BRB No. 97-1435 BLA

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| WASSIL DICASIMIRRO<br><br>Claimant-Respondent<br><br>v.<br><br>SKYTOP COAL COMPANY<br><br>Employer-Petitioner<br><br>and<br><br>LACKAWANNA CASUALTY COMPANY<br><br>Carrier-Respondent<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Mark Semanchik (Lipkin, Marshall, Bohorad & Thornburg), Pottsville, Pennsylvania for claimant.

James E. Pocius and Maureen E. Calder (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania

, for carrier.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor of Labor; 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 and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1353) of Administrative Law Judge Ralph A. Romano designating it as the party 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*. This case is before the Board for a second time. Employer has conceded claimant's entitlement to benefits. Notwithstanding, there is a dispute as to liability for the payment of benefits resides with employer or its insurance carrier, Lackawanna Casualty Company (Lackawanna). The procedural history of the case was set forth in *DiCasimirro v. Skytop Coal Co.*, BRB No. 96-0499 BLA (Sept. 27, 1996) (unpublished) and is incorporated by reference herein. The Board previously vacated the administrative law judge's Decision and Order on Modification, finding that the administrative law judge failed to consider whether employer is entitled to modification at 20 C.F.R. §725.310 based on a mistake in a determination of fact concerning the date of claimant's last coal mine employment. *Id*. The Board

directed the administrative law judge to reconsider the record evidence relevant to claimant's last day of coal mine employment in order to determine whether Lackawanna is responsible for payment of benefits. *Id*. On remand, the administrative law judge determined that claimant's last day of employment was November 23, 1990. After noting that Lackawanna terminated employer's insurance coverage on November 19, 1990, the administrative law judge concluded that Lackawanna is not the responsible insurance carrier. The administrative law judge, therefore, directed the payment of benefits by employer. Accordingly, the administrative law judge denied employer's request for modification pursuant to 20 C.F.R. §725.310. Employer appeals, challenging the administrative law judge's finding that it is responsible for the payment of benefits. Lackawanna and the Director, Office of Workers' Compensation Programs respond, urging affirmance of the administrative law judge's denial of modification.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

On appeal, employer seeks review of the administrative law judge's finding that claimant last worked in coal mine employment on November 23, 1990. As noted by the administrative law judge, the date of claimant's last coal mine employment

establishes whether Lackawanna is liable for payment of benefits. Decision and Order (D&O) at 2; *see Swanson v. R.G. Johnson Co.*, 15 BLR 1-49 (1991). Pursuant to 20 C.F.R. §726.203(a), the insurance carrier is liable for the payment of benefits to a claimant found entitled to such if the last day of claimant's last exposure to conditions causing the disease occurred during the policy period. In the instant case, employer argues that the administrative law judge ignored relevant evidence that establishing claimant's last work day for employer as November 16, 1990, prior to the cancellation of its insurance policy. Employer's argument is without merit. In determining the date of claimant's last coal mine employment, the administrative law judge properly considered all of the record evidence including claimant's hearing testimony that he last worked for employer on November 16, 1990 when he suffered a back injury, Director's Exhibit 92, and a Report of Occupational Injury, Director's Exhibit 123, identifying November 16, 1990 as the date of claimant injured his back. D&O at 3. Contrary to employer's argument, the administrative law judge had discretion to credit the emergency room records from Good Samaritan Regional Medical Center indicating that claimant had presented himself for treatment of a back injury on November 23, 1990.[1] D&O at 3; DX 68. Moreover, the administrative law judge permissibly found a chest x-ray report dated November 30, 1990 to be consistent

[1] As noted by the administrative law judge, according to the emergency room records from Good Samaritan Regional Medical Center, claimant stated on November 23, 1990 that, "I hurt my back at work today at ten o'clock today [sic]." Director's Exhibit 68.

with his finding that claimant last worked on November 30, 1990 as the report stated that claimant had been suffering lower back pain for the past seven days. *Id*.

Thus, inasmuch as the administrative law judge has provided a rational basis for the weight accorded the conflicting evidence, his finding that claimant's last date of coal mine exposure occurred on November 23, 1990 is affirmed as supported by substantial evidence.[2] *See Lafferty v. Cannelton Industries , Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). To the extent that employer was not insured by Lackawanna as of the date of claimant's last coal mine employment, Lackawanna is not liable for payment of benefits. Consequently, we affirm the administrative law judge determination that employer failed to establish modification pursuant to 20 C.F.R. §725.310.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[2] Employer also argues that Lackawanna should not be relieved of liability because it failed to notify employer of its intention to disclaim coverage or that their was a conflict of interest during the modification proceedings. Employer's argument is without merit The administrative law judge reinstated his prior finding that employer was on notice that Lackawanna contested its liability when the case was originally forwarded for a formal hearing on September 6, 1991, Director's Exhibit 31. Decision and Order on Remand at 3, n 2; Decision and Order on Modification at 3. Furthermore, the administrative law judge advised that he considered employer to have waived its right to dispute Lackawanna's position as employer failed to file timely respond or object to Lackawanna's Motion to Dismiss. *Id*.

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge