U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0100 BLA

WILLIE ANDERSON CHAPMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAIDER MINING, INCORPORATED, MINE 3	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL MIDDLE MARKET	)	DATE ISSUED: 04/30/2020
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher and Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.[1]

[1] H. Brett Stonecipher and Tighe A. Estes submitted the brief of employer/carrier (employer) in support of its petition for review. On July 15, 2019, Timothy J. Walker was substituted for Tighe A. Estes as employer's counsel.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2014-BLA-05374) of Administrative Law Judge Steven D. Bell awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 5, 2013,[2] and is before the Board for the second time.

In his initial Decision and Order Awarding Benefits issued on June 9, 2017, the administrative law judge determined employer is the proper responsible operator, credited claimant with at least twenty-one years of underground coal mine employment, and found the new evidence established complicated pneumoconiosis -- a change in an applicable condition of entitlement. He therefore found claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act,[3] 30 U.S.C. §921(c)(3), and awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Chapman v. Raider Mining, Inc. Mine 3*, BRB No. 17-0538 BLA, slip op. at 5 (Jan. 31, 2018) (unpub.). However, the Board vacated the administrative law judge's determination employer is the responsible operator.[4] *Id*. The Board instructed the

[2] Claimant filed three prior claims. On December 30, 2010, the district director denied his most recent prior claim, filed on June 7, 2010, because he failed to establish total disability. Director's Exhibit 3. Claimant took no further action until filing the current claim on March 5, 2013. Director's Exhibit 5.

[3] Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from complicated pneumoconiosis arising out of coal mine employment. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304.

[4] The Board noted the Director, Office of Workers' Compensation Programs (the Director), conceded that her office failed to meet its obligations under 20 C.F.R. §725.495(d). *Chapman v. Raider Mining, Inc. Mine 3*, BRB No. 17-0538 BLA, slip op. at 4 (Jan. 31, 2018) (unpub.). Specifically, the Director stated that in concluding Desert

administrative law judge on remand to consider employer's contention that because Desert Mining, Incorporated (Desert Mining) is its successor operator, employer is not the responsible operator. *Id*.

In a May 15, 2018 Order Establishing Briefing Schedule on Remand, the administrative law judge allowed employer to file its brief on or before June 29, 2018. Director's Exhibit 64. On October 4, 2018, employer requested the administrative law judge to vacate all prior actions and transfer the case to a properly appointed administrative law judge for a new hearing.

In his Decision and Order on Remand, the administrative law judge rejected employer's Appointments Clause challenge as untimely and found employer is the properly designated responsible operator.

In the present appeal, employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] Employer also challenges the administrative law judge's finding that it is the responsible operator and asserts the Black Lung Disability Trust Fund (Trust Fund) must assume liability for the payment of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation

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Mining, Incorporated (Desert Mining), a more recent employer, was not the responsible operator, the district director did not state that its office has no record of insurance coverage for that employer. *Id*. The Director noted absent such a statement, Desert Mining is presumed to be financially capable of assuming liability under the regulations. *Id*. Noting the administrative law judge's sole basis for finding employer liable for benefits was that employer failed to prove Desert Mining is financially capable of assuming liability, the Director asked the Board to remand the case to the administrative law judge for further consideration of the responsible operator issue. *Id.* at 5.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2.

Programs (the Director), has filed a limited response, asserting employer forfeited its right to challenge the administrative law judge's authority to decide this case by failing to raise it before the Board in the prior appeal. The Director also contends that employer is the responsible operator.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Appointments Clause

In light of the United States Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018),[7] employer argues the administrative law judge's appointment violates the Appointments Clause. Employer first raised this issue on remand after the issuance of *Lucia* and more than three months after the administrative law judge allowed it to file a brief on remand.[8] The administrative law judge found employer's challenge to his appointment was untimely. Employer contends its challenge was timely raised before the administrative law judge and the Board in the present appeal. Employer's Brief at 8-9.

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia*,

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1; Hearing Tr. at 17.

[7] In *Lucia*, the United States Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

[8] Employer did not raise an Appointments Clause challenge when this case was first before the administrative law judge or in its prior appeal to the Board. On remand, the administrative law judge allowed until June 29, 2018 to file briefs. Employer did not file a brief but on October 4, 2018, filed a Notice of Preservation of Constitutional Issue asserting its Appointments Clause challenge.

138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (internal citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 4-6.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), is inapplicable because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts). Furthermore, employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Removal Provisions

Employer also contends the administrative law judge lacked the authority to adjudicate this claim because the section governing removal of administrative law judges in the Administrative Procedure Act (APA), 5 U.S.C. §7521, violates the separation of powers doctrine as it provides two levels of for-cause protection. Employer's Brief at 13-14. Employer relies on the Supreme Court's decision in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) invalidating dual for-cause limitations on the removal of Public Company Accounting Oversight Board members.[9] *Id.* We consider employer's arguments to be adjunct to the Appointments Clause challenge, which it

[9] The United States Supreme Court held that the two-level for-cause removal protection for officers performing expansive enforcement and policymaking functions resulted in a constitutionally impermissible "diffusion of accountability." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).

forfeited. Moreover, for the same reasons we cited with respect to the Appointments Clause challenge, it was forfeited if considered independently. Furthermore, we conclude employer has failed to adequately brief this issue. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986).

The Board's procedural rules impose certain threshold requirements for alleging specific error before the Board will consider the merits of an issue on appeal. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. Further, to "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros.*, 898 F.3d at 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider the merits of argument that the FTC is unconstitutional because its members exercise executive powers yet can be removed by the President only for cause).

Employer states that the administrative law judge's appointment was improper in view of the removal provisions contained in the APA. Employer's Brief at 13. Employer has not specified how those provisions violate the separation of powers doctrine or explained how the holding in *Free Enterprise* undermines the administrative law judge's authority to hear and decide this case.[10] *Id*. Thus, we decline to address this issue. 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446-47.

[10] Employer cites the Supreme Court's decisions in *Free Enterprise* and *Lucia*. Employer's Brief at 13-14. It notes that in *Free Enterprise* the Supreme Court invalidated a statutory scheme that provided the Public Company Accounting Oversight Board with "multilevel protection from removal protection" and thus interfered with the President's duty to ensure the faithful execution of the law. *Id*. Employer does not set forth how *Free Enterprise* applies to the administrative law judge. As the Director notes, the Supreme Court expressly stated that its holding did not address administrative law judges. *Free Enter. Fund*, 561 U.S. at 507 n.10; Director's Brief at 7. Further, the majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than one year.[11] 20 C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director properly identifies a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c). If a successor relationship is established, a miner's tenure with a prior and successor operator may be aggregated to establish one year of employment. *See* 20 C.F.R. §§725.101(a)(32), 725.103, 725.494(c).

A "successor operator" is "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). It is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

The administrative law judge found claimant worked for employer, Raider Mining, Inc., Mine 3 (Raider Mining), for at least one year in 1994 and subsequently worked for Desert Mining in 1995 for 13.5 days. He further determined employer failed to establish Desert Mining is its successor because employer failed to show Desert Mining "acquired a mine or mines, or substantially all of the assets thereof" from Raider Mining, or "acquired the coal mining business of [Raider Mining], or substantially all of the assets thereof." 20 C.F.R §725.492(a). Thus, claimant's employment with Desert Mining could not be

[11] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

combined with his employment at Raider Mining to establish the one year of employment necessary for Desert Mining to be designated the responsible operator. The administrative law judge therefore concluded employer is the most recent financially-capable operator to employ claimant for at least a year and thus is the operator responsible for payment of benefits.[12] Decision and Order on Remand at 3-8.

In support of its assertion that Desert Mining is liable as the successor operator to Raider Mining, employer relies on claimant's testimony. We reject employer's argument the administrative law judge erred in finding claimant's testimony insufficient to establish Desert Mining is its successor operator.[13] Employer's Brief at 14-23.

Claimant was deposed in 1998, 2002 and 2013 and testified at the hearing in 2016. Director's Exhibits 1, 2, 18. In his 1998 and 2002 depositions, he testified he worked for Raider Mining in 1994 until the mine shut down and he was laid off. Director's Exhibit 1 at 54-56. He next worked "a short time" for Desert Mining in 1995. Director's Exhibit 1 at 56-57. Claimant stated both companies were owned by Roger Coleman and Darrell Cook, but their mines were in different locations. Director's Exhibits 1 at 57, 79, 83; 2 at 245. Raider Mining operated a mine in Phyllis, Kentucky and Desert Mining operated a mine in Phelps, Kentucky. Director's Exhibit 1 at 78-79, 83; 2 at 2-245. He also testified some of the foremen worked for both Raider Mining and Desert Mining, but he could not remember if both mines used the same equipment. Director's Exhibit 1 at 83-84.

In his 2013 deposition, however, claimant testified Desert Mining was "the same company" as Raider Mining, using the same employees[14] and equipment,[15] and both

[12] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer is financially capable of assuming liability for benefits. *See Skrack v. Island Creel Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[13] Because employer, Raider Mining, Incorporated, Mine 3 (Raider Mining) does not challenge the administrative law judge's findings that it employed claimant for at least one year and Desert Mining employed claimant for less than one year, those findings are affirmed. *See Skrack*, 6 BLR at 1-711.

[14] In a written statement dated November 11, 2013 claimant confirmed he "did not recall if the operators of Raider and Desert had transferred the miners employed by Raider, and the equipment at Raider, to Desert." Director's Exhibit 43. When asked at the hearing if the same people who worked at Raider Mining went to Desert Mining, claimant responded, "Well, some . . . went with me over there." 2016 Hearing Transcript at 32.

[15] At the hearing, claimant clarified his statement that the same equipment was used:

companies mined the same piece of land but with a different mineshaft. Director's Exhibit 18 at 16-17.

The administrative law judge found claimant's testimony insufficient to meet employer's burden to establish Desert Mining acquired a mine or coal mining business, or substantially all the assets of a mine or coal mining business from employer. Decision and Order on Remand at 6. Rather, he found it merely establishes the same people owned Raider Mining and Desert Mining, and that claimant believed the mine he worked at for Raider Mining shut down before he started working for Desert Mining.[16] Specifically, while noting claimant's conflicting testimony as to whether the two mines were located on the same land, the administrative law judge credited his earlier statements that his work for Desert Mining occurred in a separate location because this testimony "took place significantly closer in time to the actual work."[17] Decision and Order on Remand at 5 n.21;

> Q. . . . when you say you used the same equipment [when you went from Raider Mining to Desert Mining], do you mean the exact, same pieces of equipment from Raider? Or, do you mean equipment that's the same type of equipment?
>
> A. Same type of equipment. . . . They had a different [continuous] miner at each mine[].
>
> ***
>
> Q. Okay. Do you know whether any pieces of equipment were transferred from Raider's operation to the Desert operation?
>
> A. No, I don't. We would move some equipment from one place to another.

Hearing Transcript at 33-34.

[16] Claimant's employment history form, dated August 14, 2012, noted "claimant has memory problem and needs [Social Security Employment Records] for exact names and dates." Director's Exhibit 6.

[17] At the hearing, claimant again stated Desert Mining did not mine the same land as Raider Mining, but he "believe[d] it [was] called Mouthcard, [Kentucky]." Hearing Transcript at 29.

6. As employer does not challenge this determination, it is affirmed. *See Skrack v. Island Creel Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Further, he found claimant's testimony that some employees of Raider Mining worked for Desert Mining did not establish that "enough" employees were transferred between the operators to constitute a takeover of operations. Decision and Order on Remand at 6. Additionally, the administrative law judge found while claimant stated some of the same equipment may have been used by both operators, it is "unclear" how much of it was the same and whether it was actually transferred, lent, or simply the same type. *Id.* He therefore permissibly found claimant's testimony "equivocal at best" regarding whether any equipment at all was transferred between Raider Mining and Desert Mining. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); Decision and Order on Remand at 6. Moreover, employer does not challenge this credibility determination on appeal. *See Skrack*, 6 BLR at 1-711.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. Assessing the credibility of witness testimony is committed to the administrative law judge's discretion in his role as fact-finder, and the Board will not disturb his findings unless they are inherently unreasonable. *See Rowe*, 710 F.2d at 255; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Because it is supported by substantial evidence, we affirm the administrative law judge's finding claimant's testimony is insufficient to establish Desert Mining acquired a mine or coal mining business, or substantially all the assets of a mine or coal mining business from employer. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). We further affirm, as unchallenged, the administrative law judge's additional determination employer offered no other evidence it ceased to exist before claimant worked for Desert Mining.[18] *See Skrack*, 6 BLR at 1-711. We, therefore, affirm the administrative law

[18] Employer also asserts the documented business practices of Roger Coleman as found in *Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555 (2002) establish Raider Mining and Desert Mining "did not operate at the same time; therefore a predecessor/successor relationship did exist." Employer's Brief at 21. Employer's reliance on *Hall* is misplaced. In that case the miner testified that two companies he worked for, Coleman & Coleman and Grassy Creek, with which Roger Coleman was also affiliated, had the same owners but different mine sites and when they finished mining one site, the employees would move all the equipment to another mine and operate it under a different name. *Hall*, 287 F.3d at 565. The Sixth Circuit credited that testimony to find the two companies were in a predecessor/successor relationship. *Id.* Here, however, the administrative law judge found claimant's testimony too unclear and equivocal to establish

judge's finding employer failed to establish Desert Mining is its successor operator.[19] 20 C.F.R. §725.492; *see Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255.

Employer alternatively argues liability must transfer to the Trust Fund because the district director named the wrong operator in the Amended Notice of Claim and the Proposed Decision and Order.[20] Employer's Brief at 24; Director's Brief at 10; Director's Exhibits 20, 46. Employer asserts Raider Mining, Inc., Mine 3, where claimant worked, is a distinctly different company from Raider Mining, Incorporated. Employer asserts because the Notice of Claim and Proposed Decision and Order named Raider Mining, Inc. as the potential responsible operator, Raider Mining, Inc., Mine 3 should be relieved of liability.

To the extent employer argues it was denied due process because of the manner in which the district director processed this claim, we find no merit in employer's argument. The Due Process Clause of the Constitution, which applies to adjudicative administrative proceedings, requires an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 478 (6th Cir. 2009). Notice must be reasonably calculated to inform the employer of the claim for benefits. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048 (6th Cir. 1990). A delay in notifying an employer of its potential liability violates due process only if the employer is deprived of

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that all of the equipment from Raider Mining was moved to Desert Mining. Moreover, as Desert Mining was not a party in *Hall*, the findings therein are not binding on the instant case. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21 (6th Cir. 2014) (For collateral estoppel to apply, the party against whom it is asserted must have had a full and fair opportunity to litigate the issue in the previous forum.); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc).

[19] Employer additionally asserts the administrative law judge erred in relying on the Director's assertion that bankruptcy docket sheets showed Raider Mining and other mines continued to operate during the pendency of their bankruptcy "as the sole analysis" for whether Desert Mining was Raider Mining's successor. Employer's Brief at 22-23. As set forth above, and as the Director asserts, the administrative law judge found employer failed to put forth credible evidence of a successor relationship; he did not rely on evidence or arguments provided by the Director. Director's Brief at 10.

[20] The Amended Notice of Claim named Raider Mining, Incorporated, rather than Raider Mining Incorporated, Mine 3, as the operator. Director's Exhibit 20.

a fair opportunity to mount a meaningful defense against the claim. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 807 (4th Cir. 1998); *see also Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). Due process "is concerned with procedural outrages, not procedural glitches." *Energy West Mining v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009).

The pertinent issue is whether employer received adequate notice and an opportunity to be heard. *See Richardson*, 402 U.S. at 401; *Mullane*, 339 U.S. at 313; *Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807. As the Director asserts, while Raider Mining, Incorporated was identified as the liable operator in the July 16, 2013 Amended Notice of Claim, employer's counsel acknowledged on June 4, 2013, that Raider Mining, Incorporated, Mine 3 was the employer. Director's Brief at 10. Further, Raider Mining, Incorporated, Mine 3 was correctly identified within the district director's Proposed Decision and Order dated December 13, 2013, specifically in the attached Agreement to Pay Benefits, and at all times thereafter. *Id*. at 10; Director's Exhibits 46, 51, 52, 55.

Moreover, employer argued before the district director that if Desert Mining was not a successor operator, "the common relationship of all the companies [Faith Coal; Raider Mining, Incorporated; Raider Mining, Incorporated, Mine 3; and Desert Mining, Incorporated] indicates that they should be treated as a common operator." Director's Exhibit 24 at 2. Counsel for employer advised the district director he represented "Raider Mining, Inc. as successor to Faith Coal Company, Inc." (Faith Coal), and would be "representing both 'Raider Mining, Inc.' as well as Faith Coal . . . since they are covered under the same policy." Director's Exhibits 33, 55. Because Raider Mining, Incorporated, Mine 3 was the operator that employed claimant, was the successor to Faith Coal, and was insured under the same policy cited in the Amended Notice of Claim, employer received the proper notice and an opportunity to defend this claim. Director's Exhibits 19, 20, 23, 24, 27, 33, 46, 55. Employer does not explain how the district director's reference to Raider Mining, Incorporated as a potentially liable operator, rather than Raider Mining, Incorporated, Mine 3, at the outset of the claim prejudiced it. *See Borda*, 171 F.3d at 184; *Lockhart*, 137 F.3d at 807; *Lemar*, 904 F.2d at 1048. Thus, we reject employer's argument that liability should transfer to the Trust Fund because the Amended Notice of Claim named "Raider Mining, Incorporated" as successor to Faith Coal, as this error, at most, constitutes a procedural glitch.[21] *Oliver*, 555 F.3d at 1219. We therefore affirm the

[21] The parties agree Raider Mining, Incorporated, Mine 3 is insured through Employers Insurance of Wausau, c/o Liberty Mutual Middle Market (Wausau) and that the district director issued the Amended Notice of Claim to Wausau.

administrative law judge's finding that employer is the responsible operator. 20 C.F.R. §§725.494, 725.495(c); *see Martin*, 400 F.3d at 305.

Attorney Fee Award

Claimant's counsel has filed a complete, itemized statement requesting an attorney's fee for services performed before the Board in the prior appeal, BRB No. 17-0538 BLA, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $1,350.00 for 1.75 hours of legal services by Joseph E. Wolfe at an hourly rate of $350.00; 2.75 hours of legal services by Brad A. Austin at an hourly rate of $200.00; 0.25 hours of legal services by Rachael Wolfe at an hourly rate of $150.00; and 1.5 hours of services by legal assistants at an hourly rate of $100.00. No objections to the fee petition have been received.

The Board finds the fee requested to be reasonable and commensurate with the necessary services performed in defending claimant's award of benefits. Accordingly, the Board approves a fee of $1,350.00 to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and claimant's counsel is awarded a fee of $1,350.00.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge