PART III

PROCEDURAL ISSUES

D. <u>PARTIES</u>

The Board has held that the Director, Office of Workers' Compensation Programs (the Director), and his representative, the Solicitor of Labor, are proper parties in interest to participate at the formal hearing. ***Bridges v. Unites States Steel Corp.***, 1 BLR 1-372 (1978); ***Gray v. United States Steel Corp.***, 1 BLR 1-237 (1977); ***Wells v. Peabody Coal Co.***, 3 BLR 1-85 (1976); *see* 20 C.F.R. §725.360 *et seq*. Additionally, Section 422 of the Act, 30 U.S.C. §932, was amended in the Reform Act by adding subsection (k) codifying the Director's status as a party. *Cf*. ***Director, OWCP v. Donzi Marine, Inc.***, 586 F.2d 377 (5th Cir. 1978); *see also* 20 C.F.R. §725.360(a)(5); ***Truitt v. North American Coal Corp.***, 2 BLR 1-199 (1979), *dismissed sub nom*. ***Director, OWCP v. North American Coal Corp.***, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In rejecting employer's contention that the Director does not have standing to contest the administrative law judge's orders, the Board held that the Director has standing as party-in-interest to ensure the proper enforcement of the lawful administration of the Black Lung Programs. ***Reed v. Director, OWCP***, 10 BLR 1-67 (1987). Where responsibility for payment has been transferred to the Black Lung Disability Trust Fund pursuant to the 1981 Amendments, the Director may continue to defend the claim on behalf of the Trust Fund. ***Markus v. Old Ben Coal Co.***, 712 F.2d 322, 325-326, 5 BLR 2-130 (7th Cir. 1983); ***Brown v. Director, OWCP***, 7 BLR 1-730 (1985); ***White v. Director, OWCP***, 7 BLR 1-348 (1984). Moreover, the Seventh Circuit has held that a petitioner cannot insist on receiving procedural advantages because of a change in parties where the Director has been substituted for the employer by statutory amendments. ***Hardisty v. Director, OWCP***, 776 F.2d 129, 130, 8 BLR 2-72, 2-73 (7th Cir. 1985), *aff'g* 7 BLR 1-322 (1984).

The administrative law judge is not a party within the meaning of the regulations. 20 C.F.R. §725.360; ***Luketich v. Director, OWCP***, 8 BLR 1-477, 1-479 (1986). The Sixth Circuit has held, however, that under the Act, the insurance carrier is a party who must be given notice by the district director that a claim has been filed. ***Warner Coal Co. v. Director, OWCP [Saylor]***, 804 F.2d 346, 347, 12 BLR 2-328, 2-332 (6th Cir. 1986). Vacating the Board's award of benefits wherein the Board relied on ***Saylor***, ***supra***, the Sixth Circuit held that the district director had authority to notify the proper insurance carrier for employer when his investigation revealed that the wrong carrier had been notified, even after employer had procedurally defaulted by failing to respond to notice of claim. Thus, the proper carrier was required to receive notice and be given an opportunity to defend, where it, rather than employer alone, was to be held liable for

payment of benefits to claimant. ***Caudill Construction Co. v. Abner***, 878 F.2d 179, 12 BLR 2-335 (6th Cir. 1989).

In reversing a default judgment awarding benefits where the insurance carrier received no notice of pending adjudication, the Fourth Circuit noted that the insurance carrier is a party-in- interest inasmuch as it assumes all the employer's responsibilities in connection with insured claims, *i.e.*, it is "required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." ***Tazco, Inc. v. Director, OWCP [Osborne]***, 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990). The Board has held that when an administrative law judge dismisses employer as responsible operator pursuant to the 1981 Amendments, employer is not a party "adversely affected" by the decision below and therefore lacks standing to appeal. ***Angelo v. Bethlehem Mines Corp.***, 6 BLR 1-593 (1983); *cf*. ***Ohler v. United States Steel Corp.***, 1 BLR 1-300 (1977)[wherein the Board addressed employer's appeal in the interest of fair and efficient administration of the case at hand despite its reservations about employer's standing].

CASE LISTINGS

DIGESTS

Upon the death of claimant's widow, substitution of her estate as a party was appropriate. ***Clark v. Director, OWCP***, 11 BLR 1-169 (1988), citing 20 C.F.R. §§725.360(b), 725.545 (c)-(e), 802.402(b); *see generally* ***Krolick Contracting Co. v. Benefits Review Board***, 558 F.2d 685 (3d Cir. 1977); Fed. R. Civ. P. 25(a).

The Board strictly construes 20 C.F.R. §725.301(d) in affirming the administrative law judge's finding that a survivor's claim filed by the widow's estate after her death was barred because it was not filed during her lifetime and she had never indicated an intent to file a claim in writing prior to her death. ***Bianco v. Director, OWCP***, 12 BLR 1-94 (1989).

The Board held in ***Crabtree v. Bethlehem Steel Corp.***, 7 BLR 1-354 (1984), that the district director must identify all putative responsible operators, and resolve any dispute as to which one is properly responsible for benefits in one proceeding, and reaffirmed this approach in ***Goddard v. Oglebay Norton Co.***, 12 BLR 1-130 (1988). The Sixth Circuit, however, declined to follow the Board's position and, in reversing the Board, held that, under the facts of the instant case, the district director was not prohibited from naming a new responsible operator after an earlier operator had been dismissed. Note, in this case a hearing on the merits of the miner's claim had not occurred prior to the

dismissal of the first operator, whereas in ***Crabtree***, the claim had been fully litigated. ***Director, OWCP v. Oglebay Norton Co.***, 877 F.2d 1300, 12 BLR 2-357 (6th Cir. 1989).

The Third Circuit dismissed the appeal for lack of jurisdiction over a real party in interest where neither claimant's predeceased spouse nor her estate had any interest in the claim. Petitioner's motion to substitute the executor of the miner's estate was denied as untimely since such motion must be made within the statutory time for filing. ***Kowaleski v. Director, OWCP***, 879 F.2d 1173, 12 BLR 2-391 (3d Cir. 1989).

Because employer was not a party adversely affected by a decision and order under the Act, employer lacks the requisite standing to appeal under 20 C.F.R. §802.201. ***Andryka v. Rochester & Pittsburgh Coal Co.***, 14 BLR 1-34 (1990).

The Board held that a claim for benefits is not deemed approved for purposes of 20 C.F.R. §725.496(f) until it has survived review by the administrative law judge, the Board and the Court of Appeals. Inasmuch as entitlement was established on the instant survivor's claim when the district director awarded benefits in 1984, prior to the approval of the miner's claim in the administrative law judge's Decision and Order awarding benefits in 1987, the Board affirmed the administrative law judge's decision not to transfer liability for the survivor's claim to the Trust Fund pursuant to 20 C.F.R. §725.496(f). ***Hunt v. U.S. Steel Corporation***, 16 BLR 1-84 (1991).

The Board rejected employer's argument that the Director, as a party-in-interest, does not have standing to contest the issue of whether claimant has been provided with a complete pulmonary evaluation in a case involving a properly designated responsible operator. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The regulations implementing Section 413(b) of the Act do not make a distinction between cases where the Director is a respondent and where s/he is a party-in-interest. *See* 20 C.F.R. §§718.101, 718.401, 725.405, 725.406; *cf*. 20 C.F.R. §725.701(A)(b)(2). ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Director has standing to ensure the proper enforcement and lawful administration of the Black Lung program, *see* 20 C.F.R. §725.456(d); ***Pendley v. Director, OWCP***, 13 BLR 1-23 (1989)(en banc order); ***Capers v. The Youghiogheny and Ohio Coal Co.***, 6 BLR 1-1234, 1-1237 (1984), especially in *pro se* cases. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Director occupies a unique position in proceedings under the Act, such that application of the general prohibition against the raising of another party's rights, *see* ***Warth v. Seldin***, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205 (1975), is negated. ***Hodges v. BethEnergy Mines, Inc.***, 18 BLR 1-84 (1994).

The Board will not consider additional information regarding successor operators in a

motion for reconsideration which was not before the administrative law judge or the Board in its previous decision on appeal. ***Williams v. Humphreys Enterprises, Inc.***, 19 BLR 1-111 (1995).

The Board held that the administrative law judge's denial of the Director's Motion to Remand the case to the district director to rename Clinchfield Coal Company and its insurer as an additional responsible operator/carrier constituted a reviewable collateral order as it determined a disputed question that was completely separate from the merits of the claim and too important to be denied review. The Board further held that it could have entertained an appeal of the administrative law judge's denial of the Director's Motion to Remand, despite its interlocutory nature. Thus, the Board held that under *Crabtree v. Bethlehem Steel Corp.,* 7 BLR 1-354 (1984), it was too late for the Director to ask now for remand to rename Clinchfield and its insurer as the responsible operator/carrier. ***Collins v. J & L Steel***, BRB No. 97-1356 BLA (July 26, 1999).

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