

BRB No. 02-0619 BLA

DOROTHY E. KUNTZ)
(Widow of NICHOLAS KUNTZ, JR.))

Claimant-Petitioner)

v.)

BELTRAMI ENTERPRISES,)
INCORPORATED)

and)

TRAVELERS INSURANCE COMPANY)
c/o CONSTITUTION STATE SERVICES)

Employer/Carrier-)
Respondents)

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

Party-In-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John A. Bednarz (Bednarz Law Offices), Wilkes-Barre, Pennsylvania, for claimant.

James E. Pocius (Marshall, Dennehey, Warner, Coleman and Goggin), Scranton, Pennsylvania, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1997-BLA-01966) of Administrative Law Judge Robert D. Kaplan rendered on 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). This case is before the Board for the third time. Twice previously, the Board remanded this case to the administrative law judge to determine whether good cause existed to excuse employer's untimely controversion of the claim. *Kuntz v. Beltrami Enters.*, BRB No. 99-0790 BLA at 4-5 (Apr. 28, 2000)(unpub.); *Kuntz v. Beltrami Enters.*, BRB No. 00-1098 BLA at 4-6 (Sep. 28, 2001)(unpub.). On the second and current remand, the administrative law judge found that employer established good cause for its untimely controversion. Because the Board had already affirmed the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that employer's controversion was timely and further argues that she has been denied due process. Both employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the good cause finding, and they argue that claimant was afforded due process.

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 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).

The relevant procedural background of this case is as follows: Claimant filed her application for benefits on January 7, 1997. Director's Exhibit 1. On February 10, 1997, the district director notified employer and Lackawanna Casualty Company (Lackawanna) of the claim. Director's Exhibit 16. The Notice of Claim identified Lackawanna, "c/o Travelers Ins. Co." (Travelers), as the

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

insurance carrier, and listed Lackawanna's address as P.O. Box 1507, One Mellon Bank Center, Pittsburgh, PA 15230. *Id.*

On February 26, 1997, a claims representative for Constitution State Service Company (Constitution), submitted an Operator Response form acknowledging that employer was the responsible operator. Director's Exhibit 17. On the Operator Response form, the representative indicated that Constitution's address was P.O. Box 1507, Pittsburgh, PA 15230-1507. *Id.*

On June 6, 1997, the district director issued a Notice of Initial Finding that claimant was entitled to benefits. Director's Exhibit 18. The Notice of Initial Finding identified Lackawanna as the insurance carrier, at 16 South River Place, Wilkes-Barre, PA 18703. *Id.* The Notice of Initial Finding stated that, pursuant to 20 C.F.R. §725.413(2000),

employer had thirty days from the date of the notice to file a controversion and that if employer failed to respond within thirty days, it would be deemed to have accepted the initial finding and employer's failure to respond would be considered a waiver of its right to contest the claim unless good cause was shown. Director's Exhibit 18 at 2. At the end of the Notice of Initial Finding, Constitution was listed beside a "cc" notation. *Id.*

On July 15, 1997, a claims examiner for the district director telephoned Constitution's claims representative after discovering that the Notice of Claim and Notice of Initial Finding had been sent to two different insurance carrier addresses. Director's Exhibit 19. In a handwritten memorandum, the claims examiner noted that Constitution's representative informed him that "they never rec[eived] any of the documents," and "would fax us a controversion and would ask for a copy of the file." *Id.* The claims examiner also noted that Constitution "is a subsidiary of Travelers" and that he would therefore be "changing [the] carrier ID" to Travelers. *Id.* On the same day, Constitution's claims representative sent an Operator Controversion to the district director via telefacsimile, controverting all issues of entitlement. Director's Exhibit 20. On the controversion form, the claims representative wrote that the "Notice of Initial Findings was sent to Lackawanna Cas. Co. and we were not notified. Please provide us with a complete copy of the claim." Director's Exhibit 20 at 3. Also on July 15, 1997, the district director's claims examiner sent Travelers a letter acknowledging receipt of the controversion and directing Travelers to submit any evidence it developed. Director's Exhibit 21.

² The revised regulation governing the operator's response to initial findings, 20 C.F.R. §725.412, applies prospectively only. *See* 20 C.F.R. §725.2. Consequently, 20 C.F.R. §725.413(2000) applies to this case.

Thereafter, the district director again awarded benefits, Director's Exhibit 25, and employer requested a hearing. Director's Exhibits 26, 27. Before forwarding the case to the Office of Administrative Law Judges, the district director issued an Amended Notice of Initial Finding dated September 17, 1997, substituting Travelers, "C/O Constitution State Serv.," for Lackawanna as the insurance carrier. Director's Exhibit 29.

The hearing was held on July 6, 1998. Claimant appeared by counsel and moved to dismiss employer's July 15, 1997 controversion as untimely and requested a finding of entitlement based on the district director's February 10, 1997 Notice of Initial Finding. Tr. at 7-23. Employer responded that Constitution had never received the Notice of Initial Finding. Tr. at 16-18. The administrative law judge took the matter under advisement. Tr. at 19.

In his initial Decision and Order, the administrative law judge found that the district director excused the carrier's failure to file a controversion within thirty days of the June 6, 1997 Notice of Initial Finding, and ruled that he lacked jurisdiction to review the district director's implicit good cause determination. Upon consideration of claimant's appeal, the Board reversed the administrative law judge's finding that he lacked jurisdiction and remanded the case for him to make a good cause determination. [2000] *Kuntz*, slip op. at 4-5. On remand, the administrative law judge did not comply with the Board's instruction. Upon review of claimant's second appeal, the Board again remanded the case for the administrative law judge to address the good cause issue. [2001] *Kuntz*, slip op. at 4-6.

On remand, the administrative law judge reviewed the record and determined that good cause excused employer's untimely controversion. The administrative law judge found that Constitution was not notified of the district director's June 6, 1997 initial finding because the district director sent the Notice of Initial Finding to Lackawanna in Wilkes-Barre rather than to Constitution in Pittsburgh. Because the administrative law judge saw no clear evidence in the record that the Notice of Initial Finding was properly addressed and mailed to Constitution, he declined to presume that Constitution received it. The administrative law judge additionally declined to impute notice to Constitution based on either Beltrami Enterprises' or Lackawanna's receipt of the Notice of Initial Finding. Finding that "[t]he Director erred by sending the Notice of Initial Finding to Lackawanna instead of Constitution," Decision and Order Denying Benefits at 6, the administrative law judge determined that good cause excused Constitution's untimely controversion. The administrative law judge therefore reaffirmed his initial determination that employer's medical evidence was admissible, and denied benefits.

Claimant contends that the administrative law judge erred in finding good

cause established for employer's late controversion. Claimant asserts that because the Notice of Initial Finding was "cc'd" to Constitution, she is entitled to the presumption that an item properly mailed was timely received by the addressee. See *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1166, 21 BLR 2-73, 2-80 (6th Cir. 1997), citing *Hagner v. United States*, 285 U.S. 427, 430 (1932).

The applicable regulation provides that "[w]ithin 30 days after receipt of . . . [the notice of initial finding], unless such period is extended by the [district director] for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability." 20 C.F.R. §725.413(a)(2000). The regulation provides further that failure to respond within thirty days shall be deemed an acceptance of the initial findings and "a waiver of [the] operator's right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown" 20 C.F.R. §725.413(b)(2000). The Board reviews the administrative law judge's good cause determination for abuse of discretion. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Upon review of the administrative law judge's Decision and Order and the record, we hold that the administrative law judge did not abuse his discretion in finding that there was good cause for employer's late controversion under Section 725.413(b)(2000). See *Clark, supra*. Substantial evidence supports the administrative law judge's finding that the district director misidentified the carrier as Lackawanna and sent the Notice of Initial Finding to Lackawanna in Wilkes-Barre rather than to Constitution in Pittsburgh. As the administrative law judge additionally found, the district director recognized the mistake and contacted Constitution to determine whether it had received the Notice of Initial Finding, and learned that it had not. Further, contrary to claimant's contention, the administrative law judge did not err in declining to presume that Constitution received the Notice of Initial Finding. The administrative law judge properly recognized that the timely receipt presumption arises upon proof that an item was properly addressed and mailed. See *In re Cendant Corp. PRIDES Litig.*, 311 F.2d 298, 304 (3d Cir. 2002). On the facts before him, the administrative law judge did not abuse his discretion in declining to infer that the Notice of Initial Finding was properly addressed and mailed to Constitution on the basis of the "cc" appearing at the end of the document. See *Clark, supra*. Detecting no abuse of discretion, we affirm the administrative law judge's finding that good cause was established pursuant to Section 725.413(b)(2000).

³ Because the miner's coal mine employment occurred in Pennsylvania, Director's Exhibit 2, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant next contends that her due process rights were violated because she was not provided with notice and an opportunity to be heard at a meaningful time and in a meaningful manner on the untimely controversion issue. Review of the record reflects that claimant was served with copies of the district director's correspondence with employer-carrier and its counsel, and was informed of the processes of the claim. Director's Exhibits 21, 23-29, 31. Additionally, despite her claim of lack of notice of the untimely controversion, claimant, by counsel, timely raised the issue at the formal hearing and the administrative law judge decided the good cause issue *de novo*. Based upon our review of the record, we conclude that claimant was provided a meaningful opportunity to be heard and thus was afforded her right to procedural due process. See *Richardson v. Perales*, 402 U.S. 389, 402-03 (1971); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 950, 12 BLR 2-222, 2-226 (3d Cir. 1989).

Accordingly, the administrative law judge's Decision and Order Denying Benefits (Upon Remand by the Benefits Review Board) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge