

BRB No. 11-0111 BLA

CLARICE HOWARD)	
(Widow of JAMES HOWARD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WOLF CREEK COLLIERIES)	DATE ISSUED: 10/24/2011
)	
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 on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly, PLLC), Lexington, Kentucky, for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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:

Employer appeals the Decision and Order on Remand – Award of Benefits (06-BLA-5750) of Administrative Law Judge Larry S. Merck rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case is before the Board for the second

time, on the issue of the identification of the party responsible for payment of survivor's benefits. The administrative law judge initially determined, on November 19, 2007, that employer, a subsidiary of Horizon Natural Resources (Horizon),¹ met the requirements of Sections 725.495(a)(1) and 725.494(e) as the designated responsible operator herein, and that no party had challenged claimant's entitlement to benefits. *See* Order Regarding Proper Designation of Responsible Operator and Order of Continuance, dated November 19, 2007 (2007 Order). On October 6, 2008, the administrative law judge issued a second order, finding that because employer was bankrupt, employer was not capable of assuming liability for the payment of benefits. 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). *See* Order of Remand to the District Director, dated October 6, 2008 (2008 Order).

The Director, Office of Workers' Compensation Programs (the Director), appealed the 2008 Order, arguing that because the 2007 Order identified employer as the responsible operator, the administrative law judge erred in remanding this case for payment of benefits by the Trust Fund. The Director maintained that, although employer was liquidated as part of the Horizon bankruptcy proceedings, employer was a self-insured operator whose black lung liabilities were guaranteed through a surety bond issued to A.T. Massey Coal Company (Massey) by Utica Mutual Insurance Company (Utica Mutual). Thus, the Director asserted that an award of benefits payable by employer must issue, such that the surety bond is enforceable.

Because the administrative law judge's 2007 Order found that employer met the requirements of Sections 725.495(a)(1) and 725.494(e), and was therefore the proper responsible operator,² the Board held that it was error for the administrative law judge to

¹ The record reflects that employer was originally a subsidiary of A.T. Massey Coal Company (Massey). The assets of employer were subsequently sold to Shell Mining, later Zeigler Coal Company, and then to Horizon Natural Resources (Horizon). Director's Exhibit 26.

² The regulations provide that, 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.

conclude, in his 2008 Order, that benefits must be paid from the Trust Fund.³ Since the administrative law judge found that employer was the responsible operator and, by virtue of that designation, was able to assume liability for benefits, the Board agreed with the Director's position that the award of benefits must run against employer, so that the surety bond may be enforced in federal court proceedings pursuant to 20 C.F.R. §725.604.⁴ Consequently, the Board vacated, in part, the 2008 Order, and remanded the case to the administrative law judge for the issuance of an award of benefits payable by employer.⁵ *Howard v. Wolf Creek Collieries*, BRB No. 09-0165 BLA (Nov. 17, 2009) (unpub). Subsequently, by Decision and Order on Remand issued on September 2, 2010, the administrative law judge ordered employer to pay benefits on the claim.

In the present appeal, employer maintains that liability for payment of benefits must be assessed against the Trust Fund. Claimant has declined to file a brief in this appeal. The Director responds in support of the administrative law judge's decision.

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).

³ By way of clarification, the Board noted that the administrative law judge had incorrectly found, in his October 6, 2008 Order of Remand (2008 Order), that the Director, Office of Workers' Compensation Programs, had not contested the district director's determination that employer/Horizon is bankrupt and unable to pay benefits. The Board held that the district director's February 23, 2006 Proposed Decision and Order Awarding Benefits *did not* find that employer/Horizon is unable to pay benefits. 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." Director's Exhibit 35; *Howard v. Wolf Creek Collieries*, BRB No. 09-0165 BLA, slip op. at 4 n.5 (Nov. 17, 2009)(unpub.).

⁴ Additionally, the Board held that it lacked jurisdiction to determine Utica Mutual's liability for payment of benefits under the surety bond. *Howard*, slip op. at 4 n.6.

⁵ The Board affirmed, as unchallenged 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). *Howard*, slip op. at 2 n.3; *see 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.⁶ 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).

Employer argues that the Director's failure to appeal the administrative law judge's 2007 Order, finding that employer was the responsible operator and that neither Massey nor Utica Mutual was a party to this claim, renders the 2007 Order a final judgment relieving Massey and Utica Mutual of any and all liability.⁷ Employer maintains that the Director is foreclosed from filing an enforcement action against Massey or its surety in federal district court, as "[t]his would be a fundamental denial of due process because neither were parties to the claim nor have they defended the claim on the merits." Employer's Brief at 8. Thus, employer asserts that the Trust Fund is liable for payment of benefits, due to the Director's failure to provide proper notice of the claim to employer's surety. Employer's arguments are without merit.

While there is no requirement that sureties be named as parties to a claim, the Director correctly notes that a surety may be made a party to a black lung proceeding if it demonstrates that its rights may be prejudiced by the decision to be made. 20 C.F.R. §725.360(a), (d); *see Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418, 420, 23 BLR 2-424 (7th Cir. 2007); Director's Brief at 3. In the present case, Utica Mutual was apprised, in writing, of its right to intervene as a party-in-interest to this claim, and it chose not to do so. *See* Director's Exhibit 21.⁸ Where, as here, the surety declined to

⁶ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

⁷ Employer incorrectly asserts that the administrative law judge "properly dismissed" Massey and Utica Mutual as parties to this claim, Employer's Brief at 7, when, in fact, the record reflects that neither entity was ever made a party to the claim. The administrative law judge properly acknowledged that Massey and Utica Mutual were not parties to the claim, and that the issue of their liability for payment of benefits was not before him. 2007 Order at 10.

⁸ Any entity that would be prejudiced by an award of black lung benefits is entitled to intervene in the administrative proceeding, or before the Board, with the rights of a party, *Old Ben Coal Co. v. Director, OWCP [Melvin]*, 476 F.3d 418, 420, 23 BLR 2-428, 2-424 (7th Cir. 2007), *see* 20 C.F.R. §725.360(a)(4), (d), and can also seek intervention in the circuit court. *Id.*; Fed. R. App. 15(d). In the instant case, employer's

exercise its opportunity to intervene as a party while the case was before the administrative law judge, *see* 20 C.F.R. §725.360(a)(4),(d), and has not filed a motion to intervene as a party before the Board pursuant to 20 C.F.R. §802.214(a),⁹ the surety does not have standing to challenge the administrative law judge's award of benefits or his determination that employer is liable for benefits. *See* 20 C.F.R. §802.201. Because the Board previously directed the administrative law judge, on remand, to issue an award of benefits payable by employer as the properly designated responsible operator herein, and as no exception to the law of the case doctrine has been demonstrated, we affirm the administrative law judge's finding that employer is liable for payment of benefits to claimant. *See Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003).

surety was afforded the opportunity to intervene as a party-in-interest pursuant to Section 725.360(a)(4), (d), by the District Director's letter of August 1, 2005, referencing the indemnity bond issued by Utica Mutual. *See* 2007 Order at 2. Therefore, in accordance with 20 C.F.R. §§725.360(a), (d), 725.407, 802.214(a), and *Zeigler Coal Co. v. Director, OWCP [Griskell]*, 490 F.3d 609, 610, 24 BLR 2-38, 2-41 n.1 (7th Cir. 2007), employer's surety was on notice that intervention was necessary to protect its interests.

⁹ 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 administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge