



BRB No. 14-0285 BLA

CLARENCE E. FARMER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MUSTANG COAL COMPANY, Self-insured)	
through KANEB SERVICES,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	
)	
and)	
)	DATE ISSUED: 04/29/2015
FURMANITE CORPORATION ¹)	
)	
Petitioner)	
)	
and)	
)	
NUSTAR ENERGY, L.P.)	
)	
Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

¹ The administrative law judge designated Furmanite Corporation and NuStar Energy, L.P., as parties to the claim pursuant to 20 C.F.R. §725.360(d). Decision and Order at 2 n.1.

Appeal of the Decision and Order Awarding Benefits and the Order Denying Furmanite Corporation's Petition for Reconsideration of Larry S. Merck, Administrative Law Judge, United States Department of Labor. James D. Holliday, Hazard, Kentucky, for claimant.

James M. Kennedy and Lois A. Kitts (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Furmanite Corporation.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for NuStar Energy, L.P.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Furmanite Corporation (Furmanite) appeals the Decision and Order Awarding Benefits and the Order Denying Furmanite Corporation's Petition for Reconsideration (2010-BLA-05733) of Administrative Law Judge Larry S. Merck 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 miner's claim filed on February 19, 2008. Director's Exhibit 2.

At the hearing held on December 11, 2012, the parties stipulated that claimant is entitled to benefits. Hearing Transcript at 6-8; Decision and Order at 3. In a Decision and Order issued on January 8, 2014, the administrative law judge awarded benefits, and found that Mustang Coal Company (Mustang Coal) was the properly designated responsible operator. Furmanite moved for reconsideration of the responsible operator determination, which the administrative law judge denied on April 16, 2014.

On appeal, Furmanite challenges the administrative law judge's determination that Mustang Coal is the responsible operator. Claimant responds, urging affirmance. NuStar Energy, L.P. (NuStar) responds, challenging the responsible operator designation. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that Mustang Coal was properly

designated as the responsible operator.² Furmanite has filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed 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 Assocs., Inc.*, 380 U.S. 359 (1965).

The record reflects that the district director identified Mustang Coal as the responsible operator, self-insured through its parent company, Kaneb Services, Incorporated (Kaneb Services), which the district director viewed as an "Insurance Carrier." Director's Exhibit 60 at 9. Neither Furmanite nor NuStar disputes that Mustang Coal was the last coal mine operator to employ claimant for at least one year. Further, there is no dispute that, at the time of claimant's employment, Mustang Coal was self-insured through Kaneb Services, which secured an indemnity bond issued by Insurance Company of North America, under bond number M119631.³ Decision and Order at 4; Director's Exhibit 13. However, when the district director notified Mustang Coal and Kaneb Services of the claim, the notice triggered a dispute as to whether Kaneb Services had subsequently become Furmanite or NuStar. Director's Exhibits 6, 8, 34, 38, 39. Specifically, Furmanite and NuStar each argued that, as a result of a series of corporate transactions that took place between 2001 and 2007, the other company had assumed the liabilities of Kaneb Services for black lung benefits of miners who were employed by "Ikerd-Bandy" companies between July 31, 1975, and February 7, 1985. Director's Exhibits 6-8, 11, 12, 47, 54, 55. Declining to address that issue,⁴ the district

² The administrative law judge's unchallenged determination that claimant is entitled to benefits is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Claimant's last employment with Mustang Coal was in 1982. Director's Exhibit 15 at 3. In its brief, Furmanite states that Mustang Coal went out of business later in the 1980s. Furmanite's Brief at 2. Further, it is undisputed that Kaneb Services is no longer in business.

⁴ In the Proposed Decision and Order awarding benefits, the district director found that the dispute between Furmanite and NuStar as to which company had assumed the liabilities of Kaneb Services "d[id] not change the fact that Mustang Coal Company is the responsible operator." Director's Exhibit 60 at 12. The district director further noted that "both Furmanite Corporation and NuStar Energy [we]re being served with th[e] Proposed Decision and Order." *Id.*

director issued a Proposed Decision and Order awarding benefits, naming Mustang Coal as the responsible operator, self-insured through Kaneb Services. Director's Exhibit 60 at 3. The district director addressed the Decision and Order to Mustang Coal, "C/O" both Furmanite and NuStar. *Id.* Furmanite and NuStar requested a hearing. Director's Exhibits 64, 66.

After the hearing, Furmanite moved to reopen the record and submitted a June 19, 1987 notice from CIGNA Insurance Company, stating that bond number M119631 issued to Kaneb Services was canceled, effective July 24, 1987.⁵ Furmanite's Exhibit 2. Although this document was not submitted when the case was before the district director, the administrative law judge found, over the Director's objection, that Furmanite's inability to locate the document at an earlier stage in the proceedings constituted extraordinary circumstances warranting its admission into the record.⁶ *See* 20 C.F.R. §725.456(b)(1); Decision and Order at 9.

In his Decision and Order, the administrative law judge found that Mustang Coal met the criteria for designation as the responsible operator. Specifically, the administrative law judge found that the criteria at 20 C.F.R. §725.494(a)-(d) were met based on the parties' stipulations.⁷ With respect to whether Mustang Coal was capable of assuming its liability for benefits pursuant to 20 C.F.R. §725.494(e), the administrative law judge found that the Director established that Mustang Coal qualified as a self-insured operator by posting an indemnity bond, which was in effect when claimant's employment with Mustang Coal ended in 1982. Decision and Order at 13. Therefore, the administrative law judge determined that Mustang Coal was presumed to be capable

⁵ The record reflects that the cancellation notice was sent via certified mail to "State of Texas/U.S. Department of Labor, Employment Standards Administration, Division of Coal Mine Workers' Compensation, P.O. Box 12157, Austin TX 78711." Furmanite's Exhibit 2.

⁶ The administrative law judge found "no merit in Furmanite's allegation that the [d]istrict [d]irector withheld the notice of the cancellation of the bond securing Mustang Coal's liabilities under the Act." Order Denying Furmanite Corporation's Petition for Reconsideration at 2. As Furmanite does not address or specifically challenge the administrative law judge's finding, the finding is affirmed. *See Skrack*, 6 BLR at 1-711.

⁷ Specifically, the administrative law judge found that claimant's disability arose out of his employment with Mustang Coal, that Mustang Coal was an operator after June 30, 1973, that Mustang Coal employed claimant for a cumulative period of at least one year, and that claimant's employment with Mustang Coal included at least one working day after December 31, 1969. *See* 20 C.F.R. §725.494(a)-(d); Decision and Order at 12.

of assuming its liability for the payment of benefits pursuant to 20 C.F.R. §§725.494(e), 725.495(b).

Further, the administrative law judge found that he lacked jurisdiction to address the argument of Furmanite and NuStar that the bond securing Mustang Coal's liability was invalid because it was canceled in 1987. Therefore, the administrative law judge determined that the parties failed to establish that Mustang Coal was unable to assume liability for the payment of benefits, and he concluded that Mustang Coal was the properly designated responsible operator. Additionally, because the administrative law judge determined that Mustang Coal was the responsible operator, he found it unnecessary to address the issue of whether Furmanite or NuStar ultimately could be held responsible for Mustang Coal's liability.⁸

Furmanite challenges the administrative law judge's determination that Mustang Coal is the responsible operator. Specifically, Furmanite argues that, because the surety bond through which Mustang Coal was authorized to self-insure was canceled, Mustang Coal is not capable of assuming liability for the payment of benefits under 20 C.F.R. §725.494(e). Furmanite's Brief at 7-11. Both Furmanite and NuStar argue that, because the bond was subsequently canceled, the district director did not comply with his duty to properly investigate the named responsible operator's financial ability to assume its liability.⁹ Furmanite's Brief at 5-7; NuStar's Brief at 10-12. We disagree.

The regulation at 20 C.F.R. §725.494(e) provides that an operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was self-insured, during the period in which the miner was last employed by the operator, and there was a security given by the operator pursuant to 20 C.F.R. §726.104(b), that is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits as awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). In order to qualify as a self-insured operator, the operator is authorized by the regulations to give a security "[i]n the form of an indemnity bond with sureties [in an amount] satisfactory to the [Office of Workers' Compensation Programs]." 20 C.F.R. §726.104(b)(1).

⁸ On appeal, Furmanite does not challenge the administrative law judge's finding that he did not need to address the dispute between Furmanite and NuStar as to which company could be held responsible for Mustang Coal's liability. That finding is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

⁹ NuStar concedes that the administrative law judge lacked jurisdiction to decide the issue of whether the surety bond is valid. NuStar's Brief at 12.

Contrary to the arguments of Furmanite and NuStar, once a potentially liable operator has been named, the district director no longer bears the burden of establishing that the named operator continues to be capable of paying benefits. Rather, the regulation specifically provides that “[i]t shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e).” 20 C.F.R. §725.495(b). The named operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability or that another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c).

As noted above, neither Furmanite nor NuStar disputes that Mustang was the last operator to employ the miner for at least one year. The Director has established that a surety bond was posted by Mustang Coal when it was authorized to self-insure, pursuant to 20 C.F.R. §726.104(b). Director’s Exhibit 13. Furmanite concedes that Mustang Coal secured its liabilities through the bond, but argues that the original bond is no longer valid. Furmanite’s Brief at 7-8. However, as the administrative law judge correctly determined, he lacked jurisdiction to decide whether the surety bond is valid, as that is an issue to be decided in federal district court, should the Director bring an action to enforce the bond.¹⁰ See 28 U.S.C. §§1345, 1352; 33 U.S.C. §919(a), as incorporated by 30 U.S.C. 932(a); 30 U.S.C. §934(b)(4)(A); 20 C.F.R. §725.604; *Temp. Emp’t Servs. v. Trinity Marine Grp., Inc.*, 261 F.3d. 456, 465, 35 BRBS 92, 95 (CRT) (5th Cir. 2001) (holding that questions “that are not ‘integral to’ the compensation claim” are not within the jurisdiction of the administrative law judge or the Board); *Lynch v. Old Ben Coal Co.*, BRB Nos. 10-0209, 10-0209-A, slip op. at 15 (Dec. 8, 2010) (unpub.). The Board also lacks jurisdiction to decide this issue; therefore, we decline to address Furmanite’s arguments with regard to this issue on appeal.¹¹ Thus, we affirm the administrative law judge’s determination that Mustang Coal is the responsible operator.

¹⁰ As the Director notes, the cancellation of a surety bond securing an operator’s liability under the Act, which contained language virtually identical to the bond in this case, did not affect the surety’s liability for claims that arose during the bond period. See *United States ex rel. Dep’t of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997); *United States v. Ins. Co. of N. Am.*, 83 F.3d 1507, 1513 (D.C. Cir. 1996).

¹¹ Because the validity of the surety bond that secured Mustang Coal’s liability was not an issue to be determined in these claim proceedings, we also decline to address Furmanite’s argument that its due process rights were violated by the district director’s alleged failure to disclose the 1987 bond cancellation notice. Furmanite’s Brief at 5-7.

We also reject NuStar's contention that the district director failed to name a single responsible operator, as required by 20 C.F.R. §§725.410, 725.418(d). NuStar's Brief at 11, 13. The district director's Proposed Decision and Order identified Mustang Coal as the only responsible operator. Director's Exhibit 60 at 4.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Furmanite Corporation's Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge