BRB Nos. 97-1757 BLA
and 97-1757 BLA-A

BLONNIE K. MITCHEM Claimant v. BAILEY ENERGY, INCORPORATED, C & F COAL COMPANY, INCORPORATED, KENNIE CHILDERS (as President/Corporate Officer of BAILEY ENERGY, INCORPORATED, and C&F COAL COMPANY, INCORPORATED), REGENCY FINANCIAL SERVICES, RANDALL W. WHITE and D. NEAL WHITE (as President/Secretary-Treasurer/ Corporate Officers of REGENCY FINANCIAL SERVICES) Employers and UNITED POCAHONTAS COAL COMPANY and WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner Cross-Respondent	)	DATE ISSUED: DECISION and ORDER *EN BANC*

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

K. Keian Weld (West Virginia Coal-Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Rita Roppolo (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals and the West Virginia Coal-Workers' Pneumoconiosis Fund, as the carrier of United Pocahontas Coal Company, one of the named potentially responsible operators in this case, [hereinafter, the carrier and United Pocahontas, respectively] cross-appeals the Decision and Order (95-BLA-2276) of Administrative Law Judge, Edward J. Murty, finding the Black Lung Disability Trust Fund [hereinafter, the Trust Fund] responsible for the payment of 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). Oral argument was held on this case in Charleston, West Virginia on June 18, 1998.

In his Decision and Order, the administrative law judge initially noted that at the hearing all parties conceded claimant's entitlement to benefits and that the only issue to be resolved in this case is which party should be held liable for the payment of benefits. Decision and Order at 4. The administrative law judge found that the Office of Administrative Law Judges [OALJ] had jurisdiction to review this case inasmuch as it was properly referred to this office by the district director pursuant to 20 C.F.R. §725.451. Decision and Order at 4-5. The administrative law judge next found that the Director's determination pursuant to 20 C.F.R. §725.495(a) as to whether to take enforcement action against employers and/or potentially responsible operators, as well as their officers, for failing to secure the payment of benefits as required, is a discretionary determination which is not reviewable under the Administrative Procedure Act, citing *Heckler v. Chaney*, 470 U.S.

821, 823 (1985).[1] Decision and Order at 5-8. Nevertheless, the administrative law judge found that because the Director failed to take enforcement action against those potentially responsible operators and their officers for their negligence in ignoring the insurance

[1] Section 725.495(a) states in pertinent part:

> Any employer required to secure payment of benefits under the act and §725.494 which fails to secure such benefits shall be subject to a civil penalty. . .; and in any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable for such civil penalty. . .and shall be severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act in respect to any injury which may occur to any employee of such corporation. . . .

20 C.F.R. §725.495(a).

requirements under the Act, the Trust Fund is liable for the payment of benefits in this case.[2] Decision and Order at 8-10. Consequently, the administrative law judge dismissed United Pocahontas and its carrier. *Id*.

On appeal, the Director contended that he was not required to establish that the officers of a potentially responsible operator were personally incapable of assuming liability, in addition to establishing that the potentially responsible operator itself was incapable of assuming liability, before designating the next most recent employer as the responsible operator. Director's Brief at 5-13. The Director also asserted that the administrative law judge erred in dismissing United Pocahontas and its carrier and in holding the Trust Fund liable for payment of benefits, as a penalty for the Trust Fund's alleged neglect in enforcing the insurance provisions of the Black Lung Act. Director's Brief at 14-15.

The carrier cross-appealed, contending that the administrative law judge erred in finding that the OALJ had jurisdiction in this case and in ruling that Sadie Z Coal Company, Incorporated, [hereinafter, Sadie Z], could not be held liable for benefits. Carrier's Brief at 2-3. Additionally, the carrier asserted that the administrative law judge erred in finding that the Director's failure to take enforcement action against the other named and unnamed potentially responsible operators and their officers is unreviewable under the Administrative Procedure Act. Carrier's Brief at 3-8.

The carrier subsequently responded to the Director's appeal, and again asserted that the OALJ did not have jurisdiction in this case. Carrier's Response Brief at 1-2.

[2] The administrative law judge also found that Sadie Z Coal Company, Incorporated, [hereinafter, Sadie Z], which had more recently employed claimant for over one year subsequent to claimant's employment with United Pocahontas, was incapable of assuming liability in this case. Decision and Order at 9. Additionally, the administrative law judge noted that the United States Department of Labor [DOL] and/or the Director failed to establish that the officers of Sadie Z were incapable of assuming liability in this case, in part, because DOL and/or the Director failed to take enforcement action against its officers under the Act. *Id*.

Additionally, the carrier contended that the United States Department of Labor's [DOL] naming of the corporate officers as potentially responsible operators indicates that DOL intended to hold these officers liable, unless the Director showed that they were incapable of assuming financial responsibility. Carrier's Response Brief at 2-4. The carrier further asserted that since DOL did not establish that all subsequent responsible operators were unable to assume liability, citing *England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993), the administrative law judge correctly dismissed both United Pocahontas and its carrier. Carrier's Response Brief at 2, 4. Thereafter, the carrier made a request for oral argument which the Board granted in order to resolve the issue regarding the designation of the responsible operator in this case.

In his brief in response to the carrier's cross-appeal and request for oral argument, the Director conceded that the administrative law judge properly dismissed United Pocahontas as a potentially responsible operator because the evidence failed to establish that Bailey Energy, Incorporated and C&F Coal Company, Incorporated, [hereinafter, Bailey Energy and C&F Coal, respectively] were incapable of assuming liability. Director's Response Brief at 4. Nevertheless, the Director continued to challenge the administrative law judge's holding that the Trust Fund is liable for the payment of benefits. Director's Brief at 4-5. The Director contended that because the administrative law judge found that the Director failed to establish that Bailey Energy, which most recently employed claimant for more than one year, was incapable of assuming liability in this case, the administrative law judge should have found Bailey Energy liable for the payment of benefits. *Id*. Additionally, the Director noted that only if Bailey Energy fails to pay benefits in this case would the Trust Fund be liable in accordance with 20 C.F.R. §725.490(a). Director's Response Brief at 5 n.1.

Consequently, in light of his concession, the Director asserted that the issue raised in his original appeal, *i.e.*, whether the Director is obligated to establish that the officers of a potentially responsible operator are incapable of assuming liability before designating the next most recent employer as the responsible operator, is moot. Director's Response Brief at 5. In addition, the Director reasoned that the cross-appeal of the carrier for United Pocahontas would be moot. *Id*. Hence, the Director requested that the Board reconsider whether oral argument in this case is warranted. In the event that the Board chose to address the issues raised in the Director's original appeal and the carrier's cross-appeal, the Director stated that he continued to maintain the position set forth in his original brief to the extent that it is consistent with his motion to the Board to reconsider the need for oral argument in this case.

The carrier replied that either Bailey Energy or the Trust Fund should be liable in this claim. Carrier's Reply Brief at 1. Thus, inasmuch as the Director no longer challenged the administrative law judge's dismissal of United Pocahontas and its carrier in this case, the

carrier requested that the Board dismiss its cross-appeal and rescind the order requiring the carrier to participate in the scheduled oral argument. *Id*. However, at oral argument, the carrier requested permission to withdraw its request to dismiss its appeal, which the Board granted. Oral Argument Transcript at 56.

At oral argument, the Director conceded that Bailey Energy had not established, as a matter of law, that it is incapable of paying benefits. Oral Argument Transcript at 4-7. Consequently, the Director conceded that United Pocahontas and its carrier are not liable for benefits in this case and urged that the issues initially raised before the Board are now moot. *Id*.

In response, the carrier waived its earlier assertion regarding subject matter jurisdiction in this case.[3] Oral Argument Transcript at 10. The carrier also asserted that the administrative law judge was correct in dismissing it from this case because of DOL's failure to enforce Section 725.495(a) of the regulations authorizing the Secretary to impose a penalty upon employers who fail to obtain the requisite insurance. Oral Argument Transcript at 11-13. Additionally, the carrier stated that the Director should be required to prove the financial incapacity of a company's corporate officers before going after the next viable coal operator in accordance with *Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). Oral Argument Transcript at 13-17.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] The carrier also waived its earlier assertion that the Director erred in not naming Sadie Z because the Director submitted a statement that this company was dissolved. Oral Argument Transcript at 10-11.

We first address the Director's assertion that Bailey Energy, as claimant's most recent employer, should be held liable because it has not proved that it is incapable of paying benefits. Bailey Energy most recently employed claimant for over one year, from February 1991 to June 1994. Three other coal companies employed claimant for more than one year: C&F Coal from November 1989 to December 1991, Sadie Z from March 1983 to November 1984 (company has since dissolved), and United Pocahontas from October 1951 to October 1978. Director's Exhibits 2, 4; Hearing Transcript 47-57. In July 1994, the district director issued a notice of claim identifying United Pocahontas, Bailey Energy, and C&F Coal as potentially liable responsible operators. Director's Exhibits 16, 19, 20. On January 5, 1995, the district director issued a Notice of Initial Findings identifying United Pocahontas, Bailey Energy, two other coal companies, and several corporate officers as parties to this case.[4] Director's Exhibits 22, 26, 27, 29-32, 36-18. United Pocahontas, through its carrier, was the only party to controvert the district director's findings. Director's Exhibit 23.

On July 7, 1995, the Director issued a proposed decision and order, designating Bailey Energy as the responsible operator in this case. Director's Exhibit 44. The Director forwarded this case to the OALJ on July 23, 1995, even though Bailey Energy did not controvert the proposed decision. Director's Exhibit 45. Less than thirty days later, DOL issued seven separate CM-1025 forms to claimant's former employers and the corporate officers of these companies, advising them that they had been named as parties and a formal hearing would be held in claimant's case. Director's Exhibit 45. At the OALJ, the Director asserted that United Pocahontas and its carrier should be held liable for benefits as the most recent coal operator having the ability to pay. Hearing Transcript at 26. The Director introduced evidence both that Bailey Energy was uninsured, Deposition Transcript of DeMarce at 50, and that its president, Kennie Childers, had a net worth of negative one million dollars, Director's Exhibit 50.

It is well established that the DOL must resolve the responsible operator issue alone in a preliminary proceeding, *see* 20 C.F.R. §725.412(d), or proceed against all potentially

[4] The record indicates that United Pocahontas was the only employer named as a party to this case that was insured as of 1995. Director's Exhibit 45. The record is unclear as to whether any of the named employers carried insurance or was self-insured at the time of claimant's employment with that company as required by Section 423 of the Act and 20 C.F.R. §725.494.

responsible operators at every stage of the claim adjudication prior to fully litigating the claim, *see Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984); *see also England, supra*. As outlined above, the district director initially found Bailey Energy to be the responsible operator in this case, and that decision would have become final within thirty days, however, within that time, the case was referred to the OALJ for a hearing. *See* 20 C.F.R. §725.419(d). Although the Director named several companies and individual officers as parties to the hearing, he asserted that only United Pocahontas and its carrier should be held liable. Hearing Transcript at 26. Now, on appeal to the Board, the Director alleges that Bailey Energy should be liable for benefits.

As discussed at oral argument, allowing the Director to change his position after an administrative law judge has awarded claimant benefits and hold Bailey Energy liable for those benefits, raises due process concerns for Bailey Energy which did not participate in the hearing before the administrative law judge. Therefore, as discussed in *Matney*, if, on remand, Bailey Energy were held to be the responsible operator in this case, it would be entitled to challenge claimant's entitlement to benefits, *see Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *see also C&K Coal Co. v. Taylor*, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999); *Venicassa v. Consolidation Coal Co.*, 137 F.3d, 197, 21 BLR 2-277 (3d Cir. 1998), which had been established previously. To hold Bailey Energy liable for benefits in this case clearly would be inconsistent with the holdings in *Matney* and *Crabtree* and raise the concerns which the Fourth Circuit court and the Board sought to avoid in those cases.

Our dissenting colleagues believe that Bailey Energy has forfeited its right to contest the award by failing to appear at the hearing after failing to file a controversion or a response to the initial decision. The Director, however, has not fulfilled his responsibility under *Crabtree* simply by naming Bailey Energy as a party, without continuing to proceed against it. Yet at the hearing he conceded that only United Pocahontas and its insurer could be held liable. Bailey Energy's absence did not prevent the Director from offering evidence of its liability. *Crabtree* teaches: "[T]he Department must resolve the operator issue in a preliminary proceeding, *see* 20 C.F.R. §725.412(d), and/or proceed against all putative responsible operators at every stage of the claims adjudication." *Crabtree*, 7 BLR at 1-357 (emphasis added). Because the Director chose to proceed against only United Pocahontas and its insurer prior to conceding, together with United Pocahontas, claimant's entitlement to benefits, it is now too late to assign liability for those benefits to Bailey Energy.

In light of the foregoing, we affirm the administrative law judge's decision to dismiss United Pocahontas and its carrier and to hold the Trust Fund liable for benefits, inasmuch as the Director has failed to proceed against all potentially responsible operators. Because the Director failed to proceed against all potentially responsible operators in accordance with

Matney and *Crabtree*, this case cannot, at this late stage in the proceedings, be remanded for the Director to develop evidence regarding Bailey Energy. Therefore, the administrative law judge properly found the Trust Fund liable for the payment of benefits in this case.

In so finding, however, the administrative law judge relied on the mistaken assumption that the Director is required to determine whether the corporate officers of a potentially responsible operator are financially incapable of assuming liability for black lung payments, in addition to establishing that the potential operator itself is incapable of assuming liability, before designating the next most recent responsible operator.[5] Decision and Order at 9-10. The carrier similarly asserts that this is the Director's responsibility. Carrier's Brief at 3-8. On this issue, we reiterate the position we recently stated in *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*). We held in *Lester* that the Director is not required to consider whether officers of a corporation can be held liable as responsible operators pursuant to Section 725.491(a). Rather, the Director, at his discretion, may institute proceedings to impose a penalty on certain officers (presidents, secretaries, and treasurers) of **uninsured** corporations, whose responsibility it is to maintain the company's insurance policies pursuant to Section 423 of the Act and Section 725.495(a), when they fail to secure the appropriate black lung insurance.[6] *See Lester*, *supra*. This section also provides that such officers may also be held severally personally liable jointly with the corporation for the payment of benefits. Because the Director's decision to take enforcement action against corporate officers pursuant to Section 725.495 is discretionary, the

[5] Contrary to the carrier's contention, the mere naming of a party as a potentially responsible operator is not a concession of its responsibility by DOL. *See generally Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984).

[6] We note that our holdings in the instant case and *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*) supersede any prior Board decisions regarding whether corporate officers can be held liable as responsible operators pursuant to Section 725.491(a).

administrative law judge erred in finding the Trust Fund liable in this case on the theory that the Director was obliged to enforce this provision. However, we affirm the administrative law judge's finding that the Trust Fund is properly held liable for payment of benefits due to the Director's failure to proceed against all potentially responsible operators, *see* discussion, *supra*.

Accordingly, the administrative law judge's Decision and Order is vacated insofar as it holds that the Director was required to take enforcement action against corporate officers in the case at bar and it is affirmed insofar as it holds claimant entitled to benefits and the Trust Fund liable for payment of those benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

We concur:

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

NELSON, Acting Administrative Appeals Judge, concurring in part and dissenting in part:

I agree with my colleagues that the administrative law judge erred to the extent that he suggested that corporate officers could be held liable for the payment of benefits under the Act. That is not to say, however, that I do not fully understand the administrative law judge's concern. As a result of the Director's failure to enforce the insurance provisions of Section 423 of the Act, 30 U.S.C. §933, Section 725.495(a) of the regulations, 20 C.F.R. §725.495(a), those who fail to secure insurance will escape liability and thus be rewarded for their irresponsibility, while those who obey the law will have to shoulder these liabilities.

This is not the intended result. However, we are bound by the Act and the regulations. Neither provides for liability to attach to corporate officers. Thus, the Director is not required to establish that corporate officers are unable to pay benefits before designating another potential responsible operator. *See Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(order on recon.)(*en banc*).

However, I respectfully dissent from the decision of my colleagues to hold the Trust Fund liable for benefits in this case. While I am taken aback by the Director's approach to the responsible operator issue in this case, under the facts of this case, Bailey Energy is the proper party to be held liable as the responsible operator.

Bailey is the coal mine operator with whom this miner had the most recent periods of cumulative employment of more than one year. While there are assertions that Bailey did not have the proper insurance, the administrative law judge properly found that the Director had not adequately established that Bailey Energy did not have the ability to pay benefits, and in fact, the Director now concedes this point. Thus, Bailey Energy meets all of the pertinent criteria outlined at 20 C.F.R. §725.493, and thus is the responsible operator in this case. 20 C.F.R. §§725.492, 725.493.[1]

Moreover, while I am mindful that, pursuant to *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), once a claimant has been awarded benefits after a hearing, that claimant should not be required to relitigate his entitlement simply because of a piecemeal approach to resolving the responsible operator issue, I do not believe that the present situation poses a *Crabtree* problem.

[1] I would also affirm the administrative law judge's decision to dismiss United Pocahontas as a party to these proceedings, a result that the Director now acknowledges is proper. *See* Director's Brief Submitted in Response to the Board's Order of Oral Argument at 3.

The district director awarded benefits and named Bailey Energy as the responsible operator. Director's Exhibit 44. Consistent with *Crabtree*, the Director chose to proceed against all of the potential responsible operators.[2] Notice was sent to the potential responsible operator and according to the Form CM-1025, which was forwarded to the Office of Administrative Law Judges on July 23, 1995, Bailey Energy did not file a controversion or response to the award. Director's Exhibit 45. Although at some point prior to the hearing the Director decided to pursue United Pocahontas as the potential responsible operator, the other potential responsible operators were still a party to these proceedings. *See* Director's Exhibit 48.

After much ado, the Director finally concedes, and the administrative law judge ultimately found, that the Director failed to establish satisfactorily that Bailey did not have the ability to pay benefits. *Crabtree* mandates that this claimant not be required to relitigate his award of benefits simply because of the continuing controversy over the identification of the responsible operator. Nevertheless, naming Bailey Energy as the responsible operator at this juncture in these proceedings does not present a *Crabtree* problem since Bailey Energy never controverted this claim, and thus entitlement to benefits is no longer at issue.[3] *See* 20 C.F.R. §§725.463, 725.461(b).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

I concur:

BETTY JEAN HALL, Chief
Administrative Appeals Judge

---

[2] Pursuant to *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), the other option available to the Director would have been to resolve the responsible operator issue in a separate preliminary proceeding. *See Crabtree* at 1-375.

[3] In a footnote in his oral argument brief, the Director states, "[t]he Trust Fund will, of course, pay benefits to claimant should Bailey Energy, Inc., not do so." Director's Brief Submitted in Response to the Board's Order of Oral Argument at 5.