

BRB No. 06-0305 BLA

FRANK M. LEMON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	DATE ISSUED: 10/31/2006
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the August 17, 2005 Order Amending Captions, Staying Proceedings, Denying Limited Appearance Without Prejudice, and Amending Briefing Schedule, the October 21, 2005 Order Denying Reconsideration and Amending Briefing Schedule, and the December 8, 2005 Order Denying Renewed Reconsideration Motion and Extending Briefing Schedule of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Mark E. Solomons and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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.

DOLDER, Chief Administrative Appeals Judge:

The law firm of Greenberg Traurig LLP (the law firm), appeals the August 17, 2005 Order Amending Captions, Staying Proceedings, Denying Limited Appearance Without Prejudice, and Amending Briefing Schedule, the October 21, 2005 Order Denying Reconsideration and Amending Briefing Schedule, and the December 8, 2005 Order Denying Renewed Reconsideration Motion and Extending Briefing Schedule (01-BLA-0884) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) 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 administrative law judge found that the law firm had no authority to represent employer in this case, on the grounds that it failed to submit any documentation authorizing such representation and its client, St. Paul Travelers Companies, Incorporated (St. Paul), failed to intervene as a party in accordance with 20 C.F.R. §725.360.

In support of its appeal, the law firm contends that the administrative law judge erred in denying its appearance of counsel on behalf of employer. Specifically, the law firm argues that the administrative law judge's conclusion, that it cannot represent employer because employer is no longer a legal entity, violates the Order of the United States Bankruptcy Court for the Eastern District of Kentucky (the Bankruptcy Court), which established a Chapter 11 liquidation plan for Horizon Natural Resources Company (HNRC), the parent company of employer.¹ The law firm also argues that the administrative law judge erred when she

¹By 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 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).

required St. Paul to petition to become a party to the claim under 29 C.F.R. §18.10(c) in order to represent employer. Further, the law firm argues that 20 C.F.R. §725.360 does not require that St. Paul intervene in the case in order to defend employer. In addition, the law firm argues that the administrative law judge's requirement that it submit documentation showing its authority to represent employer creates a requirement found nowhere in the Act or regulations. Lastly, the law firm argues that the administrative law judge's orders deprive employer of its due process rights. Claimant responds, urging affirmance of the administrative law judge's orders finding that the law firm is not authorized to represent employer in this case. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Board to reject the law firm's contentions that it is authorized to represent employer in this case.²

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).

The pertinent procedural history of this case is as follows: Claimant filed a claim for benefits on January 14, 1980. On December 23, 1983, Administrative Law Judge Samuel B. Groner issued a Decision and Order Awarding Benefits. In a September 26, 1986 Decision and Order, the Board vacated Judge Groner's award of benefits and remanded the case for further consideration. *Lemon v. Zeigler Coal Co.*, BRB No. 84-0249 BLA (Sept. 26, 1986)(unpub.). On January 12, 1988, Judge Groner issued a Decision and Order on Remand – Awarding Benefits. In a December 14, 1992 Decision and Order, the Board affirmed Judge Groner's award of benefits. *Lemon v. Zeigler Coal Co.*, BRB No. 88-0458 BLA (Dec. 14, 1992)(unpub.). However, in a May 11, 1994 Decision and Order, the United States Court of Appeals for the Seventh Circuit reversed the Board's 1992 Decision and Order and remanded the case for further findings before a different administrative law judge. *Zeigler Coal Co. v. Director, OWCP*, 23 F.3d 1235, 18 BLR 2-279 (7th Cir. 1994). By Order dated September 28, 1994, the Board remanded the case for further proceedings consistent with the Seventh Circuit's opinion. *Lemon v. Zeigler Coal Co.*, BRB No. 88-0458 BLA (Sept. 28, 1994)(unpub.). On remand, the case was reassigned to the administrative law judge, who issued a Decision and Order Granting Benefits on August 15, 2003. In a September 27, 2004 Decision and Order, the Board affirmed in part, and vacated in part, the administrative law judge's 2003 Decision and Order, and remanded the case for further consideration. *Lemon v. Zeigler Coal Co.*, BRB No. 03-0840 BLA (Sept. 27, 2004)(unpub.).

²The law firm of Greenberg Traurig LLP (the law firm) filed a combined brief in reply to the briefs of claimant and the Director, Office of Workers' Compensation Programs, reiterating its prior contentions.

By Order Amending Captions, Staying Proceedings, Denying Limited Appearance Without Prejudice, and Amending Briefing Schedule dated August 17, 2005, the administrative law judge denied the law firm's limited appearance of counsel without prejudice, on the basis that employer cannot be represented if it does not exist. However, the administrative law judge advised the law firm that it could reassert its appearance of counsel with documentation supporting its appointment to represent employer in this case. The administrative law judge also deleted St. Paul as the "Carrier" in the caption of the case. However, the administrative law judge allowed St. Paul fifteen (15) days to submit a petition requesting that it be named as a party to this matter.

By Order Denying Reconsideration and Amending Briefing Schedule dated October 21, 2005, the administrative law judge denied the law firm's request for reconsideration, on the basis that the law firm did not establish its authority to represent employer in this case. The administrative law judge noted that the law firm did not provide the documentation required by her previous order. The administrative law judge further noted that the law firm's motion for reconsideration was deficient because the law firm did not provide a copy of the Bankruptcy Court's Order in *In re Horizon Natural Resources Company*, No. 02-14261 (Bkr. E.D. KY Sept. 16, 2004), that it cited. Hence, the administrative law judge instructed the law firm to provide a copy of the Bankruptcy Court's Order to the administrative law judge, the claimant, and the Director. Lastly, the administrative law judge granted claimant's request for a new briefing schedule.

By Order Denying Renewed Reconsideration Motion and Extending Briefing Schedule dated December 8, 2005, the administrative law judge denied the law firm's renewed motion for reconsideration, on the basis that it had no authority to act on behalf of employer or to dictate the course of these proceedings because its client, St. Paul, failed to intervene as a party in the case, in accordance with 20 C.F.R. §725.360.³ The administrative law judge noted that the law firm provided the Bankruptcy Court's Order along with its renewed motion for reconsideration.

The law firm filed a notice of appeal on December 27, 2005. Claimant filed a Motion to Strike Interlocutory Appeal on January 12, 2006. On February 6, 2006, the Board denied claimant's motion to dismiss the law firm's appeal as interlocutory. *Lemon v. Zeigler Coal Co.*, BRB No. 06-0305 BLA (Feb. 6, 2006)(unpub. order).

On appeal, the law firm contends that the administrative law judge erred in denying its appearance of counsel on behalf of employer. Specifically, the law firm asserts that the

³Administrative Law Judge Pamela Lakes Wood noted that the law firm clarified that it was actually retained by St. Paul Travelers Companies, Incorporated, but argued that the entity that pays the attorney's fees on behalf of employer is irrelevant.

administrative law judge erred in requiring it to submit documentation showing its authority to represent employer because such a requirement is not found in the Act or regulations. The law firm argues that it has satisfied the requirements of Section 725.362 by meeting the criteria of Section 725.363 and stating that it is authorized to represent employer's interests in this case. The Director argues that the administrative law judge acted within her discretion in finding that St. Paul had to demonstrate that it had some authority from employer to hire the law firm as employer's representative in this case. Specifically, the Director asserts that the regulations do not preclude an administrative law judge from looking beyond an attorney's representation when circumstances call that representation into question. The Director's assertion, that the circumstances of this case call into question employer's ability to authorize the law firm to represent it, is premised on the fact that employer's attorney withdrew from the case when employer was liquidated in bankruptcy and it is not now in a position to appoint a new attorney. For the reasons that follow, we find merit to the law firm's argument.

Section 725.362(a) provides that “[e]xcept for the Secretary of Labor, whose interest shall be represented by the Solicitor of Labor or his or her designee, each of the parties may appoint an individual to represent his or her interest in any proceeding for determination of a claim under this part.” 20 C.F.R. §725.362(a). The pertinent regulation also provides that “[s]uch appointment shall be made in writing or on the record at a formal hearing.” *Id.* Further, this regulation provides that “[a]n attorney qualified in accordance with §725.363(a) shall file a written declaration that he or she is authorized to represent a party, or declare his or her representation on the record at a formal hearing.”⁴ *Id.*

However, contrary to the administrative law judge's finding, the pertinent regulation does not require an attorney to file a document that authorizes his or her representation of a party. In her August 17, 2005 Order, the administrative law judge noted, “[b]y letter of May 13, 2005, [the law firm] entered a ‘Limited Appearance of Counsel’ on behalf of the defunct [e]mployer for the limited purpose of contesting the eligibility of the [c]laimant.” August 17, 2005 Order at 2. Consequently, since the law firm has satisfied the criteria set forth in Section 725.362(a) for representing employer, we hold that the administrative law judge erred in denying the law firm's appearance of counsel, on the ground that the law firm failed to submit any documentation authorizing its representation of employer. Thus, we reverse the administrative law judge's finding that the law firm is not authorized to represent employer in this case.

⁴Section 725.363(a) states that “[a]ny attorney in good standing who is admitted to practice before a court of a State, territory, district, or insular possession, or before the Supreme Court of the United States or other Federal court and is not, pursuant to any provision of law, prohibited from acting as a representative, may be appointed as a representative.” 20 C.F.R. §725.363(a).

In light of the foregoing, we reverse the administrative law judge's August 17, 2005, October 21, 2005 and December 8, 2005 orders denying the law firm's appearance of counsel and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reverse the administrative law judge's finding that the law firm of Greenberg Traurig LLP (the law firm) is not authorized to represent employer in this case, on the ground that it failed to submit any documentation authorizing its representation of employer. Although the law firm satisfied the requirements of 20 C.F.R. §725.362(a), I agree with the Director's position that the regulations do not preclude an administrative law judge from looking beyond an attorney's representation when circumstances call that representation into question. Director's Response Brief at 7.

In *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319 (1927), the United States Supreme Court held that a judge has inherent authority to inquire into whether an attorney has been duly authorized to appear on behalf of the purported client. In the instant case, the administrative law judge noted that, subsequent to the September 16, 2004 Order of the United States Bankruptcy Court for the Eastern District of Kentucky, Gary B. Nelson of the law firm of Feirich Mager Green Ryan, the attorney employer appointed to represent it, filed a motion on October 6, 2004 to withdraw as employer's counsel. October 21, 2005 Order at 2. The administrative law judge also noted that employer, as an entity, is defunct and cannot name a representative. August 17, 2005 Order at 2. Consequently, based on the circumstances of this particular case, I would reject the law firm's contention that the administrative law judge erred in requiring it to submit documentation showing its authority to represent employer on the ground that such a requirement is not found in the Act or

regulations. Thus, I would affirm the administrative law judge's August 17, 2005, October 21, 2005 and December 8, 2005 orders denying the law firm's appearance of counsel.

BETTY JEAN HALL
Administrative Appeals Judge