BRB No. 06-0570 BLA

NORMA A. OLENICK (Widow of NICHOLAS OLENICK) Claimant-Respondent v. OLENICK BROTHERS COAL COMPANY and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2007 DECISION and ORDER

Appeal of the Decision and Order Denying Carrier's Motion to Dismiss and the Decision and Order – Award of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein and Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for carrier.

Michelle S. Gerdano (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 Appeal Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Decision and Order Denying Carrier's Motion to Dismiss and the Decision and Order – Award of Benefits (04-BLA-6585) of Administrative Law Judge Ralph A. Romano on both a miner's claim and a survivor's 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).[1] In the Decision and Order Denying Carrier's Motion to Dismiss, the administrative law judge found that carrier is liable for the payment of benefits as the insurer of employer.[2] Further, in the Decision and Order – Award of Benefits, the administrative law judge credited the miner with twenty years of coal mine employment and adjudicated both claims pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the evidence sufficient to establish the presence of complicated pneumoconiosis and thereby sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. 718.304. The administrative law judge also found the evidence sufficient to establish that the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, the administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. 718.304. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, carrier challenges the administrative law judge's finding that it is the responsible carrier in this case. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that carrier was properly named as the responsible carrier in this case. Carrier filed a brief in reply to the Director's response brief, reiterating its prior contentions. Neither claimant nor employer has filed a brief in this appeal.[3]

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[1] The miner filed a claim on November 21, 2002. Director's Exhibit 2. However, the miner died on August 4, 2003 while his claim was pending before the district director. Director's Exhibit 30. Claimant filed a survivor's claim on September 24, 2003. Director's Exhibit 29.

[2] The Board previously dismissed employer's appeal of the administrative law judge's Decision and Order Denying Carrier's Motion to Dismiss on the ground that it was interlocutory. *Olenick v. Olenick Brothers Coal Co.*, BRB No. 05-0502 (April 29, 2005) (unpub.).

[3] Carrier does not challenge the administrative law judge's findings that the

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 evidence relevant to the identification of the responsible carrier is as follows: On his claim application form, signed on November 18, 2002, the miner indicated that he stopped working in or around coal mines "about 1999 (self employed)." Director's Exhibit 2. On the Employment History DOL Form CM-911, signed on December 23, 2002, the miner reported that he stopped working for employer in 1997. Director's Exhibit 3. Records from the Social Security Administration covering the miner's employment from January of 1948 through December of 2000, indicate no earnings for the miner after 1997.[4] Director's Exhibit 7. A computer printout from the Department of Labor (DOL) with carrier's identification number NR092, indicates that employer was insured by carrier from January 1, 1986 through January 1, 1999. The printout also identifies policy numbers for three distinct periods of coverage: WC579083 for January 1, 1998 to January 1, 1999; WC571823 for January 1, 1997 to January 1, 1998; and WC565276 for January 1, 1996 to January 1, 1997. Director's Exhibits 13, 34.

Exhibits A-D were attached to carrier's Motion to Dismiss. Exhibit A is a document on carrier's letterhead that is titled "Master File Policy Profile" and is dated January 3, 2003. This document notes that the employer was insured by carrier, describes the calculations for the premium and fees for the insurance coverage from January 1, 1997 to January 1, 1998, and lists the policy number as WC0571823. After identifying the insured as a partnership, the document also lists the "previous" policy number as WC 0565276 and the "next" policy number as WC 0579083.

Exhibit B is a September 26, 2003 letter from carrier's claims specialist, Janice Gauntz, stating that the miner's co-worker, Leo Kolenick, Jr., indicated in a September 9, 2003 interview that the miner was still working at the mine site of employer in August

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evidence established invocation of the irrebuttable presumptions of total disability and death due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and that the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. These findings and the awards of benefits are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The miner's federal tax returns from 1991 to 1997 are also of record. Director's Exhibit 6.

1998, when Mr. Kolenick left that employment due to a shoulder injury. Ms. Gauntz also stated that "[t]his is clearly past the date of last exposure as reported by [the miner]; in addition, this is past our policy period that ended with non-renewal on Jan. 1, 1998." Ms. Gauntz further stated that the non-renewal "was due to [the miner] alleging that they had no employees after that time."

Exhibit C is the transcript of a September 9, 2003 interview of Mr. Kolenick, in which he stated that the miner was dismantling equipment at employer's mine site when Mr. Kolenick's employment ended in August 1998. Lastly, Exhibit D is a September 9, 2004 letter from claimant's counsel, indicating that claimant did not disagree with Mr. Kolenick's statement that the miner was still doing reclamation work at the end of 1998, but that claimant believed that the miner's reclamation work ended sometime in 1999.

The administrative law judge excluded Exhibits B-D as inadmissible hearsay and, placing the burden of proof on carrier as the proponent of the Motion to Dismiss, determined that carrier failed to affirmatively establish that it was not employer's insurer at the time that the miner ceased his coal mine employment. Decision and Order Denying Carrier's Motion to Dismiss at 4 The administrative law judge concluded, therefore, that carrier was liable for the payment of benefits pursuant to 20 C.F.R. §726.203(a). *Id*. Carrier asserts that the administrative law judge erred in failing to find that its insurance coverage of employer ended on January 1, 1998, before the miner's employment with the employer ceased. Carrier also argues that remand for reconsideration of the evidence is required, as the administrative law judge erred in excluding Exhibits B-D from the record. These contentions are without merit.

Pursuant to 20 C.F.R. §§726.203(a) and 726.207, a carrier is liable for the payment of benefits if it was the employer's insurer when the miner was last exposed to coal dust. 20 C.F.R. §§726.203(a), 726.207. In the present case, the administrative law judge rationally found that Exhibit A, carrier's "Master Policy Profile," when read in conjunction with the DOL printout, supports a finding that carrier was employer's insurer when the miner stopped engaging in coal mine employment. Exhibit A indicates that the policy number WC 0571823, which covered the period from January 1, 1997 to January 1, 1998, was audited on February 13, 1998. In addition to listing policy number WC0571823 for the audit year of 1998 that covered the period of 1997 to 1998, Exhibit A lists policy number WC0565276 for the "previous" year and policy number WC0579083 for the "next" year, implying that carrier's coverage of employer continued beyond 1998. Employer's Exhibit 2. Further, as argued by the Director, Exhibit A corroborates the DOL printout indicating that carrier's insurance coverage extended to January 1, 1999, as it tracks the same policy numbers that appear on the DOL printout. Thus, the administrative law judge reasonably found that carrier insured employer after January 1, 1998. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

In addition, the administrative law judge reasonably found that the evidence upon which the Director relied – Social Security Administration records and federal income tax returns – supports a determination that the miner did not work for employer after the end date of carrier's insurance coverage on January 1, 1999. Decision and Order Denying Carrier's Motion to Dismiss at 4; Director's Exhibits 6, 7. In this regard, the administrative law judge acted within his discretion in finding that claimant's testimony regarding when the miner's tenure with employer ended is unreliable. The administrative law judge stated that "[claimant] demonstrated trouble remembering and admitted that her testimony indicating that her husband had worked through 1999 was at least in part a result of her nephew telling her so." Decision and Order Denying Carrier's Motion to Dismiss at 4. Thus, the administrative law judge acted within his discretion in finding that claimant's testimony does not support a finding that the miner's tenure with employer went beyond the term of carrier's coverage of employer. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Next, we address carrier's assertion that the administrative law judge erred in excluding the majority of its evidence from the record on the basis that this evidence constitutes hearsay. The administrative law judge specifically stated:

> Exhibit B, the September 26, 2003 letter from the claims specialist to [c]arrier's counsel, does not prove that [c]arrier did not insure the [r]esponsible [o]perator beyond January 1, 1998, because that letter is "self-serving hearsay," as the Director clearly labels it. (DB at 5). It is excluded for that reason.
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> Exhibit C is a transcript of an interview of a former employee of the [r]esponsible [o]perator's. Director was not present and had no opportunity to cross-examine this witness. In addition, the testimony was not sworn. Because I find this exhibit to be inadmissible hearsay, I will not consider it in reaching my decision. Exhibit D, which is a letter from [c]laimant's counsel to [c]arrier's counsel recounting a conversation that occurred between [c]laimant and counsel, is also excluded because it too is inadmissible hearsay.

Decision and Order Denying Carrier's Motion to Dismiss at 4. Contrary to the administrative law judge's findings, hearsay evidence is admissible, as the Federal Rules of Evidence do not apply in administrative proceedings under the Act. *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). Nonetheless, because we agree with the Director that Exhibits B-D are insufficient, as a matter of law, to establish that the miner worked

for employer after its coverage with carrier expired, we hold that any error by the administrative law judge in excluding Exhibits B-D from the record on the basis that this evidence is inadmissible hearsay is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In Exhibit B, carrier's claims examiner set forth Mr. Kolenick's statement, which appears in Exhibit C, that the miner was still working for employer in August 1998 when Mr. Kolenick ceased working for employer. However, there is no indication by Mr. Kolenick or carrier's claims examiner that the miner continued working for employer after January 1, 1999 – the last date on which the evidence establishes that carrier insured employer. Further, while carrier's claims examiner stated, in Exhibit B, that carrier's insurance of employer, under policy number WC0571823, ended with non-renewal on January 1, 1998, due to employer's allegation that it had no employees after that time, this evidence does not prove that carrier did not subsequently insure employer. As the administrative law judge rationally found, the documentary evidence of record establishes that carrier insured employer from January 1, 1998 to January 1, 1999 under policy number WC0579083. Carrier's claims examiner's statement in Exhibit B relates only to carrier's insurance coverage of employer under the policy for the period from January 1, 1997 to January 1, 1998, and does not rule out any subsequent coverage of employer by carrier. Finally, we hold that any error by the administrative law judge in excluding Exhibit D, a letter in which claimant's counsel reported that claimant believed that the miner's work for employer ended in 1999, is harmless. As indicated, the administrative law judge rationally found that claimant's recollections regarding the end date of the miner's coal mine employment are unreliable. *Lafferty*, 12 BLR at 1-192.

In view of the foregoing, we affirm the administrative law judge's finding that carrier is liable for the payment of benefits in this case as the properly named responsible carrier.[5]

[5] The administrative law judge found that carrier did not accept liability or waive its right to contest its liability in this case on the basis that the issue was not raised before the district director. Decision and Order Denying Carrier's Motion to Dismiss at 2-3. The Director, Office of Workers' Compensation Programs, notes his disagreement with the administrative law judge's finding that the applicable regulations do not require carrier to submit its liability evidence to the district director in the first instance. In view of our affirmance of the administrative law judge's finding that carrier is the properly named responsible carrier, we need not address this issue.

Accordingly, the administrative law judge's Decision and Order Denying Carrier's Motion to Dismiss and the Decision and Order – Award of Benefits are affirmed.

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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JUDITH S. BOGGS
Administrative Appeals Judge