

BRB No. 06-0659 BLA

HENRY LEE JUDE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WOLF CREEK COLLIERIES)	DATE ISSUED: 05/23/2007
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Larry Price, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6403) of Administrative Law Judge Larry Price rendered 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). Claimant filed his claim for benefits on May

6, 2003. Director's Exhibit 2. The district director identified Wolf Creek Collieries dba SMC (doing business as Shell Mining Company) (employer) as the potentially liable operator, and advised employer of its right to contest the claim. Director's Exhibit 19. On February 26, 2004, the district director issued a proposed Decision and Order awarding benefits. Director's Exhibit 27. At employer's request, the case was forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibit 35.

While the case was pending with the OALJ, the law firm of Baird & Baird, P.S.C., withdrew as counsel for employer, informing the court that employer's parent company, Horizon Natural Resources Incorporated (Horizon) had been liquidated in bankruptcy; and therefore, that it was their understanding that any future liability for the claim would assign to the Black Lung Disability Trust Fund. On December 17, 2004, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Hold Case in Abeyance, which verified that Horizon was the parent company of employer, and that Horizon had been dissolved in bankruptcy, effective September 30, 2004. The Director requested that the OALJ hold the case in abeyance for sixty days in order for him to investigate whether there was a surety bond available to secure employer's potential liability for the claim. Director's Motion to Hold Case in Abeyance at 2.

On February 23, 2005, the Director submitted a Status Report to the OALJ, advising that his investigation had revealed a surety bond issued by St. Paul Fire and Marine Insurance Company (St. Paul), which secured employer's liability for benefits. Status Report at 1. The Director explained that claimant last worked for employer, a subsidiary of Shell Mining Company (SMC), on March 8, 1989, at which time SMC had posted a surety bond with St. Paul, effective July 1, 1986, for the penal sum of 1.4 million dollars, which bond expressly covered SMC's subsidiaries, including employer. Status Report at 2. The Director further noted that Horizon Liquidating Trust was also potentially liable for the claim as a result of the Joint Liquidation Plan approved by the United States Bankruptcy Court, which had created Horizon Liquidating Trust to pay the claims of general creditors, including federal black claims filed by the Director with the court. *Id.* Based on this information, the Director maintained that the case should proceed against employer. As a final note, the Director informed the OALJ that since St. Paul and the Horizon Trust Liquidating Trust had an interest in the outcome of the claim, he was providing them with a copy of his pleading in order to notify them of their right to request that they be permitted to intervene in the case pursuant to 20 C.F.R. §725.360(d). Status Report at 2-3.

By Order dated April 28, 2005, Administrative Law Judge Jeffrey Tureck scheduled the case for a hearing on August 10, 2005. The Order listed St. Paul as an insurance carrier in the caption of the case. On August 1, 2005, Mark Solomons, with the law firm of Greenberg Traurig, LLP, filed a Limited Appearance of Counsel on behalf of

employer, asserting that the OALJ did not have authority to consider the potential liability of St. Paul or whether the claim was covered by a surety bond. Thereafter, the record reveals that the August 10, 2005 hearing was continued by agreement of the parties, and the case was reassigned to Administrative Law Judge Larry Price (the administrative law judge). On December 8, 2005, Mr. Solomons filed a motion requesting that St. Paul be dismissed as a party to the case, that the hearing be postponed, and that the case be remanded to the district director for proper identification of the parties.¹ Both claimant and the Director filed a response opposing employer's motion to remand the case, asserting that the administrative law judge should proceed with a hearing to determine claimant's eligibility for benefits.

On December 28, 2005, the administrative law judge denied employer's motion, noting that any determination that he made regarding employer's liability would have no effect on the Director's decision to pursue an action against St. Paul in another forum. Thereafter, the administrative law judge scheduled a hearing in the case for January 10, 2006. At the hearing, David P. Callett, another attorney with the law firm of Greenberg Traurig, LLP, appeared on behalf of St. Paul. Hearing Transcript at 5. Mr. Callett advised that St. Paul would not intervene as a party to the case; and therefore, he asked that their name be removed from the caption. Hearing Transcript at 8-9. Notwithstanding, Mr. Callett requested that the record be held open for sixty days post-hearing in the event that there was some interested party that wished to submit evidence to defend against the claim. Hearing Transcript at 10. In response to Mr. Callett's request, the administrative law judge agreed to remove St. Paul from the caption of the case, but he refused to hold the record open and further delay the claim. Hearing Transcript at 21-22. Following resolution of these procedural matters, the administrative law judge heard testimony by claimant. At the close of the hearing, the administrative law judge agreed to leave the record open for ten days post-hearing for submission of briefs, including a brief from counsel for St. Paul on any issue he deemed relevant to his client's interests. Hearing Transcript at 40. On December 27, 2006, following receipt of

¹ Mr. Solomons argued that St. Paul Fire and Marine Insurance Company (St. Paul) was not an "insurance carrier" and the district director had failed to provide any "coherent theory or evidence" to establish a basis for St. Paul's alleged liability. Employer's Motion to Dismiss or Remand Claim (Dec. 8, 2005) at 3. Mr. Solomons asserted that insofar as St. Paul had not received proper notice of the claim while the case was before the district director, it could not properly be named as a party for the first time before the Office of Administrative Law Judges. *Id.* Mr. Solomon's further asserted that liability for benefits should transfer to the Black Lung Disability Trust Fund based on employer's inability to pay benefits, and the fact that employer "was operating under an unfunded and unsecured self-insurance program as a subsidiary of [Horizon Natural Resources Incorporated] at the time of [Horizon's] bankruptcy." *Id.*

the briefs, the administrative law judge issued his Decision and Order awarding benefits. The administrative law judge specifically determined that claimant was totally disabled due to pneumoconiosis and ordered employer to pay benefits commencing May 2003, the month in which claimant filed his subsequent claim.

On appeal, the law firm of Greenberg Traurig, LLP, appears on behalf of employer, asserting that the administrative law judge erred by not finding that liability for benefits in this claim must transfer to the Black Lung Disability Trust Fund. Employer also raises several arguments pertaining to St. Paul's liability. Employer specifically contends that the administrative law judge erred by failing to address whether the Director provided adequate notice of the claim to St. Paul, that the administrative law judge erred when he "implied" that St. Paul had to intervene as a party in order to participate in the case, and that the administrative law judge erred by refusing to hold open the record for other interested "non-parties" to submit a defense to the claim.

Claimant responds, asserting that the brief filed by Greenberg Traurig, LLP, on behalf of "employer" is a guise to further the interests of St. Paul, the actual client of the law firm as established at the hearing. Claimant contends that this appeal should be dismissed for lack of standing by St. Paul to contest the administrative law judge's decision. Claimant argues that, insofar as St. Paul refused to intervene, it cannot be a party to the claim, and therefore claimant asks the Board to either dismiss the appeal or refuse to hear any questions raised relating to whether St. Paul received adequate notice of the claim under 20 C.F.R. §725.407(d). Claimant maintains that that the United States District Court is the proper forum to hear St. Paul's arguments relating to notice of the claim, and that these arguments are only relevant in the event that an enforcement action is filed by the Director pursuant to 20 C.F.R. §725.604. The Director has also filed a brief. The Director asserts that because a surety bond covers employer's liability for benefits, the administrative law judge properly held employer liable for benefits.² Employer has also filed a reply brief.

² The Director, Office of Workers' Compensation Programs (the Director), contends that St. Paul has not been identified as a responsible operator; and therefore, he was under no obligation to employ the responsible operator notification procedures set forth at 20 C.F.R. §725.407 in notifying St. Paul of the claim against employer. Director's Brief at 5. The Director asserts that "although [the Department of Labor] does not generally notify a surety of, or give it an opportunity to participate in, a black lung claim, the Director thought notification prudent in this case since the surety's principal [Horizon] no longer exists, raising the possibility of a default judgment. At least one federal court has held that a surety may not be held liable for a default judgment against its principal where the surety does not receive notice and an opportunity to defend itself." Director's Brief at 5-6. The Director contends that the administrative law judge did not err in refusing to hold the record open post-hearing for further medical development, at

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).

Employer's counsel argues that, insofar as employer is bankrupt and no longer able to pay benefits, the administrative law judge erred by failing to direct the transfer of liability for benefits to the Black Lung Disability Trust Fund in accordance with 20 C.F.R. §725.495(a)(4). We disagree. Section 725.495 sets forth the criteria for determining a responsible operator and states that the responsible operator "shall be the potentially liable operator, as determined in accordance with [Section] 725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). Section 725.494(e) provides that an operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was self-insured, during the period in which the miner was last employed by the operator, and there was a security given by the operator pursuant to 20 C.F.R. §726.104(b) that is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits as awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). In order to qualify as a self-insured operator, the regulations permit the operator to give a security in the form of an indemnity bond with sureties [in an amount] that is satisfactory to the [Office of Workers' Compensation]." *See* 20 C.F.R. §726.104(b).

In this case, the administrative law judge did not specifically address the issue of transfer, although his basis for holding employer liable for benefits is apparent from the record. Applying Sections 725.494(e)(2), 725.495, and 726.104(b), we conclude that the administrative law judge properly deemed employer capable of assuming liability for benefits based on the assurances of the Director that there has been a surety bond posted on behalf of Horizon and its subsidiaries. Furthermore, the administrative law judge's assessment of liability against employer is consistent with the terms of the liquidation trust. By Order dated September 16, 2004, the United States Bankruptcy Court for the Eastern District of Kentucky stated:

Except as otherwise agreed to in writing by the Debtors or the Liquidating Trustee, as applicable, on the Effective Date, all pre-petition lawsuits, litigation, administrative or other proceedings, judicial or administrative, against any of the Debtors, shall be dismissed as to the Debtors; provided

the request of St. Paul's counsel, since St. Paul declined to intervene as a party to the case. Director's Brief at 8.

however, that all claims for benefits under the Black Lung Benefits Act (30 U.S.C. §§901-944) (the “BLBA”) pending as of the Effective Date [of the Horizon Plan, i.e., September 30, 2004] shall not be dismissed but instead, allowed to proceed to final adjudication with the applicable Debtors as parties. Finally adjudicated claims that result in benefit awards will form the basis for collection from any other responsible parties therefor, including without limitation, the Debtors sureties under the BLBA. In the event the sureties’ obligations are exhausted, final benefit awards will mandate payment by the Black Lung Disability Trust Fund. 26 U.S.C. §9501(d).

In re Horizon Natural Resources Co., No. 02-14261, slip op. at 44-45 (Bkr. E.D. KY. Sept. 16, 2004).

Additionally, since employer’s counsel conceded that the administrative law judge was without authority to determine St. Paul’s liability under the surety bond, *see* August 1, 2005 Letter of Appearance, we reject employer’s contention that the administrative law judge erred by not dismissing employer as the responsible operator as such an action would preclude the Department of Labor from exercising its enforcement remedies in district court. While the Black Lung Disability Trust Fund may ultimately be required to pay benefits, the Director must have an award of benefits issued against employer in order to enforce liability on the surety bond. *See* 20 C.F.R. §725.604. Thus, because substantial evidence exists in the record to support a finding that employer is capable of assuming liability for benefits, we reject employer’s assertion that the administrative law judge erred by not transferring liability for benefits to the Black Lung Disability Trust Fund.

The remaining arguments raised by employer pertain to St. Paul’s status as a surety, whether it received adequate notice of the claim, and whether it may be held liable for benefits. We decline to consider these arguments. Pursuant to Section 802.201, only a “party” adversely affected by a decision may file an appeal with the Board. 20 C.F.R. §802.201. In this case, because St. Paul refused to exercise its right to intervene as a party to the case while the case was before the administrative law judge,³ *see* 20 C.F.R.

³ Employer asserts that St. Paul could not have intervened in this case because it does not meet the regulatory definition of a “party.” Employer’s Brief in Support of Petition For Review at 10-11. We reject this assertion. Section 725.360(a)(4), (d) states that any “individual may be made a party [to a claim] if that individual’s rights with respect to benefits may be prejudiced by a decision to be made. 20 C.F.R. §725.360(a)(4), (d). We interpret Section 725.360(a)(4), (d) to entitle a surety to petition to intervene in a black lung case with the rights of a party if the interests of the surety

§725.360(a)(4),(d), and St. Paul has not filed a motion to intervene as a party before the Board pursuant to 20 C.F.R. §802.214(a),⁴ we conclude that St. Paul does not have standing in this appeal to challenge the administrative law judge's award of benefits or his determination that employer is liable for benefits. *See Old Ben Coal Co. v. OWCP [Melvin]*, 476 F.3d 418, 23 BLR 2-424 (7th Cir. 2007). Therefore, we will not consider arguments raised by employer's counsel with regard to St. Paul's potential liability in this claim.

Because no party challenges the administrative law judge's findings on the merits of entitlement, we affirm the administrative law judge's award of benefits. We also affirm his decision to hold employer liable for the payment of benefits to claimant.

may be prejudiced by the outcome of a claim. *See* 20 C.F.R. §725.360(a)(4),(d); *Old Ben Coal Co. v. OWCP [Melvin]*, 476 F.3d 418, 419, 23 BLR 2-424, 2-428 (7th Cir. 2007).

⁴ Section 802.214(a) of the Board's Rules of Practice and Procedure provides that if a legal entity shows in a written petition to intervene that its rights are affected by any proceeding before the Board, the Board may permit that entity to intervene in the proceeding and to participate within the limits prescribed by the Board. 20 C.F.R. §802.214(a).

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge