BRB No. 94-3703 BLA

VERDA M. WILLIAMS (Widow of BILLIE E. WILLIAMS)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED:
LOVILIA COAL COMPANY	)	
and	)	
BITUMINOUS CASUALTY CORPORATION	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Bernard J. Gilday, Jr., Administrative Law Judge, United States Department of Labor.

William E. Berlin (Arter & Hadden), Washington, D.C., for employer.

Barry H. Joyner (J. Davitt McAteer, Acting 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.
PER CURIAM:

The Director, Office of Workers' Compensation Programs appeals the Decision and Order - Awarding Benefits (93-BLA-1495) of Administrative Law Judge Bernard J. Gilday, Jr. based 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).

The sole issue on appeal is whether the administrative law judge erred in dismissing employer, Lovilia Coal Company, as the responsible operator and its carrier, Bituminous Casualty Corporation, thereby holding the Black Lung Disability Trust Fund (Trust Fund) liable for benefits.[1]

The record reflects that the miner, Billie E. Williams (Williams), worked in the mines for Lovilia Coal Company (Lovilia) from 1969 until about 1984. Decision and Order at 4; Director's Exhibit 5.[2] Lovilia obtained from Bituminous Casualty Corporation (Bituminous) an insurance policy with respect to federal black lung benefits, which along with the audit sheets, identified the named insured to be "Billie E. Williams and Tom Kent Wignall d/b/a as Lovilia Coal Company" and further identified the insured as a partnership. The policy covered claims for federal black lung benefits, beginning January 22, 1982. Employer's Exhibit 1. The policy was cancelled on May 16, 1985. Director's Exhibit 42.

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[1] This case includes both a miner's and a survivor's claim. Williams, the miner, filed for benefits on December 10, 1990. He died on July 31, 1992. His surviving widow filed a survivor's claim for benefits. Because both employer and the Director have conceded entitlement to benefits on both claims, the issue of entitlement is not before the Board. Employer's Brief at 1; Director's Brief at 1.

[2] Lovilia is the only post-1969 employer which satisfies the definition of responsible operator. *See* 20 C.F.R. §725.492. Blue Lake Land Company and Big D Mining Company employed the miner for less than one year each. There is no evidence that the miner was employed by one employer for at least one year when he worked in Kentucky and Tennessee.

The administrative law judge found that Williams was a miner within the meaning of the Act. He further found that Williams was a partner-operator in the Lovilia mine in which he worked and was, thus, not an employee of that mine--"[I]t is ludicrous to contend that he employed himself or, differently stated, that he was his own employee." Decision and Order at 7. The administrative law judge also found that the insurance policy issued by carrier Bituminous protected Williams or his partner/co-owner Tom Kent Wignall from liabilities to which they were exposed, but could not be construed to provide coverage for Williams or Wignall should they contract pneumoconiosis.[3] Decision and Order at 7. He found that Lovilia Coal Company is "a title, a mere business name, a legal non-entity. As such, Lovilia Coal Company cannot be and is not a Responsible Operator." *Id.* Thus, he dismissed Lovilia and Bituminous. He concluded that because the Director failed to name Williams or his Lovilia partner, Wignall, as potentially liable parties for this claim, the Trust Fund was liable. *Id.*

On appeal, the Director argues that the administrative law judge erred in dismissing Lovilia as the responsible operator and Bituminous as the responsible carrier. She further argues that Lovilia and Bituminous should be directed to assume payment of benefits in this case and reimburse the Trust Fund for interim benefits which it has expended. Employer urges affirmance of the administrative law judge's Decision and Order. Claimant has not responded to this appeal.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the responsible operator issue, we agree with the Director's position that the administrative law judge erred in dismissing Lovilia as the responsible operator. Williams' status as a partner in Lovilia does not affect his eligibility for benefits based on his work for that concern. Similarly, Lovilia's status as the responsible operator does not

[3] The policy covered Illinois Workers' Compensation and Federal Coal Mine Health and Safety Act liabilities. Employer's Exhibits 2, 3 accompanying Employer's February 2, 1994 Renewed Motion to Dismiss.

turn on Williams' partnership agreement. The Black Lung Act and the regulations list partnerships among the entities which can be coal mine operators. 30 U.S.C. §802(d),(f); 20 C.F.R. §725.101(a)(27), (29). The partnership, or the partners individually, may be held liable as meeting the definition of responsible operator if it or they meet the criteria, as here. *See* 20 C.F.R. §§725.491, 725.492, 725.493. Moreover, the Federal Rules of Civil Procedure specifically provide that

> [A] partnership or other unincorporated association, [regardless of its capacity to sue or be sued under state law], may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

Fed. R. Civ. P. 17(b)(1); *see Penrod Drilling Co. v. Johnson*, 414 F.2d 1217 (5th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970)(in a claim under the Jones Act, 46 U.S.C. §668, based on an injury to a seaman in the course of his employment, the defendant could be sued in the firm name).

We agree with the Director that because the Act creates a federal statutory cause of action, a partnership which operates a coal mine, as here, is properly named as the responsible operator under the firm name.

Moreover, if this were a state question, the laws of the relevant states, Iowa and Illinois, wherein Lovilia operated, permit a partnership to be sued in the firm name. *See* Iowa R. Civ. P. 4; Ill. Comp. Stat Ann. Ch. 735, §5/2-411 (Michie 1993). We, therefore, reverse the administrative law judge's finding that Lovilia was not the responsible operator.

Contrary to employer's contention, there is no option in the Federal Coal Mine Safety and Health Act (FCMSHA) for a partner or self-employed person to opt out of coverage for qualifying coal mine employment. Section 421(a) of the FCMSHA, 30 U.S.C. §931(a), provides, without exception, that "miners or their surviving widows, children, parents, brothers, or sisters, as the case may be...shall be entitled to claim benefits under [Part C]." Section 422, 30 U.S.C. §932(b), requires that each "operator shall be liable for and shall secure the payment of benefits" for death or total disability due to pneumoconiosis. There are no exceptions. Section 423(a), 30 U.S.C. §933(a), requires that each operator must secure the payment of benefits for his own liability under Section 422. Lovilia obtained a contract from Bituminous pursuant to the requirements of 20 C.F.R. §726.201. The policy contained the requisite FCMHSA endorsement provided at 20 C.F.R. §726.203. The regulations require that the contract be construed to establish coverage to the fullest extent possible, 20 C.F.R. §726.203(c)(6). Moreover,

the carrier is bound by the provisions at 20 C.F.R. §726.210 concerning the black lung liability of coal mine operators. *See* 20 C.F.R. §726.210.

The endorsement provides no exclusions. It prevents an operator from excluding some employees who work as miners. The miner's status as a partner in the firm does not affect his eligibility for benefits based on his work as a miner for that firm. Indeed, the insurance policy issued by Bituminous covers, as a matter of law, the claims filed by the miner and his widow, 20 C.F.R. §726.203(a), (c)(1); *see Bates v. Creek Coal Co., Inc.*, 18 BLR 1-4 (1993), *aff'd. on recon.,* BLR , No. 85-1800 BLA (May 23, 1996). The administrative law judge here found that "Williams was a miner within the meaning of the Act and the regulations and, as a miner, he had all the protections and rights provided by the Act." Decision and Order at 7; 20 C.F.R. §725.202. Inasmuch as employer has not challenged Williams' status as a miner and the regulations mandate that the operator's miners be covered under the policy negotiated between the operator and carrier, we reverse the administrative law judge's dismissal of Bituminous as the responsible carrier and hold that it, not the Trust Fund, is responsible, as a matter of law, for Williams' benefits and those of the surviving widow.

In conclusion, we note in passing, that employer in its response raises a number of challenges that the Board fully discussed and disposed of in *Bates*, *supra*. Specifically, it argues, *inter alia*, that because nothing in the Act addresses insurance, the state of Illinois regulates the relationship between Williams and Bituminous. Contrary to employer's contention, the Act and the Illinois insurance statute are not in conflict since the former pertains to federal benefits while the latter concerns state benefits. Thus, the McCarran Act is inapplicable to the instant case. *See generally Bates, supra*. Employer also responds that Williams' decision to exclude himself from coverage is not only consistent with the insurance policy but is also explicitly contemplated by Illinois law. Employer's Brief at 12. The Office of Workmen's Compensation Programs has acknowledged that the FCMSHA imposes a number of requirements on operators which differ in varying degrees from traditional workmen's compensation concepts, 20 C.F.R. §726.203(c). Employer further contends that since Williams did not elect coverage, his salary was not included in the insurance coverage, and as he did not pay any premiums, he should not receive benefits. *Id.* Employer also contends that if it is required to provide coverage, it is deprived of due process, since the Illinois law appears on its face to preclude it from collecting a premium from Williams. As in *Bates*, 18 BLR 1-4, n.8, however, employer does not cite any provision in the insurance contract setting forth the manner in which premiums to Bituminous are to be calculated. With respect to employer's contention that it is provided with no remedy and no due process, the Board stated in *Bates*, "[i]f

claimant underpaid his premiums to [carrier] or provided false information regarding the amount of employees to be covered by the policy, [carrier] may have a cause of action in civil court against claimant."

Accordingly, the administrative law judge's Decision and Order dismissing Lovilia as the responsible operator and Bituminous as the responsible carrier and finding the Director and the Trust Fund responsible for payment of benefits is reversed. We hereby hold that Lovilia Coal Company is the responsible operator and Bituminous Casualty Corporation is the

responsible carrier and, as such, they are liable for the payment of benefits to claimant and for reimbursement to the Trust Fund.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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The Board held that Lovilia Coal Company, a partnership, is a responsible operator and may be held liable for black lung benefits under the firm name pursuant to the Act and regulations. *See* 30 U.S.C. §802(d), (f); 20 C.F.R. §725.101(a)(27), (29); *see generally* 20 C.F.R. §§725.491, 725.492, 725.493; Fed. R. Civ. P. 17(b)(1); ***Penrod Drilling Co. v. Johnson***, 414 F.2d 1217 (5th Cir. 1969), *cert. den.*, 396 U.S. 1003 (1970). ***Williams v. Lovilia Coal Co.***, BLR , BRB No. 94-3703 BLA (June 14, 1996).

Following the rationale in ***Bates v. Creek Coal Co., Inc.***, 18 BLR 1-1 (1993), *aff'd on recon*. BLR 1- (1996), the Board held that the miner, a partner-operator in the Lovilia Coal Company, working in the mines for Lovilia, is an employee covered for black lung insurance by employer's carrier, Bituminous Casualty Corporation, under the terms of the rider added to the regulations at 20 C.F.R. §726.203(a). This rider, in part, prevents an operator from excluding some employees who act as coal miners from coverage. *See* 20 C.F.R. §726.203(a), (c); 20 C.F.R. §726.210. ***Williams v. Lovilia Coal Co.***, BLR , BRB No. 94-3703 BLA (June 14, 1996).