U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 284
September 2017

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Alexander Smith
Senior Attorney

I. Longshore and Harbor Workers' Compensation Act and Related Acts

[There have been no published decisions under the LHWCA in September 2017.]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Island Fork Construction v. Bowling*, ___F.3d ___, 2017 WL 4324979 (6th Cir. Sept. 29, 2017), the Sixth Circuit addressed the question of whether the Black Lung Disability Trust Fund or the Kentucky Insurance Guaranty Association[1] ("KIGA") was liable for the payment of benefits in light of the insolvency of the employer and its original insurer, Frontier Insurance. There was no dispute that the claimant was entitled to benefits.

At the hearing on the miner's black lung claim, which was held in December of 2014, the administrative law judge was informed that both the employer and Frontier were insolvent. Following briefing, the administrative law judge concluded that the employer was still the responsible operator in light of KIGA's ability to pay benefits. The Benefits Review Board affirmed the administrative law judge's decision, and the employer then appealed to the Sixth Circuit.

The court first addressed KIGA's argument that it had never properly been made a party in the case and, therefore, that the court lacked personal jurisdiction over it. In rejecting KIGA's argument, the court noted that Frontier did not become insolvent until the District Director had issued a Proposed Decision and Order and the claim had been forwarded to the administrative law judge. The court summarized KIGA's conduct after Frontier's insolvency in the following way:

> At that time, KIGA filed a letter that stated: "all of [Frontier's] claims have been turned over to KIGA." KIGA also indicated 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 law." At the hearing before the ALJ, counsel stated that she was making an appearance "on behalf of Island Fork Construction which was previously insured by Frontier Insurance Company which is now insolvent so my client in fact at this point is KIGA." Counsel for Island Fork and KIGA raised arguments on the merits at the ALJ and Board level, and introduced medical evidence. She briefed both decision makers on whether Island Fork was properly considered a responsible party, but did not challenge KIGA's status.

---

[1] The Sixth Circuit described KIGA as follows:

> KIGA is a nonprofit body created by the Kentucky Insurance Guaranty Association Act (Guaranty Act) to provide benefits when a member insurance company is insolvent. All providers of property and casualty insurance in Kentucky are required to be KIGA members and pay fees—assessed with insurance premiums—to the association. Ky. Rev. Stat. § 304.36-080(1)(d). KIGA covers "claims made against insureds whose carrier becomes insolvent." *Ky. Ins. Guar. Ass'n v. Jeffers*, 13 S.W.3d 606, 608 (Ky. 2000). KIGA also "assist[s] in the detection and prevention of insurer insolvencies." Ky. Rev. Stat. § 304.36-020. The Guaranty Act provides exceptions for "[o]cean marine insurance" and "[a]ny insurance provided, written, reinsured, or guaranteed by any government or governmental agencies." Ky. Rev. Stat. § 304.36-030.

2017 WL 4324979 at *2.

2017 WL 4324979 at *2 (footnote omitted). The court concluded that KIGA had forfeited its personal jurisdiction challenge because it did not raise the issue with the administrative law judge or the Board and, in fact, participated in the proceedings.

After distinguishing the instant case from a recent unpublished decision, *Appleton & Ratliff Coal Corp. v. Ratliff*, 664 Fed.Appx. 470 (6th Cir. 2016), involving KIGA, the court addressed KIGA's argument that one or more exclusions under the Guaranty Act apply, thereby rendering KIGA not liable for benefits payments. *see* Ky. Rev. Stat. § 304.36-030(1)(f), (h). First, the court considered and rejected KIGA's argument that insurance coverage under the Black Lung Benefits Act is "[o]cean marine insurance," in light of how the Guaranty Act uses and defines that term. Second, the court held that the Guaranty Act's exception for insurance "guaranteed by ... governmental agencies" also does not apply, as "[t]he Trust Fund has not 'guaranteed' the Black Lung Benefits Act coverage under Kentucky law." *Id.* at *5.

In light of the above, the court determined that KIGA was liable for the Frontier-issued insurance coverage and affirmed the Board's decision below.

[Insolvent carrier; liability of guaranty association]

In an unpublished opinion, *Zurich Am. Ins. Grp. v. Director, OWCP [Linton]*, ___ Fed.Appx. ___, 2017 WL 4231076 (4th Cir. Sept. 25, 2017), the Fourth Circuit summarily affirmed the Board's affirmance of an administrative law judge's award of benefits.

B. Benefits Review Board

In *Griffith v. Terry Eagle Coal Co., LLC*, ___ BLR ___, BRB No. 16-0587 BLA (Sept. 6, 2017), the Board clarified the analysis to be applied on rebuttal at 20 C.F.R. §718.305(d). In the case, the Board initially affirmed, as unchallenged, the claimant's invocation of the 15-year rebuttable presumption of total disability due to pneumoconiosis. Slip op. at 2 n.2. The Board agreed with the employer that the administrative law judge erred in his analysis on rebuttal and provided the following guidance on remand:

> The administrative law judge is instructed to reconsider whether employer established rebuttal in accordance with the regulations. The administrative law judge is instructed to begin his analysis by considering whether employer disproved the existence of legal pneumoconiosis by establishing that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich [v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting)]. Similarly, the administrative law judge must determine whether employer has established that claimant does not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich,* 25 BLR at 154-56.
>
> If the administrative law judge finds that employer has met its burden to disprove the existence of both legal and clinical pneumoconiosis by a preponderance of the evidence, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. However, if employer fails to establish that claimant has neither legal nor clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) by establishing that "no part of

> [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Minich*, 25 BLR at 1-159. If employer is unable to rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii), the administrative law judge must reinstate the award of benefits.

Slip op. at 5-6.

Accordingly, the Board remanded the matter to the administrative law judge for further consideration.

[Fifteen-year presumption at 20 C.F.R. § 718.305]