U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0174 BLA
and 18-0174 BLA-A

GREGORY H. MINIARD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED, self-insured through SUN COAL COMPANY	)	DATE ISSUED: 08/30/2019
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Gregory H. Miniard, Hazard, Kentucky.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,[1] without the assistance of counsel,[2] and employer cross-appeals, the Decision and Order Denying Benefits (2016-BLA-05329) of Administrative Law Judge Richard M. Clark, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on April 21, 2014.

The administrative law judge credited claimant with one year and one and one-half months of underground coal mine employment.[3] Because claimant did not have at least fifteen years of coal mine employment, the administrative law judge found he could not invoke the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2012). He also found that because the record

[1] By correspondence dated July 25, 2019, the Board informed claimant that a recent Supreme Court decision, *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018), may apply to his case. The Board indicated that it would only consider whether the *Lucia* decision applies to this case if claimant responded to the Board and requested that it do so. Claimant did not respond.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Napier is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or

lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Considering whether claimant could establish entitlement to benefits without the aid of these presumptions, the administrative law judge found that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[5] and denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief to claimant's appeal. Employer filed a cross-appeal challenging the administrative law judge's finding that it is the responsible operator. The Director responds in support of the administrative law judge's finding that employer is the responsible operator. Employer filed a reply brief reiterating its contentions on cross-appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the decision if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Section 411(c)(3) Presumption - Complicated Pneumoconiosis

The record contains no evidence that claimant has complicated pneumoconiosis. We therefore affirm the administrative law judge's finding that claimant failed to invoke the irrebuttable presumption of total disability due to pneumoconiosis. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 10 n.11.

II. The Section 411(c)(4) presumption - Length of Coal Mine Employment

Claimant bears the burden of proof to establish the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will

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pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[5] The administrative law judge did not address whether claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered claimant's Social Security Administration (SSA) earnings records, and deposition and hearing testimony. Decision and Order at 3-9. During the hearing, claimant alleged thirty-seven years of coal mine employment. Hearing Transcript at 14.

Based on the SSA earnings records, the administrative law judge found that claimant had one year and one and one-half months of coal mine employment with Shamrock Coal Company working as an underground miner from January 1990 to January 1992. Decision and Order at 7-9; Director's Exhibit 3. He then noted that claimant alleged an additional thirty-three years and seven months of coal mine employment from October 1975 to January 1990 as a coal lab technician[6] for Aceco, Inc.,[7] Ekenco, Inc., Coal-Fields Testing & Engineering, and HCI-Hall, Inc., and then again from January 1992 to May 2011 doing the same work for M&E Enterprises.[8] Decision and Order at 6-9; Director's Exhibits 3, 5. Applying the situs-function test adopted by the United States Court of Appeals for the Sixth Circuit, the administrative law judge evaluated whether claimant's employment from October 1975 to May 2011 as a lab technician constituted coal mine employment. Decision and Order at 6-9, *citing Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014) (to satisfy the situs-function test, a miner must have worked in or around a coal mine or coal preparation facility, and done work necessary to the extraction or preparation of coal).

The administrative law judge found that claimant's employment as a coal lab technician failed to meet the situs requirement. Decision and Order at 7-9. In making this

[6] On form CM-913, claimant stated that he worked as a coal lab technician. Director's Exhibit 4. On form CM-911a, claimant stated that he worked as a coal crusher, coal sampler, and coal preparer. Director's Exhibit 3.

[7] The hearing transcript incorrectly identifies this company as "Ace Coal Company." Hearing Transcript at 18. Claimant's employment history forms and Social Security Administration earnings records indicate that he worked for "Aceco, Inc." during this time. Director's Exhibits 5, 6.

[8] Claimant indicated that he worked from October 1975 to March 1977 for Aceco, Inc., from March 1977 to March 1981 for Ekenco, Inc., from March 1981 to September 1982 for Coal-Fields Testing & Engineering, from September 1982 to December 1989 for HCI-Hall, Inc., and from January 1992 to May 2011 for M&E Enterprises. Director's Exhibits 3, 5.

finding, he summarized claimant's testimony at the hearing with respect to the nature and location of this work. *Id*. at 3-7. Claimant testified that his work from October 1975 to May 2011 involved visiting strip mines,[9] collecting coal samples from the mines, and crushing and testing those samples in his office laboratory to assess the quality of the coal for sale.[10] Hearing Transcript at 18-32; *see also* Director's Exhibit 3. The administrative law judge found "no evidence in the record to suggest that [c]laimant's [office/laboratory]" where he crushed and tested the coal "was located near a coal mine or coal preparation facility." Decision and Order at 7. Further, he highlighted claimant's statement that he "had to spend one to two hours every day driving" from his office "to various mines to pick up samples to be tested." *Id.*, *citing* Hearing Transcript at 23-24. The administrative law judge determined that claimant's visits to pick up the samples were only "incidental" to his primary occupation of testing the samples because claimant's dust exposure during these visits was "minimal," and "did not involve entering the area where coal was mined or processed." *Id*.

The administrative law judge also found that claimant's coal lab technician work did not meet the function test. Decision and Order at 7. He found that claimant's work involved "grading processed coal for the purpose of assigning it a price." *Id*. The administrative law judge concluded that this work was only "indirectly" related to the extraction or preparation of coal. *Id*. Citing *Forester*, the administrative law judge noted that indirect work constitutes coal mine employment only if it involves "handling raw coal or keeping the mine operational and in repair." *Id*. (internal quotations omitted). The administrative law judge found that claimant's testimony establishes that the coal he handled was already processed and that claimant was not involved in keeping the mine operational. *Id*. Thus he found that claimant's work "was not integral or necessary to the extraction or production of coal." *Id*. Based on his finding that claimant's thirty-three years and seven months of coal lab technician work did not constitute coal mine employment, the administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment.

[9] Claimant testified that he occasionally collected samples from underground coal mines. Hearing Transcript at 18.

[10] Claimant also testified at a June 17, 2015 deposition about his work at M&E Enterprises. Director's Exhibit 19. Claimant stated that he worked as a water sampler hired by coal mine companies to go to their mine sites and sample water in the ponds and streams, and report his findings to the state regulatory agency. Director's Exhibit 19 at 13-14, 18.

We are unable to affirm the administrative law judge's finding that claimant's work as a coal lab technician does not meet the definition of a miner. In applying the situs test, the administrative law judge did not consider relevant documentary evidence, or weigh this evidence with claimant's hearing testimony.

Specifically, on his Work Questionnaire forms, claimant was asked to describe the work he did for Ekenco, Inc., Coal-Fields Testing & Engineering, HCI-Hall, Inc., and M&E Enterprises. Director's Exhibit 5. He specified the nature and location of his work, indicating that he sampled coal from underground and aboveground mines, and "crushed and pulverized" the coal samples at the "coal tipples and prep plants." *Id*. He stated that this work took place at preparation plants and tipples "and in a sample room where I crushed and pulverized all coal samples." *Id*. Claimant stated that seventy-percent of his typical workday with Ekenco, Inc., Coal-Fields Testing & Engineering, and M&E Enterprises, and eighty-percent of his typical workday with HCI-Hall, Inc., took place at, or near, a coal mine, tipple, or preparation plant. *Id*. Moreover, he stated that he spent 312 days a year near a coal mine, tipple, or preparation plant, and he was exposed to dust around the tipples, in the preparation plants, "and while crushing and pulverizing all coal samples." *Id*. Because the administrative law judge failed to consider and weigh this evidence, we vacate his finding that claimant's work as a coal lab technician did not meet the situs test, and his finding that this work did not constitute coal mine employment. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (explaining that an administrative law judge need not always credit a miner's statements about his own work history in the face of conflicting evidence); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Further, insofar as the administrative law judge relied on claimant's testimony, he did not properly evaluate that evidence. Specifically, the administrative law judge failed to address the portions of claimant's testimony that establish that he engaged in coal preparation work as defined in 20 C.F.R. §725.101(a)(13), i.e., crushing, sizing, cleaning, washing, drying and loading coal, when he worked as a coal lab technician.[11] Claimant

[11] Further, in finding that claimant's visits to collect coal samples were only "incidental" and "did not involve entering the area where coal was mined or processed," Decision and Order at 7, the administrative law judge did not address claimant's testimony that he occasionally had to take "channel samples" or "stockpile samples," which required him to personally collect the samples in the mines. Hearing Transcript at 21-22; *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

testified that the process of analyzing the coal in the laboratory involved crushing and pulverizing the coal to get it ready for testing. Hearing Transcript at 18. He indicated that he crushed the coal samples in a "crusher room" that was "in a little block building outside of the laboratory." *Id*. Because a coal preparation facility satisfies the definition of a coal mine even if it is geographically remote from the site where the coal is extracted, *see Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 932 (6th Cir. 1989), the location of claimant's office laboratory is not pertinent if the administrative law judge finds that claimant engaged in coal preparation work. Thus, on remand, the administrative law judge must ascertain the extent to which claimant engaged in coal preparation work, which allows claimant to meet the situs requirement by establishing that his work took place in or around a coal preparation facility. *See Petracca*, 884 F.2d at 932; *Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729, 1-736 (1979), *aff'd sub nom. Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 69-71 (4th Cir. 1981).

The administrative law judge also erred in summarily determining that "grading processed coal for the purpose of assigning it a price" does not meet the function test because claimant did not handle raw coal or keep the mine operational and in repair.[12] Decision and Order at 7. The Board has held that a laboratory technician collecting coal samples for processing and analysis is performing a function that is integral and necessary to the preparation of coal. *See Bower*, 2 BLR at 1-736 (1979), *aff'd sub nom. Bower*, 642 F.2d at 69-71.[13] Although the Sixth Circuit explained in *Forester* that "[i]n general, those

[12] The administrative law judge also erred in finding that claimant's employment did not constitute coal mine work because claimant did not handle "raw coal." Decision and Order at 7. The administrative law judge failed to address claimant's deposition testimony that he worked around "unprocessed coal." Director's Exhibit 19 at 18. Further, in order for claimant's duties to meet the definition of coal preparation under 20 C.F.R. §725.101(a)(13), the coal that claimant encountered must not have entered the stream of commerce, regardless of whether it was processed or unprocessed. Once coal enters the stream of commerce, it is beyond the preparation stage. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Eplion v. Director, OWCP*, 794 F.2d 935, 937 (4th Cir. 1986). Thus on remand the administrative law judge must ascertain the extent to which the coal that claimant handled had entered the stream of commerce.

[13] In affirming the Board's decision in *Bower*, the United States Court of Appeals for the Fourth Circuit stated there is a factual and legal basis for concluding that testing and preparing samples of coal came within the statutory definition of coal preparation because "some evidence tended to show that knowledge of the chemical composition and energy content of the coal was a necessary step in [the employer's] preparation of the coal for sale." *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70-71 (4th

individuals who handle raw coal or who perform tasks necessary to keep the mine operational and in repair are generally classified as 'miners,'" the court did not hold that only those who do so can be miners. *Forester*, 767 F.3d at 641, *quoting Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922-23 (6th Cir. 1989). In *Clemons*, the Sixth Circuit noted that coal laboratory technicians have been found to perform incidental duties that are an "integral" and "necessary" part of the coal mining process. *Clemons*, 873 F.2d at 922-23, *citing Bower*, 642 F.2d at 69-71.

In light of these errors, we must also vacate the administrative law judge's findings that claimant failed to establish at least fifteen years of coal mine employment, and that claimant could not invoke the Section 411(c)(4) presumption. We also vacate the administrative law judge's denial of benefits.

On remand, the administrative law judge must reconsider the length of claimant's coal mine employment,[14] apply the situs-function requirements, and determine whether the evidence, including the documentary evidence, establishes at least fifteen years of coal mine employment. If the administrative law judge finds that the evidence establishes at least fifteen years of coal mine employment, he should then address whether that employment was in underground coal mines, or in conditions substantially similar to those in an underground mine, and whether the evidence establishes a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

If claimant establishes at least fifteen years of qualifying coal mine employment and total disability, claimant will be entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1). The administrative law judge must then consider whether employer can rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R.

Cir. 1981). The Court also affirmed the Board's holding that "work in collecting the samples at the mine sites and tipple and transporting them to the laboratory was also work in preparing coal," on the basis that "[i]f testing the coal in the laboratory is also part of the preparation of the coal, then transporting the coal from the excavation site to the laboratory is . . . evidently work of preparing coal." *Id*., *citing Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975).

[14] When calculating claimant's coal mine employment, the administrative law judge must also address the documentary evidence, forms CM-911a and CM-913, indicating that claimant worked from January 1974 to October 1975 on the belt line for Indianhead Mining Company, for a total of one year and nine months. Director's Exhibits 3, 5.

§718.305(d)(1)(i), (ii). The administrative law judge must resolve the conflicts in the evidence and set forth his findings in detail, including the underlying rationale, in compliance with the Administrative Procedure Act, 5 U.S.C. §500-599, as incorporated into the Act by 30 U.S.C. §932(a).[15] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because claimant may be entitled to the Section 411(c)(4) presumption of pneumoconiosis, we decline to address, as premature, the administrative law judge's finding claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

III. Responsible Operator

In light of our decision to vacate the administrative law judge's denial of benefits, we will address employer's cross-appeal challenging its designation as the responsible operator. The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). To be a "potentially liable operator," a coal mine operator must have employed the miner for a cumulative period of not less than one year and be financially capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(c), (e).[16] Once a potentially liable operator has been properly identified by the Director, it may be relieved of liability only if it proves either that it is financially incapable of paying benefits, or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

In cases in which the designated responsible operator did not most recently employ the miner, the district director must explain the designation. 20 C.F.R. §725.495(d). If the operator that most recently employed the miner is financially incapable of assuming liability for the payment of benefits, the district director must submit a statement to that effect, which is prima facie evidence "that the most recent employer is not financially capable of assuming its liability for a claim." *Id*.

[15] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).

[16] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

The administrative law judge found that claimant worked for employer for one year and one and one-half months from 1989 to 1990. Decision and Order at 7-10. Although claimant subsequently worked for M&E Enterprises for more than one year, the administrative law judge reiterated his finding that claimant's coal lab technician work for this company was not coal mine employment and, thus, found that M&E Enterprises could not be a potentially liable operator. *Id*. at 10.

Employer argues that the administrative law judge erred in finding that it employed claimant for at least one year. Employer's Cross-Appeal at 5 n.2. We disagree. In calculating claimant's employment with employer from 1989 to 1990, the administrative law judge permissibly credited the SSA earnings records over claimant's testimony and the documentary evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 7-9. Relying on the SSA records, he applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[17] and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, credited claimant with 33.25 working days in 1989 and 267.71 working days in 1990, for a total of approximately 301 working days. *Id*. at 9. Taking into account weekends and holidays, the administrative law judge rationally found that this number of working days "more likely than not (and in fact, almost certainly)" reflected that claimant worked for employer in coal mine employment for at least one calendar year. Decision and Order at 8-9; *see Shepherd*, 915 F.3d at 401-07; *Osborne v. Eagle Coal Co.*, 25 BLR 1-197, 1-204 (2016); *Muncy*, 25 BLR at 1-27.

Employer also argues that, if the Board vacates the administrative law judge's finding that claimant's employment with M&E Enterprises is not coal mine employment, it must also vacate his responsible operator finding. We disagree. The record in this case contains a statement from the district director submitted pursuant to 20 C.F.R. §725.495(d) indicating that M&E Enterprises is not financially incapable of assuming liability for the payment of benefits. Director's Exhibit 64. Thus the burden shifted to employer to prove that M&E Enterprises had the financial capability of paying benefits pursuant to 20 C.F.R. §725.495(c)(2).

[17] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*. *See Shepherd*, 915 F.3d at 401-07.

Review of the record indicates that employer did not submit any evidence to support its burden.[18] Nor does employer argue before the Board that the record contains evidence which, if credited, supports its burden to establish that M&E Enterprises is financially capable of paying benefits. In its post-hearing brief, employer argued only, incorrectly, that the district director failed to submit a statement pursuant to 20 C.F.R. §725.495(d). Employer's Post-Hearing Brief at 20. Thus, any error in the administrative law judge's determination that claimant's work for M&E Enterprises does not constitute coal mine employment does not affect the responsible operator finding. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). We therefore affirm the administrative law judge's finding that employer is the responsible operator. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014); Decision and Order at 10.

[18] Although claimant testified that M&E Enterprises had insurance, he could not recall the name of the carrier. Director's Exhibit 19 at 15-17. Moreover, he stated that this was likely only liability insurance "on the vehicles and possibly" coverage for "when we went on other people's property." *Id*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge