BRB No. 08-0807 BLA

J.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
and	)	DATE ISSUED: 08/26/2009
	)	
SEABOARD SURETY COMPANY	)	
	)	
Intervenor	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Granting Claimant's Motion for Procedural Ruling Barring Representation of Nominal Party of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer and intervenor.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The law firm of Greenberg Traurig LLP (Greenberg), appeals the Order Granting Claimant's Motion for Procedural Ruling Barring Representation of Nominal Party (02-BLA-5251) of Administrative Law Judge Edward Terhune Miller with respect to 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). This case involving a miner's claim has been before the Board previously. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In *Harris*, pursuant to employer's appeal, the Board affirmed in part, and vacated in part, the administrative law judge's Decision and Order awarding benefits, and remanded the case to the administrative law judge for further consideration.[1] Both employer and claimant requested reconsideration, which the Board denied. *Harris v. Old Ben Coal Co.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

On remand, the administrative law judge granted the motion of employer, Old Ben Coal Company (Old Ben), to reopen the record, and both Old Ben and claimant submitted additional evidence to comply with the Board's remand instructions. On May 28, 2008, claimant filed with the administrative law judge a Motion for Procedural Ruling and to Suspend Briefing Schedule, arguing that, because Old Ben had been dissolved in bankruptcy in 2004, it was no longer a real party in interest. Claimant argued that, although the Board had permitted Greenberg to participate on appeal on behalf of the defunct Old Ben,[2] intervening case law from the United States Court of Appeals for the

[1] Specifically, the Board held that the administrative law judge permissibly accorded less weight to medical opinions that were based, in part, on x-ray readings in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The Board also held that the administrative law judge should have considered digital x-rays at 20 C.F.R. §718.107 rather than at 20 C.F.R. §718.202(a)(1). Further, the Board instructed the administrative law judge to order the parties to select and designate, as affirmative or rebuttal evidence, one reading of each CT scan. Regarding the merits of entitlement, the Board vacated the administrative law judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.304, and remanded the case to the administrative law judge for reconsideration. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting).

[2] In 2005, the Board denied claimant's motion to dismiss Old Ben's appeal, and granted the motion of the Director, Office of Workers' Compensation Programs (the Director), that Old Ben be retained as a party to the claim in order to preserve any right the Director might later have to seek reimbursement of benefits paid by him from either the Horizon Natural Resources Liquidating Trust, or Seaboard Surety Company. [*J.E.H.*] *v. Old Ben Coal Co.*, BRB No. 04-0812 BLA (June 14, 2005)(unpub. order). In the same

Seventh Circuit[3] established that Old Ben has no legally protected interest in the outcome of the claim. Claimant's Motion at 4, citing *Old Ben Coal Co. v. OWCP* [*Melvin*], 476 F.3d 418, 23 BLR 2-424 (7th Cir. 2007)(dismissing appeal filed on behalf of Old Ben for lack of a real party in interest). Claimant argued further that since no other entity, such as a surety, had sought to intervene to protect its interests, Greenberg should not be allowed to participate as counsel for Old Ben, and the evidence that Greenberg had submitted on Old Ben's behalf should be excluded from the record.

On June 24, 2008, the administrative law judge ordered the parties to show cause why Greenberg should not be barred from appearing on behalf of Old Ben, and why the evidentiary materials filed on remand on behalf of Old Ben should not be excluded from the record. The Director, Office of Workers' Compensation Programs (the Director), responded that he had no objection to claimant's motion. Greenberg responded, requesting that claimant's motion be denied, and arguing that the case should either proceed against Old Ben, or that Seaboard Surety Company (Seaboard) should be permitted to intervene.[4]

On July 31, 2008, the administrative law judge issued his Order Granting Claimant's Motion for Procedural Ruling Barring Representation of Nominal Party (Order), which is the subject of the instant appeal. The administrative law judge noted the similarities between the instant case and *Melvin*, where the Seventh Circuit court held that Old Ben, which had been liquidated in bankruptcy proceedings, was "not a real party in interest. . . [but] a party in name only," and, as a result, dismissed Old Ben's appeal. Order at 4, *quoting Melvin*, 476 F.3d at 420, 23 BLR at 2-427. The administrative law judge concluded that "Old Ben is a 'ghost,' a non-existent entity that has long been liquidated in bankruptcy." *Id.*, at 4. The administrative law judge noted further that, although a surety could have a potential interest in the outcome of the claim, to date, no

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order, the Board acknowledged that Mark E. Solomons of Greenberg Traurig had filed a "Limited Appearance of Counsel" on behalf of Old Ben. *Id.* at 2. Subsequently, when the Board held oral argument, Mr. Solomons was permitted to participate on behalf of Old Ben. Oral Argument Transcript at 5.

[3] The record indicates that claimant's coal mine employment occurred in Illinois. Director's Exhibits 1, 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] Greenberg did not file a motion to intervene on behalf of Seaboard. Rather, it stated that it would file such a motion if the administrative law judge concluded that intervention was necessary. Employer's Response at 6 n.2.

surety had moved to intervene as a party in the claim proceedings. The administrative law judge therefore distinguished this case from *Zeigler Coal Co. v. Director, OWCP*, [*Griskell*], 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007), where, following the issuance of *Melvin*, a surety moved to intervene and the court granted the motion. The administrative law judge concluded that, pursuant to *Melvin*, Old Ben had no legally protectable interests that "warrant representation by counsel, or entitle it to invoke this tribunal's jurisdiction." *Id.* at 5. Consequently, the administrative law judge barred Greenberg from further participation on behalf of Old Ben, and he excluded the evidentiary materials filed on remand by Greenberg, purportedly on behalf of Old Ben.

On appeal, Greenberg argues that claimant waived the argument that Old Ben lacks party status. Greenberg argues further that the Board's previous acceptance of Old Ben as a party and of Greenberg's appearance on behalf of Old Ben, constitutes the law of the case. Additionally, Greenberg contends that the administrative law judge erred in applying *Melvin* because *Melvin* was wrongly decided. Greenberg also asserts that the administrative law judge erred in failing to apply *Griskell*. Along with its opening brief, Greenberg filed a Protective Motion for Conditional Intervention requesting that the Board permit Safeco Insurance Company (Safeco) to intervene in this case, if the Board believes that *Melvin* requires such intervention.[5]

Claimant responds, urging affirmance of the administrative law judge's findings regarding Greenberg's representation of Old Ben. Claimant responds further that Safeco's motion to intervene should be denied, as Safeco has not been identified as a surety in this case, and it is too late for the surety that was identified by the Director as a potentially liable party, namely, Seaboard, to now seek leave to intervene. The Director responds, asserting that *Melvin* is controlling law, and that the administrative law judge correctly barred Greenberg from litigating the claim since it did not represent an entity with a real interest in the outcome. The Director also asserts that Safeco's motion to intervene should be denied, as Safeco has no demonstrated interest in the outcome of this claim. Further, the Director notes that although a "motion to intervene by Seaboard, even at this late date" might have merit, no such motion was before the Board as of the time his brief was submitted. Director's Brief at 3.

Greenberg filed a Combined Reply Brief, reiterating its contentions that the administrative law judge erred in barring it from participating on behalf of Old Ben. Additionally, Greenberg filed a second Protective Motion for Conditional Intervention, requesting that Old Ben's surety, Seaboard, be permitted to intervene in this case. Greenberg notes that this motion replaces the previous motion that inadvertently listed

[5] By order dated January 22, 2009, the Board stated that it would hold the motion to intervene in abeyance pending a decision on the merits.

Safeco as the surety. Claimant responded that he objects to Seaboard's motion for the reasons previously stated in his response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

As an initial matter, we note that Greenberg appeals from a non-final, or interlocutory, order of the administrative law judge. The Board ordinarily does not undertake review of non-final orders. *See, e.g., Arjona v. Interport Maint.*, 24 BRBS 222 (1991). The United States Supreme Court has articulated a three-pronged test to determine whether an order that does not finally resolve a claim is, nonetheless, appealable. First, the order must conclusively determine the disputed question. Second, the order must resolve an important issue that is completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment. *Gulfstream Aerospace Corp. v. Mayacamas Corp*., 485 U.S. 271 (1988). Because we conclude that the administrative law judge's Order in this case satisfies the three-pronged test of *Gulfstream*, we accept this interlocutory appeal.

Greenberg asserts that claimant waived his right to assert that Old Ben lacks standing as a real party in interest pursuant to *Melvin* because claimant did not raise the issue earlier. This assertion lacks merit. As the Director notes, the issue of whether a party has standing is a jurisdictional issue, and jurisdictional issues are open to review throughout litigation. *See National Organization for Women v. Scheidler*, 510 U.S. 249 (1994); *see also Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171 (1988). We therefore reject Greenberg's assertion.

Greenberg argues further that the Board's prior acceptance of Greenberg as Old Ben's counsel is the law of the case. The doctrine of the "law of the case" is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.,* 339 U.S. 186 (1950); *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). However, exceptions to the law of the case doctrine include: a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993). In view of *Melvin*, which was issued after the Board accepted Greenberg as Old Ben's counsel, and which explicitly addressed whether Old Ben had

standing to litigate a federal black lung claim, the Board's prior decision to allow Greenberg to represent Old Ben is not controlling. *See Williams*, 22 BRBS at 237.

We now turn to the merits of Greenberg's appeal. Initially, we decline to address Greenberg's argument that *Melvin* was incorrectly decided. *Melvin* is the law of the Seventh Circuit, which the Board will apply in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989).

Upon review of the administrative law judge's Order, we conclude that the administrative law judge was correct in his application of *Melvin*. Here, as in *Melvin*, Greenberg sought to litigate on behalf of Old Ben, which no longer had any interest in the litigation, but remained as a nominal party only. *See Melvin*, 476 F.3d at 419-20, 23 BLR at 2-427-28. Therefore, the administrative law judge correctly concluded that, under *Melvin*, Old Ben was not a real party in interest, and that consequently, Greenberg established no grounds for continuing to represent Old Ben. Further, the administrative law judge accurately noted that here, unlike the situation in *Griskell*, no surety had moved to intervene. Consequently, we affirm the administrative law judge's determination that, under *Melvin*, Old Ben has no legally protectable interest in this case, and that therefore, there are no grounds for Old Ben to be represented and submit evidence.

We now turn to the two Protective Motions for Conditional Intervention that Greenberg has filed with the Board. Initially, we deny Greenberg's motion filed on behalf of Safeco. As the Director notes, there is no evidence that Safeco has any interest in this case. The record reflects that, after investigating the matter, the Director determined that Seaboard is the surety in this case. *See* n.2, *supra*; Director's Status Report, filed March 30, 2005. Moreover, Greenberg explains that the second motion to intervene, filed on behalf of Seaboard, is intended to replace the motion filed on behalf of Safeco. Therefore, pursuant to the regulations, Safeco may not be made a party as it does not have any rights that would be affected by a decision in this case. 20 C.F.R. §§725.360 (a)(4),(d), 802.214.

However, we grant the motion filed on behalf of Seaboard. Any "entity, such as an insurance company or a surety, that would be prejudiced by an award of black lung benefits is entitled to intervene in the administrative proceeding with the rights of a party. 20 C.F.R. §725.360(a)(4),(d)." *Griskell*, 490 F.3d at 610 n.1, 24 BLR at 2-41 n.1, *quoting Melvin*, 476 F.3d at 420, 23 BLR at 2-428. Seaboard, as the surety, has an interest in the outcome of this claim. Director's Status Report, filed March 30, 2005. We are not persuaded by claimant's argument that the motion to intervene must be denied as untimely, particularly since the regulations do not include any requirement that such a motion be filed within a specific time frame. *See* 20 C.F.R. §§725.360, 802.214. Moreover, we take into account the Director's statement that, until *Melvin* and *Griskell* were issued, there was "some confusion regarding how, procedurally, sureties should

defend these claims." Director's Response at 2. Therefore, we grant Seaboard's motion to intervene. On remand, the administrative law judge should regard Seaboard as a party to this claim. *See* 20 C.F.R. §725.360(a)(4),(d).

Accordingly, the administrative law judge's Order Granting Claimant's Motion for Procedural Ruling Barring Representation of Nominal Party is affirmed, the Protective Motion for Conditional Intervention on behalf of Safeco is denied, the Protective Motion for Conditional Intervention on behalf of Seaboard is granted, and the case is remanded to the administrative law judge for further consideration consistent with this opinion, as well as with our 2006 and 2007 opinions in this case.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge