include the complete development of evidence regarding Vernon Mining's capability to assume liability up until the time of claimant's last coal mine employment in 1984. In order to meet its responsibility for liability, an employer is obligated to qualify as a self-insurer, or obtain a policy or contract of insurance. 20 C.F.R. §§725.492(a)(4), 726.201. The Director, as the administrator of the Act, *see* 20 C.F.R. §701.201; 20 C.F.R. §725.601(a), is responsible for "vigorously" enforcing these provisions, 20 C.F.R. §725.601(b), and thus, ensuring employer compliance. While the record establishes that Vernon Mining was insured by the CWP Fund from July, 1981 until August of 1982, Director's Exhibit 26, the record is devoid of any evidence as to the insurer for Vernon Mining from 1982 up until 1984, when Vernon Mining went out of business. Additionally, there is no indication that the Department of Labor made any effort to determine whether Vernon Mining took the requisite steps to ensure its ability to pay any possible benefits after August of 1982, in order to be in compliance with the pertinent

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[6] In order for an operator to be found responsible pursuant to 20 C.F.R. §725.492(a)(2)-(4), it must be determined that the operator operated a mine or facility after June 30, 1973, 20 C.F.R. §725.492(a)(2); that the miner's employment with the operator included at least one working day after December 31, 1969, 20 C.F.R. §725.492(a)(3); and that the operator is capable of paying benefits through certain specified means, 20 C.F.R. §725.492(a)(4). Additionally, it must be determined that the miner's disability or death arose at least in part out of employment in a mine or facility operated by the operator. 20 C.F.R. §725.492(a)(1).

[7] In a letter dated May 19, 1987 (Department of Labor Form CM-911b), the district director concluded that both Arizona and Vernon Mining were incapable of assuming liability. Specifically, the document notes that Vernon Mining could not be the responsible operator because: 1) their corporate charter was dissolved on September 11, 1986; 2) they were insured only to August 24, 1982; 3) no successor operator existed. Likewise, the document notes that Arizona could not be the responsible operator because: 1) they were out of business; 2) they were insured up to March 5, 1981; 3) the miner worked to March 6, 1981; 4) no successor operator existed, *see* 20 C.F.R. §725.492(a)(2)(iii)(3). Director's Exhibit 26.

regulations. *See* 20 C.F.R. §725.492(a)(4)(i), (ii). We note that the carrier for Vernon Mining on the last day of the last exposure, which has not been identified in this case, is the entity which would appear to be liable for benefits. 20 C.F.R. §726.203(a).

An underpinning for the Director's decision to pursue Trace Fork in the instant case involves an 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. We reject this interpretation of Section 725.493(a)(4) by the Director, 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).

The regulations require that "the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year" shall be responsible for payment of benefits. 20 C.F.R. §725.493(a)(1). We, therefore, interpret 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 that operator is subject to the successor operator provisions set out in Section 725.493(a)(2)-(4). 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).

In light of the foregoing, and inasmuch as the Director has failed to properly develop the evidence in respect to naming a responsible operator,[8] we affirm the administrative law judge's dismissal of Trace Fork as responsible operator, and his consequent determination that the Trust Fund is liable for the payment of benefits.

Accordingly, the administrative law judge's Decision and Order awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

[8] We affirm the administrative law judge's findings that "the evidence was inadequately developed in this case," and that "[t]he Director was provided ample opportunity to further develop the evidence regarding the responsible operator issue, yet declined to do so," as supported by substantial evidence. Accordingly, we affirm the administrative law judge's application of *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), and thus, reject the Director's request for remand for further consideration of the responsible operator issue.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge