BRB No. 99-0121 BLA

ROGER D. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE SIX CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
CONTRACTING ENTERPRISES	)	DATE ISSUED: 10/28/99
	)	
and	)	
	)	
BIG SIX CORPORATION	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Adopting District Director's Award of Benefits and Order Denying Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe (Wolfe & Farmer), Norton, Virginia, for claimant.

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; 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:

Little Six Corporation (Little Six) appeals the Decision and Order Adopting District Director's Award of Benefits and Order Denying Motion for Reconsideration (98-BLA-0064) of Administrative Law Judge Daniel F. Sutton with respect to 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 relevant procedural history of this case is as follows: Claimant, a living miner, filed an application for benefits on September 28, 1992. Director's Exhibit 1. The district director made an initial determination that claimant was eligible for benefits and that Little Six was the operator responsible for payment.[1] Notice of this initial finding was served upon Little Six and its insurer, the Rockwood Insurance Company (Rockwood) in care of the Virginia Property and Casualty Insurance Guarantee Association (VPCIGA), on March 29, 1993. Director's Exhibit 27. Neither Little Six, Rockwood, nor VPCIGA responded to the notice of initial finding. On May 14, 1993, the district director issued an award of benefits in claimant's favor and identified Little Six as the responsible operator, indicating that Little Six's failure to respond to the notice of initial finding constituted an acceptance of liability. Director's Exhibit 28. Notification of the award of benefits and a

[1]Claimant worked for Marty Corporation, the operator of a strip mine, from April 1965 to March 1971. Director's Exhibit 2. Claimant's next coal mine employment was for Big Six Corporation from March 1971 to August 1974. *Id.*. Claimant subsequently worked at a strip mine operated by Contracting Enterprises from August 1974 to June 1978. *Id.*. Claimant was employed by Little Six from June 1978 to March 1988. *Id.*. Claimant also worked for Black Mountain Enterprises from August 1988 to February 1989. *Id.*.

letter instructing Little Six to begin benefit payments was served upon Little Six and Rockwood, care of VPCIGA. *Id.*.

After receiving no response from Little Six or its insurer, the district director initiated interim payments from the Black Lung Disability Trust Fund. Director's Exhibit 29. On June 28, 1993, a claims examiner noted in the case file that a representative of VPCIGA indicated that the claim was time-barred because VPCIGA did not receive notice within one year following the issuance of an Order of Insolvency deeming Rockwood unable to meet its contractual obligations. The district director took no further action until February 16, 1996, when it issued a Notice of Initial Finding in which Marty Corporation (Marty) was identified as a potential responsible operator. Director's Exhibit 32. The district director also informed Little Six that it could still be held liable for the payment of benefits even if its insurance company was unwilling or unable to indemnify it. Director's Exhibit 33.

Marty timely filed a notice of controversion in which it contested its designation as a potential responsible operator. Director's Exhibit 37. The district director referred the case to the Office of Administrative Law Judges (OALJ) for a hearing, indicating that the sole issue for determination concerned VPCIGA's assertion that the claim was time-barred. Director's Exhibit 34. Marty then filed a motion requesting that the case be remanded to the district director for the development of evidence concerning employers for whom claimant worked subsequent to his tenure with Marty. Director's Exhibit 38. On May 9, 1996, Administrative Law Judge Jeffrey Tureck granted Marty's motion. On remand, the district director issued additional notices of initial finding in which Contracting Enterprises and Big Six Corporation (Big Six), both insured by Liberty Mutual Insurance Company, were identified as potential responsible operators. Director's Exhibits 44, 45. The district director then transferred the case to the OALJ for a hearing.

On February 11, 1997, the district director requested that the case be remanded again to cure a possible defect in service of the notices of initial finding to Contracting Enterprises and Big Six. Administrative Law Judge Pamela Lakes Wood canceled the scheduled hearing and directed the parties to draft a proposed order of remand. In an Order dated May 5, 1997, Judge Wood adopted the parties' proposed order and remanded the case to the district director in order to resolve the issue of insurance coverage for the named responsible operators. On remand, the district director issued notices of initial finding naming Contracting Enterprises and Big Six as responsible operators. Director's Exhibits 70, 71. The district director also asked Little Six to verify the exact dates of claimant's employment and to provide information concerning the insurance policies in effect during claimant's tenure. Director's Exhibit 73. Little Six responded on July 29, 1997 and stated that it had moved to a new office in October 1992 and could not locate the records pertaining to claimant or to its insurance coverage for the period from 1971 through 1988. Director's Exhibit 77. Liberty Mutual informed the district director that it insured Big Six from August 1, 1974 through August

1, 1975, Contracting Enterprises from August 1, 1977 through August 1, 1978, and Little Six from 1989 through August 1, 1994. Director's Exhibit 78. Based on this information, the district director dismissed Marty as a putative responsible operator. Director's Exhibit 79. The district director notified the remaining parties that Little Six was the primary responsible operator but that Contracting Enterprises and Big Six were named as additional responsible operators should it be determined that Little Six or Rockwood were incapable of assuming liability. Director's Exhibit 80. The district director then transferred the case to the OALJ for a hearing.

The case was assigned to Administrative Law Judge Daniel F. Sutton (the administrative law judge) who notified the parties that a hearing was scheduled for February 23, 1998. At the request of Contracting Enterprises and Liberty Mutual, the administrative law judge issued an Order to Show Cause why Contracting Enterprises and Liberty Mutual should not be dismissed as parties to the case. Inasmuch as none of the remaining parties responded, the administrative law judge issued an Order on January 6, 1998 in which he dismissed Contracting Enterprises and Liberty Mutual. The Director, Office of Workers' Compensation Programs (the Director), asked the administrative law judge to reconsider his Order on the ground that he failed to consider the Director's letters in response to the request for dismissal and the Order to Show Cause. The administrative law judge granted the Director's motion in an Order dated January 15, 1998 and vacated his Order dismissing Contracting Enterprises and Liberty Mutual.

The hearing was held on February 23, 1998. Claimant appeared with counsel and appearances were made on behalf of Contracting Enterprises, Liberty Mutual, Big Six and the Director. Evidence was admitted concerning the merits of entitlement and the responsible operator issue and claimant testified as to his history of coal mine employment and his physical condition. On May 19, 1998, the administrative law judge issued an Order in which he gave Little Six, Rockwood, and VPCIGA fifteen days to show cause why they should not be found in default and why the other named responsible operators should not be dismissed. The Director, Contracting Enterprises, and Big Six responded, essentially concurring in the position that Little Six is the properly designated responsible operator.

In his Decision and Order, the administrative law judge determined that the district director acted properly in issuing the award of benefits on May 14, 1993 and in treating Little Six's failure to respond to the notice of initial finding as an acceptance of liability. The administrative law judge further found that Little Six did not demonstrate good cause for its failure to respond to the notice of initial finding and, therefore, waived its right to contest the claim. The administrative law judge also adopted the district director's award of benefits and dismissed Contracting Enterprises and Big Six as potential responsible operators. Little Six filed a Motion for Reconsideration which the administrative law judge denied, stating that even if Little Six did not receive notice of the hearing in this case, its failure to timely respond to the March 1993 Notice of Initial

Finding rendered Little Six liable for benefits. Little Six contends on appeal that the administrative law judge erred in determining that good cause did not exist for its failure to respond to the May 1992 Notice of Initial Finding. Little Six further requests that the Board remand the present case to the district director for reconsideration of the issue of good cause. The Director has responded and has no objection to Little Six's remand request. The Director maintains, however, that Little Six's assertion that Contracting Enterprises, Big Six, and Liberty Mutual are no longer parties to the claim is incorrect. Claimant has responded in opposition to Little Six's contention that remand is required. Contracting Enterprises, Big Six, and Liberty Mutual have not filed response briefs in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Pursuant to 20 C.F.R. §725.413, an operator who has received notification of an initial finding of entitlement has thirty days within which to respond. 20 C.F.R. §725.413(a). If the operator does not respond, the operator is deemed to have waived the right to contest the claim, unless the operator's failure to respond is excused for good cause shown. 20 C.F.R. §725.413(b)(3). In the present case, Little Six maintains that inasmuch as it did not know that Rockwood was assigning claims to VPCIGA at the time that the district director issued the Notice of Initial Finding, good cause existed for its failure to respond. In support of its contention that due process requires that the case be remanded, Little Six notes that the district director apparently was aware of a potential problem with Rockwood's solvency as early as October 1992, as evidenced by the presence in the record of a document produced at the district director's request which indicated that the "Pennsylvania insurance department has placed Rockwood Insurance Company in liquidation as of August 26, 1991."[2] Director's Exhibit 9. Little Six contends that neither Rockwood nor the district director ever notified it of Rockwood's financial difficulties and that it did not become aware that Rockwood was insolvent until VPCIGA responded to the administrative law judge's May 1998 Order to Show Cause by stating that any claim relating to the award of benefits was time-barred.

Little Six's contentions are without merit, as the administrative law judge acted within the broad discretion granted him in resolving procedural issues in finding that:

> The failure of [Little Six, Rockwood, and VPCIGA] to take any action to defend against this claim for more than five years, despite being served with dozens of papers reflecting that the District Director had determined that Little Six is liable as the responsible operator for the Claimant's

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[2]Claimant's employment with Little Six occurred in Virginia. Director's Exhibit 9.

benefits, forecloses any possibility that good cause existed for their failure to respond to the notification of initial finding.

Decision and Order at 8; *see Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986). Support for the administrative law judge's determination is found in the fact that Little Six was served with numerous documents indicating that it and/or its insurer was liable for the payment of benefits because no response was received to the Notice of Initial Finding, but never inquired as to the status of Rockwood's defense of the claim and did not attempt to contest the claim on its own until after the issuance of the administrative law judge's Decision and Order. Moreover, the length of time that elapsed after the Notice of Initial Finding and the district director's continued service upon Little Six renders invalid Little Six's argument that it was reasonable to assume that Rockwood was satisfying its contractual obligations. We affirm, therefore, the administrative law judge's determination that, pursuant to Section 725.413(b)(3), Little Six is the operator responsible for the payment of benefits. *See Clark*, *supra*; *Kincell*, *supra*.

Thus, we must also reject Little Six's assertion that the administrative law judge erred by not rendering findings on the merits in the present case. Due to Little Six's failure to establish good cause for its lack of timely response to the Notice of Initial Finding and subsequent documents served upon it by the district director, Little Six was deemed to have accepted the district director's initial finding of entitlement. 20 C.F.R. §725.413(b)(3). In addition, Little Six deprived itself of the opportunity to raise issues or present evidence contrary to the district director's determinations. *Id.*. Finally, Little Six waived its right to contest the claim. *Id.*. Accordingly, the administrative law judge did not err by adopting the district director's award of benefits without considering the merits of entitlement.

Turning to the issue of the administrative law judge's dismissal of Big Six and Contracting Enterprises from the present case, the Director's asserts that these parties remain potentially liable as prior responsible operators until it is finally determined that Little Six is the operator responsible for payment of benefits in this claim. We hold that the administrative law judge's dismissal of Big Six and Contracting Enterprises was rational and forecloses the possibility that these parties can be held responsible for the payment of benefits to claimant if Little Six is unable to pay. A formal hearing on the merits of the claim has been held and benefits have been awarded. Although the administrative law judge did not premise the award of benefits upon findings on the merits, he properly determined that absent a finding of good cause for Little Six's failure to respond to the Notice of Initial Finding, Little Six is the properly designated responsible operator under the terms of both Section 725.413(b)(3) and 20 C.F.R. §725.492(a)(1)-(4), which sets forth the factors governing identification of the responsible operator. Decision and Order at 8, 9 n.9. Regarding whether Little Six is able to make payments to claimant, the administrative law judge indicated correctly that "there is no evidence that Little Six is not capable of assuming liability for the Claimant's

continuing benefits payments pursuant to any of the means enumerated in 20 C.F.R. §725.492(a)(4)." Decision and Order at 9. Moreover, the Director stated in his post-hearing filing that there is evidence indicating that Little Six is "still in business" and asserted that Little Six is the responsible operator. Finally, although the Director responded to the administrative law judge's post-hearing Order to Show Cause why Little Six, Rockwood, and VPCIGA should not be held liable for the payment of benefits to claimant and why Big Six and Contracting Enterprises should not be dismissed as parties to the claim, the Director did not oppose either portion of the administrative law judge's Order.

In light of these facts, we hold that to permit the Director to seek payment from a prior operator, should Little Six be found incapable of meeting its obligation some time in the future, would run afoul of the concerns expressed in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), regarding piecemeal litigation and potential unfairness to a claimant in receipt of an award of benefits. *See Crabtree*, *supra*; *see also Beckett v. Raven Smokeless Coal Co.*, 14 BLR 1-43 (1990); *Sisko v. Helen Mining Co.*, 8 BLR 1-272 (1985). Although there are circumstances present in this case that distinguish it from *Crabtree* and its progeny, we affirm the administrative law judge's dismissal of Big Six and Contracting Enterprises as potential responsible operators due to the district director's failure to ascertain whether Little Six is capable of assuming liability for the payment of benefits when it had reason to suspect that it no longer had viable insurance coverage, *see* 20 C.F.R. §725.412(a), and in light of the Director's failure to oppose the portion of the administrative law judge's Order to Show Cause pertaining to the dismissal of the prior employers.[3] We affirm, therefore, the administrative law judge's dismissal of Big Six and Contracting Enterprises as parties to the present claim. *See Sisko*, *supra*; *Crabtree*, *supra*.

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[3]Unlike the situation in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), in the present case, the Director, Office of Workers' Compensation Programs, would be pursuing prior operators who received notice of the claim and the initial finding of entitlement, had the opportunity to develop evidence in response to claimant's submissions, and appeared at a hearing on the merits of entitlement. In addition, the award of benefits in the present claim was not based upon findings on the merits.

Accordingly, the administrative law judge's Decision and Order Adopting the District Director's Award of Benefits and Order Denying Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMTIH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge