

BRB No. 09-0165 BLA

CLARICE HOWARD	)	
(Widow of JAMES HOWARD)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	DATE ISSUED: 11/17/2009
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Order of Remand to District Director of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Incorporated), Whitesburg, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky for employer.

Rita Roppolo (Deborah Greenfield, Acting 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 Director, Office of Workers' Compensation Programs (the Director), appeals the Order of Remand to District Director of Administrative Law Judge Larry S. Merck issued on a survivor's claim<sup>1</sup> 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 administrative law judge initially determined, on November 19, 2007, that employer, a subsidiary of Horizon Natural Resources (Horizon), was the designated responsible operator and that no party had challenged claimant's entitlement to benefits. *See* Order Regarding Proper Designation of Responsible Operator and Order of Continuance (Nov. 19, 2007). On October 6, 2008, the administrative law judge issued a second order, finding that employer was bankrupt, and, therefore, it was not capable of assuming liability for the payment of benefits.<sup>2</sup> Order of Remand to the District Director (Oct. 6, 2008). Thus, the administrative law judge ordered that the case be remanded to the district director for payment of benefits from the Black Lung Disability Trust Fund (Trust Fund).

On appeal, the Director contends that the administrative law judge erred in ordering that liability be assessed against the Trust Fund. Claimant and employer have filed response briefs, urging affirmance of the administrative law judge's remand order.<sup>3</sup>

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<sup>1</sup> Claimant filed a survivor's claim for benefits on October 18, 2004. Director's Exhibit 2. In the Notice of Claim issued on August 1, 2005, the district director named employer, a subsidiary of Horizon Natural Resources (Horizon), as a potentially liable operator. The district director noted that Horizon was self-insured under the Act through an indemnity bond issued by Utica Mutual Insurance Company (Utica Mutual). Director's Exhibit 21. Because Horizon was being liquidated under Chapter 7 of the Bankruptcy Code, and was expected to default on any award of benefits issued against it, the district director also issued, on August 1, 2005, a copy of the Notice of Claim to Utica Mutual, advising that, in light of the surety bond issued to employer, it had the right to intervene as a party-in-interest to the claim. *Id.* The district director issued a Proposed Decision and Order awarding benefits on February 23, 2006, finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 35.

<sup>2</sup> The record reflects that employer was originally a subsidiary of A.T. Massey Coal Company. The assets of employer were subsequently sold to Shell Mining, later Zeigler Coal Company and then Horizon. Director's Exhibit 26.

<sup>3</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant is entitled to survivor's benefits, and that employer is the responsible operator pursuant to 20 C.F.R. §725.495(c). *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, the Director argues that, because the administrative law judge found that employer is the responsible operator in his November 19, 2007 Order, the administrative law judge erred in remanding this case for payment of benefits by the Trust Fund. In support of his position, the Director asserts that while employer was liquidated as part of the Horizon bankruptcy proceedings, it is his belief that employer's black lung liabilities are covered by a surety bond issued by Utica Mutual Insurance. Director's Brief at 5-6. The Director maintains that the administrative law judge issued the wrong type of remand order. *Id.* The Director asserts that the claim must be remanded to the district director with instructions that he issue an award of benefits payable by employer, such that the surety bond is enforceable. We agree.

The regulations set forth the criteria for determining a responsible operator. Pursuant to 20 C.F.R. §725.495, 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). The regulation at 20 C.F.R. §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 a 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 Programs]." See 20 C.F.R. §726.104(b).

In his November 19, 2007 Order, the administrative law judge found that employer met the requirements of Sections 725.495(a)(1) and 725.494(e). Because the administrative law judge found that employer was the proper responsible operator and, by

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<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last year of coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

virtue of that designation, that it was able to assume liability for benefits, it was error for the administrative law judge to conclude that benefits must be paid from the Trust Fund.<sup>5</sup> Because employer is the responsible operator, the Director correctly asserts that an award of benefits must run against it.<sup>6</sup> Therefore, we vacate the administrative law judge's remand order and return this case to the administrative law judge for issuance of an award of benefits payable by employer.

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<sup>5</sup> In his Order of Remand, the administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), had not contested the district director's determination that employer/Horizon is bankrupt and unable to pay benefits. Contrary to the administrative law judge's finding, however, the district director, in his February 23, 2006 Proposed Decision and Order Awarding Benefits, did not find that employer/Horizon is unable to pay benefits. Director's Exhibit 35. Rather, the district director specifically found that employer "was bonded by Utica Mutual under a self-insurance program. . . ." and, thus, concluded that employer "is liable for any potential benefits payable to the widow." *Id.*

<sup>6</sup> The administrative law judge correctly observed that he has no jurisdiction to decide whether Utica Mutual is liable under a surety bond. The Board also does not have jurisdiction to decide this issue; therefore, we decline to address employer's arguments with regard to this issue on appeal. We note that the Black Lung Disability Trust Fund (Trust Fund) is currently paying benefits to claimant and, while the Trust Fund may be required to continue such payments in the future, the Director first must have an award of benefits issued against employer in order to enforce liability on the surety bond against Utica Mutual in federal district court. *See* 20 C.F.R. §725.604.

Accordingly, the administrative law judge's Order of Remand to District Director is vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

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