PART IV

ADMINISTRATIVE PROCESSING OF CLAIMS, POWERS AND DUTIES OF THE ADMINISTRATIVE LAW JUDGE

A. THE CLAIMS PROCESS

4. PROCEDURAL ISSUES AT THE DISTRICT DIRECTOR OR THE HEARING LEVEL

g. Controversion

Section 725.412 provides for identification of the responsible operator by the district director. 20 C.F.R. §725.412. Section 725.413 which regulates the operator's response to notification under Section 725.412 provides that within 30 days after receipt of such notification, "unless such period is extended by the district director for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability." 20 C.F.R. §725.413. Operators are permitted a reasonable time to develop and submit evidence. 20 C.F.R. §725.414; ***Pruitt v. USX Corp.***, 14 BLR 1-129 (1990). The Board consistently held that ministerial duties performed by the district director under the provisions of 20 C.F.R. §§725.412, 725.413, 725.414 are discretionary acts, properly reviewed by the Board. ***Haskins v. Shamrock Coal Co.***, 12 BLR 1-117 (1989); ***Whary v. Bush Coal Co.***, 11 BLR 1-50 (1988); ***Saylor v. Warner Coal Co.***, 12 BLR 1-205 (1988), *rev'd sub nom*. ***Pyro Mining Co. v. Slaton***, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); ***Slaton v. Pyro Mining Co.***, 10 BLR 1-150 (1987), *rev'd sub nom*. ***Pyro Mining Co. v. Slaton***, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989); ***Cyktich v. C & K Coal Co.***, 7 BLR 1-529, 1-531 (1984); ***Duke v. United States Steel Corp.***, 7 BLR 1-914 (1985); *but see* ***Lukman v. Director, OWCP***, 896 F.2d 1248, 13 BLR 2-232 (10th Cir. 1990). *See* Part IV.A.2. of the Desk Book.

CASE LISTINGS

[employer's failure to controvert initial finding of eligibility within 30 days of receipt of notification not fatal as it was within district director's discretion to grant extension as one of employer's key personnel was on vacation] ***Cyktich v. C & K Coal Co.***, 7 BLR 1-529 (1984).

[remand to district director for determination of timeliness of employer's controversion and to consider applicability of seven-day extension contained in Section 725.311(c)] ***Duke v. U. S. Steel Corp.***, 7 BLR 1-914 (1985).

[employer's acknowledgement that it had been properly identified as responsible operator did not constitute acceptance of liability] ***Vance v. Eastern Associated Coal Corp.***, 8 BLR 1-68, 1-69 (1985).

[adjudicator had no jurisdiction to rule whether employer had failed to timely respond to initial finding; remand to district director, 20 C.F.R. §§725.413, 725.414, to determine whether employer demonstrated good cause for failing to timely controvert] ***Sharber v. Zeigler Coal Co.***, 8 BLR 1-143 (1985).

DIGESTS

The Sixth Circuit overruled the Board's prior holdings in ***Warner Coal Co. v. Saylor*** and ***Pyro Mining Co. v. Slaton***. The Court held that both as a matter of constitutional law (pursuant to the Due Process clause of the 14th Amendment) and statutory interpretation (pursuant to 20 C.F.R. §725.360(a)(4) and 33 U.S.C. §919(b)(1982)) insurance carriers for the claimant's employer must be given written notice of the black lung claim prior to the administrative adjudication of a claim affecting the carrier's liability. ***Warner Coal Co. v. Director, OWCP*** [***Warman, Henry***], 804 F.2d 346, 11 BLR 2-62 (6th Cir. 1986).

The Board looked to the totality of employer's actions and held that the clear intent of those actions was to offer no contest to the claim rather than to withdraw controversion. Since employer merely offered no defense rather than withdrawing controversion, claimant still had the burden of establishing his entitlement to benefits, *see* 20 C.F.R. §725.461. ***Young v. Barnes and Tucker Co.***, 11 BLR 1-147 (1988).

The Third Circuit rejected employer's argument that failure of the district director to notify employer's counsel of the district director's award precluded commencement of the thirty-day controversion period. ***Pothering v. Parkson Coal Co.***, 861 F.2d 1321, 12 BLR 2-60, 2-72 (3d Cir. 1989).

In this Sixth Circuit case, the Board holds that the district director *must* send valid notification of the pendency of a claim to all parties whom the district director reasonably *considers* to be *interested parties*. This holding complies fully with ***Slaton v. Pyro Mining Co.***, 8 BLR 1-39 (1985), *rev'd and remanded sub nom*. ***Warner Coal Co. v. Director, OWCP***, 804 F.2d 346, 9 BLR 2-158 (6th Cir. 1986), in which the 6th Circuit required that notice of the proceedings be provided to all known interested parties, including carriers, but did not suggest that the district director must actively *seek out* all possible interested parties. The Board concluded that, in light of employer's failure to inform the district director of its contractual relationship with another carrier, the district director provided adequate notice to both employer and the presumed carrier (who was reasonably considered to be an interested party), and employer's failure to timely controvert the claim bars employer from contesting eligibility. ***Abner v. Caudill***

Construction Co., 12 BLR 1-88 (1988).

The Board held that in cases arising under the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *see* ***Warner Coal Co. v. Director, OWCP*** [***Warman, Henry***], 804 F.2d 346, 11 BLR 2-62 (6th Cir. 1986), *rev'g* ***Slaton v. Pyro Mining Co.***, 8 BLR 1-39 (1985), Section 725.412(b) requires the district director to send valid notification of the pendency of a claim to *both* employer and carrier. In the instant case, the Board held that carrier's receipt of the Notice of Initial Finding provided carrier with the necessary information to determine within the thirty days of receipt of this notice whether to controvert liability pursuant to Section 725.413. Further, the district director's finding that "good cause" was not shown for the untimely filing of the notice of controversion was not an abuse of discretion. ***Slaton v. Pryo Mining Co.***, 12 BLR 1-205 (1987); *see also* ***Saylor v. Warner Coal Co.***, 12 BLR 1-100 (1989)(en banc)(McGranery, J., concurring and dissenting).

Citing the rationale in ***Whary***, ***supra***, the Board held that the district director's notice under Section 725.412 in notifying employer of its potential liability was found to be timely. The Board noted that employer had failed to demonstrate prejudice resulting from the district director's delay in providing notice of potential liability since it failed to develop medical evidence. ***Hoskins v. Shamrock Coal Co.***, 12 BLR 1-117 (1989).

In reversing the Board in ***Slaton***, ***supra***, and ***Saylor***, ***supra***, the Sixth Circuit affirmed the administrative law judge's findings that good cause existed for the untimely filing of controversion forms based on the inadequacy of documentation, *i.e.*, not all documentation required by Section 725.412(b) was included in the notice to the carriers in ***Slaton*** and ***Saylor***.

The court remanded ***Slaton*** and ***Saylor*** to the Board for reconsideration of the merits of claimant's appeals and remanded a third case to the administrative law judge on the issue of good cause and, if necessary, on the merits of the claim. ***Pyro Mining Co. v. Slaton***, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989).

In remanding ***Abner***, ***supra***, the Sixth Circuit held that the district director has the authority to notify the proper carrier under Section 725.412, as he did here, giving it an opportunity to respond to the claim, even after the employer had procedurally defaulted by failing to respond to the district director's notification. The court found no justification for employer's failure to controvert and agreed with the Board that employer cannot defend against the claim. The court remanded the case to the Board for consideration of the merits of claimant's appeal vis-a-vis carrier. ***Caudill Construction Co. v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989).

The Sixth Circuit declined to follow the Board's holding in ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984) that the Department of Labor is not entitled to a second opportunity to designate a responsible operator. The court held that, under the facts in

this case, the district director was not prohibited from naming a new responsible operator after an earlier operator had been dismissed. Note, in this case, a hearing on the merits of the miner's claim had not occurred prior to the dismissal of the first operator. In ***Crabtree***, the claim had been fully litigated. Thus, despite the fact that identification of the responsible operator had been made 10 years earlier, no prejudice was shown and no time limitations were read into Section 725.412(a) allowing for the naming of an operator at "[a]t any time during the processing of a claim ...," and transfer of the liability to the Black Lung Disability Trust Fund was improper. ***Director, v. Oglebay Norton Co.***, 877 F.2d 1301, 12 BLR 2-357 (6th Cir. 1989).

The Board affirmed the administrative law judge's finding that 20 C.F.R. §§725.412 and 725.413 do not establish a requirement that the district director send a copy of the Notice of Initial Finding to the carrier in addition to the notice which is sent to the employer. In the instant case, employer failed to timely controvert the Notice of Initial Finding of Entitlement and argues that the district director's notice to the employer (in view of the failure to notify the carrier) was insufficient pursuant to 20 C.F.R. §§725.412 and 725.413. There was no dispute over the fact that employer failed to timely controvert the claim. The Board affirmed the administrative law judge's finding that lack of notice to the carrier alone does not constitute good cause for failure to timely controvert a claim, and affirmed the award of benefits. ***Osborne v. Tazco, Inc.***, 10 BLR 1-102 (1987). The Fourth Circuit reversed the default award, holding that such action violated due process where the insurance carrier received no notice of the pending adjudication. ***Tazco, Inc. v. Director, OWCP***, 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1989).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.408, regarding the notification of responsible operators, shifts the burden of production, not the burden of proof, by requiring operators to submit evidence rebutting an assertion of liability within a given period of time. Because the revised regulation applies only to the designated responsible operator, *i.e.* it applies only to the extent that a claimant has already carried his burden of proving that an operator is liable, Section 725.408 does not relieve the agency of its burden to identify the correct responsible party and shift that burden onto coal mine operators, and, therefore, it is not inconsistent with either the Supreme Court's holding in ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir.1993), or the Administrative Procedure Act. ***Nat'l Mining Ass'n v. Department of Labor***, 292 F.3d 849, 871-872, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001).

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