No. 16-4319

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ISLAND FORK CONSTRUCTION

Petitioner

v.

JIMMY BOWLING

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

NICHOLAS C. GEALE
Acting Solicitor of Labor

MAIA S. FISHER
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

JEFFREY S. GOLDBERG
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5650

Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES (cont'd)

CASES (cont'd)

STATUTES

Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-944

Internal Revenue Code

The Jones Act

Kentucky Insurance Code

STATUTES (cont'd)

Kentucky Insurance Guaranty Association Act

Kentucky Contracts

Longshore and Harbor Workers' Compensation Act, as amended

STATUTES (cont'd)

REGULATIONS

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-4319

ISLAND FORK CONSTRUCTION

Petitioner

v.

JIMMY BOWLING

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

A. Subject matter jurisdiction

This case involves a claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Jimmy Bowling, an underground coal miner for twenty-nine years. On September 28, 2015,

Administrative Law Judge Alice M. Craft issued a decision awarding benefits and finding Island Fork Construction and the Kentucky Insurance Guaranty Association (KIGA) responsible for the payment of benefits. Appendix (AX) 23, 29 (referencing May 12, 2015 ALJ decision holding KIGA liable, AX 65).[1] Island Fork appealed this decision to the United States Department of Labor (DOL) Benefits Review Board on October 22, 2015, AX 16, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On September 21, 2016, the Board affirmed the award of benefits, including the determination that KIGA is responsible for the payment of benefits. AX 4, 9. Island Fork petitioned this Court for review of that decision on November 18, 2016. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The miner's exposure to coal mine dust − the injury contemplated by 33 U.S.C. § 921(c) − occurred in the Commonwealth of Kentucky, within this Court's

[1] Because petitioner did not consecutively paginate the Appendix, we cite to the ECF numbering of the Appendix.

territorial jurisdiction. The Court therefore has jurisdiction over Island Fork's petition for review.

B. Personal jurisdiction

KIGA argues that it was never a party to this claim and thus the ALJ lacked personal jurisdiction over it to hold it liable for the payment of benefits. Pet. Bf. 9-11. This contention is baseless. As detailed below, KIGA voluntarily submitted to the ALJ's jurisdiction by repeatedly appearing and defending the claim, without limitation. It therefore waived this newly-minted lack of personal jurisdiction defense. *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718, 721 (6th Cir. 2006); *Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 648 (6th Cir. 2016); *Rauch v. Day & Night Manufacturing Corp.*, 576 F.2d 697, 701 (6th Cir. 1978).

KIGA's voluntary submission of personal jurisdiction began in June 18, 2013, when it informed the parties and ALJ in a letter that "all of [Frontier's] claims have been turned over to KIGA." Supplemental Appendix (SA) 166-67. It further raised, and explicitly preserved, the defense that it was not responsible for black lung claims under state guaranty law.[2] *Id.* No mention was made of a lack of personal jurisdiction. Instead, on the same date under separate cover, and again

[2] Frontier was liquidated on November 16, 2012. *See* www.nylb.org/frontier.htm.

one month later, KIGA submitted, without qualification, medical evidence contesting claimant's entitlement to benefits. SA 168-69.

At the formal hearing before the ALJ, KIGA's counsel left no doubt about KIGA's participation: "I'm here on behalf of Island Fork Construction Limited which was previously insured by Frontier Insurance Company which is now insolvent, *so my client in fact at this point is KIGA, the Kentucky Insurance Guaranty Association.*" AX 115-16 (emphasis added). Counsel for KIGA then entered eight exhibits into evidence and cross-examined the claimant. AX 119, 126-27.

After the hearing, KIGA filed two post-hearing briefs to the ALJ. In the first, KIGA confirmed its party status, conceding that "[it] had received a notification letter advising of potential liability as a result of the insolvent carrier. In response, KIGA made an entry of appearance and defended the case while it investigated whether Claimant was eligible for assistance under the Kentucky guarantees [*sic*] law." AX 108. KIGA's second ALJ brief addressed claimant's medical entitlement to benefits, and again did not assert the absence of personal jurisdiction. SA 173-82.

Unsurprisingly, given KIGA's admission that it had been notified of its liability and its failure to assert a personal jurisdiction defense, the ALJ did not address the issue in her decisions ordering KIGA to pay benefits. Neither did the

Benefits Review Board. In its brief before the Board, KIGA again admitted that it had been notified and was a party to the case. SA 185 (reiterating *verbatim* statement to ALJ that it had been duly notified).

By its full and unqualified participation in the agency proceedings below, KIGA clearly submitted to the ALJ and Board's jurisdiction, and so waived its lack of personal jurisdiction defense. Moreover, the defense was not raised below and is thus barred on general exhaustion principles as well. *Cox v. Benefits Review Bd.*, 791 F.2d 445, 447 (6th Cir. 1986); *see also Bailey v. Floyd Cty. Bd. Of Educ.*, 106 F.3d 135, 144 (6th Cir. 1997).[3]

STATEMENT OF THE ISSUE

In general, a miner's most recent employer of at least one year, or its insurance carrier, is responsible for the payment of benefits. Although neither

---

[3] KIGA wrongly contends (Pet. Bf. 9) that the ALJ was required to use the "procedural mechanism" set forth in 20 C.F.R. § 725.407 ("Identification and notification of responsible operator") to make it a party. That section, however, applies to proceedings before the district director, not the ALJ. *See* 20 C.F.R. Part 725, Subpart E ("Adjudication of Claims by the District Director"). The ALJ permitted KIGA to timely appear as a party and defend Bowling's claim for the simple reason that KIGA was potentially liable under Kentucky law for the black lung claims against the insolvent Frontier. *See* 20 C.F.R. §§725.360(a), (d) (only persons who qualify as a party may "participate . . . in the adjudication of a claim for benefits;" an individual whose "rights with respect to benefits may be prejudiced by a decision to be made" may be a party); *Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 442(7th Cir. 2011) (person whose rights may be affected by black lung claim may timely intervene after being notified of proceeding).

Island Fork nor Frontier can pay here, KIGA, a creature of the Kentucky Insurance Guarantee Association Act (the State Guaranty Act), is obligated to pay the covered claims of insolvent insurers, like Frontier. The State Guaranty Act, however, excludes from coverage "ocean marine insurance" and "insurance provided, written, reinsured, or guaranteed by any government or governmental agencies."

The question presented is whether the State Guaranty Act precludes KIGA from paying benefits because black lung insurance is "ocean marine insurance" or because the Black Lung Disability Trust Fund (Trust Fund) "guarantees" black lung insurance.

STATEMENT OF THE CASE

Bowling filed the instant claim in June 2010.[4] DX 3. A DOL district director notified Island Fork and its insurance carrier, Frontier, of the claim, and Island Fork replied by controverting both its liability and Bowling's eligibility for benefits. DX 20-22. The district director then issued a proposed decision and order awarding benefits against Island Fork. DX 30. Island Fork requested a

[4] Bowling filed a prior claim in 2002, which the Benefits Review Board finally denied in September 2006. Director's Exhibit (DX) 1.

hearing before an ALJ. DX 39.[5] Following a formal hearing, the ALJ awarded benefits and found KIGA responsible for paying them. AX 23-62. Island Fork appealed, but the Benefits Review Board affirmed the ALJ's decision. AX 4-11. Island Fork then petitioned this Court for review.

STATEMENT OF THE FACTS

A. Statutory and regulatory background

1. BLBA and regulatory provisions for determining the liable entity

The BLBA provides disability benefits to miners who are totally disabled by pneumoconiosis, and survivors' benefits to their qualifying dependents. 30 U.S.C. §§ 901(a), 922, 932(c). It was Congress' intent to have liability for these benefits fall on the miner's employer "to the maximum extent feasible." *See Arkansas Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014) (quoting *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300, 1304 (6th Cir. 1989)); 30 U.S.C. § 932(c). Congress thus made individual coal mine operators liable for benefits if the miner's disability or death arose "at least in part" out of coal mine employment with the operator after December 31, 1969, while requiring the Trust Fund to assume liability only when "there is *no* operator who is liable for the payment of

[5] Pursuant to 26 U.S.C. § 9501(d)(1)(A)(1) and 20 C.F.R. § 725.420, the Trust Fund began paying interim benefits pending the resolution of the claim.

such benefits." 26 U.S.C. § 9501(d)(1)(B) (emphasis added); 30 U.S.C. § 932(c).[6]

Congress additionally took steps to ensure that liable operators would be able to pay for benefits when awarded. It mandated that coal mine operators secure the payment of benefits either by obtaining permission from OWCP to self-insure or by purchasing insurance from an entity authorized under state law to insure state workers' compensation liabilities. 30 U.S.C. § 933(a); 20 C.F.R. § 726.1. This BLBA insurance coverage is established through a mandatory endorsement attached to the standard workers' compensation policy, which specifies that the "unqualified term 'workmen's compensation law'" set forth in the policy includes BLBA coverage. 20 C.F.R. § 726.203(a).

To further prevent operators from passing liability onto the Trust Fund, Congress gave the DOL broad authority to promulgate regulations "for determining whether pneumoconiosis arose out of employment in a particular coal mine" or, "if appropriate," "for apportioning liability" among operators. 30 U.S.C. § 932(h). The DOL accordingly promulgated regulations broadly defining the cast

---

[6] Given that the vast majority of current BLBA claims involve miners who worked in coal mine employment after 1969, individual coal mine operators, not the Trust Fund, are typically liable for approved claims. 20 C.F.R. § 725.490(a) (noting primary purpose of Trust Fund is to pay approved claims for pre-1970 coal mine employment).

of employers that may be potentially liable for a claim. 20 C.F.R. § 725.494.[7] Of the five criteria that must be met to be potentially liable, only the last – the operator's financial capability to assume liability – is at issue here.

An operator is deemed financially capable of assuming liability if it "obtained a policy or contract of insurance . . . that covers the claim" unless "the insurance company has been declared insolvent and its obligations for the claim are not otherwise guaranteed." 20 C.F.R. § 725.494(e)(1). This provision thus clearly anticipates holding insurance guarantors liable, including state guaranty associations, when possible. *See* 62 Fed. Reg. 3338, 3364 (Jan. 22, 1997) (explaining that an operator's purchase of insurance is insufficient to establish financial capability where insurer is insolvent and no successor, such as another insurance company or state guaranty association, is available to pay benefits); *see also* 20 C.F.R. § 725.619(e) (allowing enforcement of an award against an entity

---

[7] An operator is "*potentially liable*" when:

(i) the miner's disability or death arose out of employment with the operator;
(ii) the entity was an operator after June 30, 1973;
(iii) the miner worked for the operator for at least one year;
(iv) the miner's employment with the operator included at least one working day after December 31, 1969; and
(v) the operator is financially capable of assuming liability for the claim.

20 C.F.R. § 725.494(a)-(e).

that "has assumed or succeeded to the obligations of the operator or insurer by operation of any state or federal law"); 62 Fed. Reg. 3338, 3369 (Jan. 22, 1997) (explaining that OWCP may collect from a state insurance guaranty association where state law requires such an association to assume the insurer's liabilities).[8]

The district director is responsible for identifying the operators that are potentially liable and for designating the responsible operator. 20 C.F.R. §§ 725.401, 725.418(d). Typically, the district director identifies the operator that most recently employed the miner for more than one year as the "responsible operator," *i.e.*, the entity finally-determined to be liable for benefits if awarded. 20 C.F.R. § 725.495(a)(1). But if the most recent employer is not financially capable of assuming liability, the Director may hold liable a prior employer that is financially capable of paying benefits. 20 C.F.R. § 725.495(a)(3); *Arkansas Coals*, 739 F.3d 313 (noting that "a common reason why a director might select a prior employer as the responsible operator is if the most recent employer lacked insurance").

The responsible operator may then contest its designation by requesting a de novo hearing and determination by an administrative law judge. 20 C.F.R. §§

---

[8] An operator is also capable of assuming liability if it "qualified as a self-insurer" or "possesses sufficient assets to secure the payment of benefits." 20 C.F.R. § 725.494(e)(2)-(3). Neither alternative is at issue in this appeal.

725.419(a), 725.455(a).

It bears emphasis that after the district director designates the responsible operator and the claim is referred to the Office of Administrative Law Judges, there is no further opportunity (with one narrow exception not relevant here) to impose liability on another operator if the first choice is overturned. In that event, the Trust Fund assumes liability for the claim. *See generally* 65 Fed. Reg. 79990-91, ¶ (b) (Dec. 20, 2000); *Director, OWCP, v. Trace Fork Coal Co*, 67 F.3d 503, 507-08 (4th Cir. 1995) (addressing responsible operator identification under prior regulations).

2. Kentucky Insurance Guarantee Association Act

The Kentucky Insurance Guarantee Association Act (the State Guaranty Act), KY Rev. Stat. § 304.36-010 through § 304.36-170 (West), established KIGA "to cover claims made against insureds whose carrier becomes insolvent." *Ky. Ins. Guar. Ass'n v. Jeffers*, 13 S.W. 3d 606, 607 (Ky. 2000) (citing KY Rev. Stat. § 304.36-010). The Act, which is modeled on a proposal by the National Association of Insurance Commissioners (NAIC), *Hawkins v. Ky. Ins. Guar. Ass'n*, 838 S.W. 2d 410, 412 (Ky. Ct. App. 1992), applies "to all kinds of direct insurance."[9] KY Rev. Stat. § 304.36-030(1). Although the State Guaranty Act

[9] The current version of the NAIC Property and Casualty Insurance Guaranty (continued…)

leaves "direct insurance" undefined, the term essentially encompasses property and casualty insurance by virtue of the many types of insurance the Act excludes. *Id*.; *see also NAIC* ***Property and Casualty Insurance*** *Model Act*, NAIC 540-1 (2016) (bolding for emphasis added). In any event, the Act clearly covers claims under workers' compensation insurance. KY Rev. Stat. §§ 304.36-080(1)(a)(1), 304.36-120(2); *see also* KY Rev. Stat. § 304.5-070 (including workers' compensation and employer's liability within the definition of "casualty insurance"). Conversely, the Act does not cover claims under "[o]cean marine insurance" and "[a]ny insurance provided, written, reinsured, or guaranteed by any government or government agencies[.]" KY Rev. Stat. § 304.36-030 (1)(f) and (h).

The State Guaranty Act provides a lengthy definition of "ocean marine insurance," which (in essence) covers risks and perils associated with the operation of a vessel on the ocean or inland waterways, and includes coverage written pursuant to the Jones Act, the Longshore Harbor and Workers' Compensation Act, and similar Federal statutes.[10] KY Rev. Stat. § 304.36-050(11). By contrast, the

---

(…continued)
Association Model Act, NAIC 540-1 (2016), is available on Westlaw in the National Association of Insurance Commissioners database.

[10] The BLBA incorporates various Longshore Act provisions, but not the latter's insurance provisions. 30 U.S.C. § 932(a) (excluding 33 U.S.C. §§ 932, 936, 938, the Longshore Act's insurance sections). As discussed above, the duty to obtain BLBA insurance arises from the BLBA itself (30 U.S.C. § 933).

Act does not explain what is meant by insurance "provided, written, reinsured, or guaranteed by any government or government agencies." Comments to the NAIC model guaranty association act, however, indicate this provision was intended "to exclude flood and crop hail damage insurance guaranteed by the federal government." NAIC PC 540-1 at 9 (discussing amendment to Section 12, *Exhaustion of Other Coverage (Previous version of model)*).

KIGA is a nonprofit unincorporated legal entity comprised of its member insurers. KY Rev. Stat. § 304.36-060. A "member insurer" is an insurer that sells the kinds of insurance that KIGA guarantees. KY Rev. Stat. § 304.36-050(8). KIGA likewise covers claims that "arise[ ] out of . . . an insurance policy to which this subtitle applies," KY Rev. Stat. §§ 304.36-050(6), 304.36-080(1)(a), and in doing so, is deemed to be the insolvent insurer, taking on "all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." KY Rev. Stat. § 304.36-080(1)(c). To cover its costs and pay claims, KIGA makes assessments on the premiums of policies written by its members. KY Rev. Stat. § 304.36-080(1)(d). The member insurers may then recoup these assessments in the "rates and premiums charged for insurance policies to which this subtitle applies." KY Rev. Stat. § 304.36-160. Finally, KIGA may return unspent assessments to its members. *Id*.

One further purpose of KIGA is signficant: KIGA was established "to aid in

the detection and prevention of insurer insolvencies." KY Rev. Stat. § 304.36-130. Among other duties, the KIGA board of directors is obligated to notify the insurance commissioner of any information indicating that a member insurer may be insolvent; request the insurance commissioner conduct a financial examination of the member; issue reports and make recommendations regarding the solvency of member insurers; and, in insolvencies where KIGA paid covered claims, KIGA must prepare a report on the history and causes of the insolvency. *Id*.

B. Decisions below

1. ALJ order holding KIGA liable (AX 65)

In light of the representations at the hearing regarding Island Fork and Frontier's insolvencies, the ALJ directed the parties to brief the issue of KIGA's potential liability for the claim. SA 170-72 (December 16, 2014 order). After considering the parties' positions, the ALJ concluded that "KIGA is responsible for the payment of benefits as a coverage guarantor if the Claimant is awarded benefits in this case." AX 68. In reaching this determination, the ALJ rejected KIGA's assertion that the Trust Fund is a government guarantor, finding that the federal government did not provide, write, re-insure, or guarantee Island Fork's insurance policy; instead, the ALJ determined that KIGA had guaranteed the policy. AX at 67. Moreover, the ALJ rejected KIGA's argument that it is barred by state law from paying black lung benefits because it is "ocean marine insurance." The ALJ

reasoned that the BLBA is distinct from the Longshore and Harbor Workers' Compensation Act (Longshore Act) "and does not cover the same or similar types of risks associated with ocean marine insurance." AX at 67.[11]

2. ALJ decision and order awarding benefits (AX 23)

The ALJ reiterated her prior conclusion that KIGA is liable and then found Bowling totally disabled due to pneumoconiosis and entitled to benefits on the merits. Because neither KIGA nor the Director disputes the miner's entitlement to benefits, the ALJ's evaluation of the medical evidence is not summarized.

3. Benefits Review Board affirmance (AX 4)

The Board affirmed the ALJ's finding of the miner's entitlement to benefits (as unchallenged on appeal), and her determination that KIGA is responsible for paying them.

In rejecting KIGA's argument that the Trust Fund is a guarantor of insurance, the Board reasoned that the federal government had not provided, written, reinsured, or guaranteed Island Fork's insurance policy. AX at 8. Nor did the Board believe that the Director behaves like a guarantor: "If an operator is not

---

[11] The ALJ also rejected KIGA contentions that it should be excused from liability because its $300,000 per claimant limitation may be insufficient and because Frontier's insolvency arose before the miner's claim. AX 68. KIGA no longer presses either contention.

a potentially liable operator . . . because its insurance carrier is insolvent, the Trust Fund does not automatically step in; rather, the potentially liable operator that next most recently employed the miner will become the responsible operator." *Id*.

The Board also held that black lung insurance does not fall within the State Guaranty Act's exclusion for ocean marine insurance. It explained that black lung insurance "covers benefits payable based on a determination that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment . . . Thus, the mere fact that the BLBA contains certain provisions that are also contained in the [Longshore Act] does not alter the BLBA's status as a distinct statute that is not subject to the KIGA Act's exclusion of coverage for 'ocean marine insurance.'" AX at 7-8, quoting *Ratliff v. Appleton & Ratliff Coal Corp.*, BRB No. 14-0145 BLA, slip op. at 4, 2015 WL 6087286 (Sep. 30, 2015) (unpub.), *aff'd Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed. Appx. 470 (6th Cir. 2016).[12] The Board continued, "[f]urther, because the BLBA covers benefits arising from employment in coal mining, it is not 'similar' to statutes such as the [Longshore Act], which provides for insurance against risks arising from 'ocean

[12] The Court held that KIGA, which appeared on behalf of the responsible operator before the district director, failed to timely contest its liability as required under the black lung regulations, and therefore was precluded from doing so in later proceedings. 664 Fed. Appx. 475-76.

marine' activities[.]" AX at 8.

SUMMARY OF THE ARGUMENT

KIGA argues that it cannot be responsible for federal black lung benefits because the State Guaranty Act under which it operates excludes insurance guaranteed by a government agency and ocean marine insurance. KIGA asserts that the Trust Fund, which pays awarded benefits when no operator is available, is such a guarantor. It further argues that black lung insurance is "ocean marine insurance." The Court should reject these contentions and hold KIGA liable.

The Trust Fund does not "guarantee" black lung insurance, as that term is meant under the State Guaranty Act. The Trust Fund is not part of a federal insurance program. Nor is there any formal arrangement or contract between the Trust Fund and insurers under which the Trust Fund agrees to take on, or guarantee, their liabilities. Finally, because KIGA is charged by law with preventing insolvencies, it should be held liable as a policy matter for the failure of Frontier here.

Furthermore, black lung insurance obviously is not "ocean marine insurance." Under the State Guaranty Act, "ocean marine insurance" refers to "maritime perils or risks;" the BLBA, by contrast, addresses pulmonary disability arising from coal mine employment (including employment underground). Moreover, the inclusion of Longshore Act insurance within the definition of

"ocean marine insurance" does not make KIGA's case. The BLBA expressly excludes the Longshore Act's insurance requirements in favor of its own.

ARGUMENT

A. Standard of review

The issues addressed in this brief are primarily legal in nature. The Court exercises plenary review with respect to such questions. *Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 571 (6th Cir. 1998). In reviewing an appeal from the Board, the Court "review[s] the Board's legal conclusions de novo . . . [and] will not vacate the Board's decision unless the Board has committed legal error or exceeded its scope of review[.]" *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1068 (6th Cir. 2013).

B. The State Guaranty Act does not prevent KIGA from assuming liability. The Trust Fund is not a guarantor of black lung insurance, and black lung insurance is not ocean marine insurance.

KIGA contends that the State Guaranty Act prevents it from assuming liability, and that the Trust Fund must pay benefits. This argument is incorrect.

1. The Trust Fund is not a guarantor of black lung insurance.

KIGA argues that it is not liable because the State Guaranty Act provides, in relevant part, that it does not apply to "[a]ny insurance provided, written, or reinsured, or guaranteed by any government or government agency." KY Rev. Stat. § 304.36-030(1)(h). KIGA then alleges that because the Trust Fund pays

benefits when there is no liable operator, it "functionally operates as a guarantor of benefits to Claimants that would otherwise be paid under the insurance policies[.]" Pet. Bf. 24 (citing 26 U.S.C. § 9501(d) (emphasis in original removed).

KIGA's casual understanding of "guarantee" cannot be squared with the State Guaranty Act. Legal terms are to be interpreted according to their traditional legal meaning. *E.g.*, *Matter of Warrant to Search a Certain E-mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 211 (2d Cir. 2016) (citing *FAA v. Cooper*, 566 U.S. 284, 292 (2012)). The provision and writing of insurance and reinsurance – the other activities identified in subsection 304.36-030(1)(h) – are highly regulated with technical meanings and requirements, filling scores of pages in the Kentucky Code and Administrative Regulations. *See e.g.*, KY Rev. Stat. Chapter 304 (Insurance Code); KY Admin. Regs. Chapters 3-20. There is no reason to suspect that a "guaranty of insurance" was intended to be any less formal an arrangement or be any less regulated. *See e.g.*, *Parker v. Met. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (applying the canon of statutory construction *noscitur a sociis*); *see also* KY Rev. Stat. §§ 304.1-030, 304.5-130 (defining "insurance" and reinsurance" as "contracts"); KY Rev. Stat. § 371.065(1) (setting forth the requirements for a valid, enforceable guaranty). Indeed, the proceedings of the NAIC explain that the insurance guaranty provision was meant

to exclude recognized and well-established government insurance guaranty programs, such as flood and crop insurance.

The Trust Fund operates nothing like the federal government agencies in these programs. Whereas Congress intended to minimize Trust Fund payments, the Federal Emergency Management Administration (FEMA) underwrites the National Flood Insurance Program by reimbursing participating private insurers when their claims payments exceed net premium income. *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 947 (6th 2002) (quoting *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 166-67 (3d Cir.1998)). These private insurers thus act as the federal government's fiscal agents. *Id*. Similarly, the Federal Crop Insurance Corporation (FCIC) under the Federal Crop Insurance Act "reinsure[s] crop insurance contracts between producers and private insurance companies . . . and will pay the private insurance companies' operating and administrative costs with respect to those policies which the FCIC reinsures." *State of Kan. ex rel. Todd v. United States*, 995 F.2d 1505, 1508 (10th Cir. 1993) (internal citations omitted). Rather than being agents of the Trust Fund, black lung insurers are its adversaries when trying to overturn the district director's designation of liability.[13]

---

[13] Both FEMA and FCIC have programs to issue insurance directly to homeowners or agricultural commodity producers. *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 183 (2d Cir. 2006); *State of Kan.*, 995 F.2d at 1508. Although authorized to do so, (continued…)

Moreover, if the Trust Fund were a guarantor, liability would pass directly to the Trust Fund when an operator and carrier become insolvent. *See Intercargo Insurance Co. v. B. W. Farrell, Inc.*, 89 S.W.3d 422, 426 (Ky. Ct. App. 2002) ("A guaranty agreement is one in which the promisor protects his promisee from liability for a debt resulting from the failure of a third party to honor an obligation to that promise – thus creating a secondary liability"). But that is not what typically happens under the black lung regulations. When the most recent operator is not financially capable, the district director is authorized to name and hold liable an operator that employed the miner earlier. 20 C.F.R. § 725.495(a)(3). And the underlying reason for this power is to hold employers, not the Trust Fund, liable to the maximum extent feasible. *Arkansas Coals*, 739 F.3d at 313.

KIGA's own actions belie its contention that black lung insurance is excluded under the State Guaranty Act. KIGA pays covered claims in part by making assessments on the premiums of workers' compensation policies issued to coal mine operators in Kentucky. By law, these coal company workers' compensation policies include the federal black lung insurance endorsement.

(…continued)
the Secretary of Labor has not established a federal black lung insurance program for coal mine operators. *See* 30 U.S.C. § 943(a). Such a program was contingent on the unavailability of reasonably priced insurance, and Congress intended that the program "not be operated solely as an insurer of a high-risk pool." H.R. Conf. Rep. 95-864 (Feb. 2, 1978).

Supra at 8. KIGA is thus funded in part by federal black lung insurance. If black lung insurance is excluded under the Act, as KIGA claims, it cannot collect these monies. *See supra* at 13 (explaining KIGA makes assessments on covered lines of insurance.).

Finally, as a policy matter, KIGA, not the Trust Fund, should be held responsible. The Kentucky legislature expressly tasked KIGA with the duty to detect and prevent insolvencies, or to absorb their costs. KY Rev. Stat. 304.36-130, 304.36-080(1)(a). By contrast, the DOL (and ultimately the Trust Fund) has no control over the insurers that Kentucky authorizes to write workers' compensation policies. *See* 30 U.S.C. § 933. If an insurer fails, liability should fall on KIGA, whose job it is to prevent insolvencies, not the Trust Fund.

2. Black lung insurance is not ocean marine insurance.

KIGA also argues (Pet. Bf. 25-27) that insurance purchased to pay federal black lung benefits is actually "ocean marine insurance" and, as such, is excluded from coverage under the State Guaranty Act. KY Rev. Stat. § 304.36-030(1)(f). This contention is meritless. The risks associated with breathing coal mine dust (often underground) are far afield from the perils of operating a vessel on open waters. Moreover, the requirement to purchase federal black lung insurance arises directly from the BLBA, not the Longshore Act, as KIGA contends.

The State Guaranty Act defines "ocean marine insurance" as "any form of insurance . . . that insures against maritime perils or risks and other related perils or risks, that are usually insured against by traditional marine insurance such as hull and machinery, marine builders risk, and marine protection and indemnity." KY Rev. Stat. § 304.36-050(10). It further specifies that "[o]cean marine insurance" includes coverage written for "(a) The Jones Act (46 U.S.C. sec. 688); (b) The Longshore and Harbor Workers' Compensation Act D (33 U.S.C. secs. 901 et seq.); or (c) Any other similar federal statutory enactment, or any endorsement or policy affording protection and indemnity coverage[.]"[14] KY Rev. Stat. 304.36-050(10)(a)-(c).

Resting on subsection (b), KIGA asserts that BLBA coverage is excluded because the BLBA is "empowered and authorized" by the Longshore Act. Pet. Bf. 26. KIGA paints with too broad a brush. While it is true that the BLBA incorporates some Longshore Act provisions, it is far more telling that the BLBA *expressly excludes* from adoption the Longshore Act *insurance* provisions. 30

---

[14] The Longshore Act concerns injuries "occurring upon the navigable waters of the United States" and certain adjoining areas. 33 U.S.C. § 903; *Day v. James Marine, Inc.*, 518 F.3d 411, 414 (6th Cir. 2008). The Jones Act allows a "seaman," *i.e.*, a master or member of a crew of a vessel," to bring suit for injuries incurred in the course of employment. 33 U.S.C. § 902(3)(G); 46 U.S.C. § 30104; *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 415 (2009).

U.S.C. § 932(a) (excluding Longshore Act Section 4 ("Liability for Compensation"), Section 32 ("Security for Compensation"), Section 36 ("Insurance Policies") and Section 38 ("Penalty for Failure to Secure Payment of Compensation"), respectively 33 U.S.C. §§ 904, 932, 936, and 938)). Instead, the BLBA delineates its own particular insurance measures and requirements. 30 U.S.C. § 933(a)-(d). Thus, KIGA's attempt to tie BLBA insurance coverage to the Longshore Act is refuted by the BLBA's plain text. *See e.g., Rote v. Zel Custom Manufacturing LLC*, 816 F.3d 383, 392 (6th Cir. 2016), *reh'g en banc denied* (April 14, 2016).

Grasping at straws, KIGA also argues that subsection (c)'s catch-all provision includes BLBA insurance because it "provides claimants with statutory protection and indemnity coverage." Pet. Bf. 26. Here, too, KIGA misconstrues the statute. The catch-all is intended to encompass other types of federal enactments (or insurance policies) that are "similar" to the Jones Act and Longshore Act that relate to maritime risks and perils in the first instance. BLBA insurance does not cover maritime perils and risks – it secures liability for pulmonary or respiratory diseases arising from employment in United States coal mines. *See* 20 C.F.R. § 726.203(a), (c). KIGA's tortured reading of the catch-all provision, which expands it beyond any plausible understanding of "ocean," "marine," or "maritime," is nonsensical.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

MAIA S. FISHER
Associate Solicitor

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
BLLS-SOL@dol.gov
Goldberg.jeffrey@dol.gov
Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

The Director does not object to KIGA's request for oral argument, but does not think it necessary given the clarity of the facts and law.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 5,399 words, as counted by Microsoft Office Word 2010.

/s/ Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Goldberg.jeffrey@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2017, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

H. Brett Stonecipher, Esq.
Fogle, Keller, Purdy
300 East Main Street, Suite 400
Lexington, KY 40507
bstonecipher@fkplaw.com

Joseph E. Wolfe, Esq.
Wolfe, Williams & Reynolds
P.O. Box 625
Norton, VA 24273
jwolfe@wwrrlawfirm.com

/s/ Jeffrey S. Goldberg
JEFFREY S. GOLDBERG
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Goldberg.jeffrey@dol.gov