

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 24-0351 BLA

SUSAN E. CUMPSTON )  
(o/b/o ROBERT B. CUMPSTON, deceased) )

Claimant-Respondent )

v. )

NEW WARWICK MINING COMPANY )

and )

PENNSYLVANIA WORKERS' )  
COMPENSATION SECURITY FUND )  
o/b/o INSERVCO INSURANCE SERVICES )

Employer/Carrier- )  
Petitioners )

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

Party-in-Interest )

**NOT-PUBLISHED**

DATE ISSUED: 08/11/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta,  
Administrative Law Judge, United States Department of Labor.

Deanna Lyn Istik (Sinatra & Istik Law Office, PLLC), Cranberry Township,  
Pennsylvania, for Claimant.

Ronald A. Varga (Law Office of Nathaniel M. Holmes, LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.<sup>1</sup>

Ann Marie Scarpino (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2023-BLA-05772) rendered on a claim filed on February 18, 2021, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found New Warwick Mining Company (New Warwick) is the responsible operator and the Pennsylvania Workers' Compensation Security Fund (PWCSF) is the responsible carrier.<sup>2</sup> She accepted the parties' stipulations that the Miner had at least 29.83 years of coal mine employment and that he established a total pulmonary or respiratory disability due to pneumoconiosis arising out of his coal mine employment; he was therefore entitled to benefits. 20 C.F.R. §§718.202, 718.203, 718.204(b)(2), (c).

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<sup>1</sup> Employer and its Carrier were previously represented by Margaret M. Hock (Thomson, Rhodes & Cowie, P.C.), of Pittsburgh, Pennsylvania, who filed their Petition for Review and Supporting Brief. After briefing, but prior to a decision in the case, Ronald A. Varga filed a Notice of Appearance as counsel for Employer and its Carrier.

<sup>2</sup> The district director had named Arrowood Indemnity as the responsible carrier. On April 29, 2024, the ALJ dismissed Arrowood Indemnity and added Pennsylvania Workers' Compensation Security Fund (PWCSF) as the responsible carrier due to Arrowood Indemnity's insolvency and liquidation, and PWCSF's request that it be added as a party "in its place." April 29, 2024 Order at 2.

On appeal, Employer argues the ALJ erred in finding New Warwick is the responsible operator.<sup>3</sup> Claimant<sup>4</sup> and the Acting Director, Office of Workers' Compensation Programs (the Director), respond, urging the Benefits Review Board to affirm the ALJ's responsible operator finding.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>5</sup> 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, 361-62 (1965).

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).<sup>6</sup> Once the district director identifies a potentially liable operator, that operator may be relieved of liability only if it proves it is financially incapable of assuming liability for benefits, or another operator more recently

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<sup>3</sup> We affirm, as unchallenged on appeal, the ALJ's finding that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 10; Hearing Tr. at 6-7.

<sup>4</sup> Claimant is the widow of the Miner, who died on December 14, 2023. October 2, 2024 Order Granting Claimant's Request to Hold Survivor's Claim in Abeyance. She filed a separate survivor's claim but requested it be held in abeyance while she pursues the miner's claim. *Id.*

<sup>5</sup> The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3 n.5; Director's Exhibit 3.

<sup>6</sup> For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

Employer argues the ALJ erred because she improperly declined to consider the Miner's deposition testimony. Employer's Brief at 5-7. It contends this testimony establishes either New Warwick is not the responsible operator or, if it is, the Miner was employed by New Warwick after PWCSF's insurance coverage terminated. *Id.* at 2.

An ALJ exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Thus a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The district director issued a Notice of Claim on April 14, 2021, advising New Warwick that it had been identified as a potentially liable operator, and Employer responded by controverting the claim. Director's Exhibits 30, 40. On August 3, 2021, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) designating New Warwick as the responsible operator. Director's Exhibit 43. In the SSAE, the district director advised Employer that it may "now submit . . . additional documentary evidence relevant to liability, and may identify witnesses relevant to liability that the designated responsible operator intends to call if the case is referred to the Office of Administrative Law Judges [(OALJ)]." *Id.* at 3, *citing* 20 C.F.R. §725.414(b), (c). The district director specified that Employer had until October 2, 2021, to submit liability evidence or identify liability witnesses. *Id.*

Employer continued to generally challenge New Warwick's designation as the responsible operator, but it did not submit any additional documentary evidence to the district director and did not identify any liability witnesses within the timeframe set forth by the SSAE. Director's Exhibits 54, 56-62. Thereafter, the district director issued a Proposed Decision and Order (PDO) on March 28, 2022, naming New Warwick as the responsible operator and awarding benefits. Director's Exhibit 63.

In response to the PDO, Employer requested modification on April 7, 2022, alleging a mistake in fact regarding New Warwick's designation as the responsible operator. Director's Exhibit 76. The district director considered Employer's response to be a request for a hearing and forwarded the case to the OALJ on June 21, 2022. Director's Exhibit 81. On September 22, 2022, Employer submitted the Miner's deposition testimony to the district director to support its position that New Warwick is not the responsible operator. Director's Exhibit 79. The district director subsequently denied Employer's request for

modification because the claim had been forwarded to the OALJ for a formal hearing and thus was no longer under the district director's jurisdiction. Director's Exhibit 80. The ALJ, however, remanded the case to the district director based on Employer's argument that it had never requested a hearing and its request for modification had not been ruled on. Director's Exhibit 96.

Thereafter, the district director issued another PDO awarding benefits and naming New Warwick as the responsible operator. Director's Exhibit 99. Employer filed a second request for modification and again submitted the Miner's deposition testimony. Director's Exhibit 104. On March 8, 2023, the district director issued another PDO denying Employer's second request for modification. Director's Exhibit 105. Subsequently, the case was referred to the OALJ. Director's Exhibit 110.

Before the ALJ, Employer argued that New Warwick should be dismissed as the responsible operator because the Miner's deposition testimony establishes that there is no insurance policy that covers New Warwick's black lung liability on the Miner's last day of coal mine employment with it. Hearing Tr. at 12-18. The ALJ held, however, that Employer was precluded from relying on the Miner's deposition testimony because it failed to timely identify him as a liability witness before the district director as 20 C.F.R. §725.414(b), (c) requires, nor did it allege extraordinary circumstances to excuse its failure. February 8, 2024 Order at 5-6; Decision and Order at 6 & n.8. Addressing Employer's remaining arguments, the ALJ found Employer failed to establish it is financially incapable of assuming liability for benefits, or another operator more recently employed the Miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c); Decision and Order at 7-10.

Employer concedes it failed to identify the Miner as a liability witness before the October 2, 2021 deadline set by the district director in the SSAE. Employer's Brief at 6 (PWCSF "acknowledges that the testimony of the [Miner] was not submitted in accordance with the [SSAE] issued on August 3, 2021."). Employer argues the ALJ should have considered the Miner's testimony, however, because it submitted this evidence on September 22, 2022, when the case was still with the district director, in conjunction with its request for modification of the PDO. *Id.* at 5-6. It also argues the ALJ should have considered the evidence because Claimant is an "essential party to the case." *Id.* We are not persuaded.

Witness testimony relating to an operator's or carrier's liability is not automatically admissible before the ALJ. Rather, an employer must designate potential liability witnesses "in accordance with the schedule issued by the district director." 20 C.F.R. §725.414(c). "Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in

any hearing conducted with respect to the claim unless the [ALJ] finds that the lack of notice should be excused due to extraordinary circumstances.” *Id.*

The district director’s SSAE informed Employer that it had until October 2, 2021, to designate potential liability witnesses in support of its affirmative case. Director’s Exhibit 43 at 3. Employer, however, did not submit the Miner’s deposition testimony until September 22, 2022, after the district director had issued her PDO. Director’s Exhibit 79. Employer has not alleged extraordinary circumstances exist to excuse its failure either before the district director, the ALJ, or the Board. Because the ALJ followed the applicable regulations, she acted within her discretion in excluding the Miner’s deposition testimony as untimely.<sup>7</sup> 20 C.F.R. §725.414(c); February 8, 2024 Order; Decision and Order at 6 & n.8; *see Clark*, 12 BLR at 1-153.

As Employer does not otherwise challenge the ALJ’s findings that it did not establish it is financially incapable of assuming liability for benefits, or another operator more recently employed the Miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits, we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7-10. Thus, we affirm the ALJ’s finding that New Warwick is the responsible operator. *See* 20 C.F.R. §725.495.

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<sup>7</sup> Employer also argues the Miner’s testimony is relevant to establishing it is not financially capable of assuming liability and thus should be admitted. Employer’s Brief at 6-7. However, relevance is not a basis to excuse Employer’s failure to timely identify the Miner as a liability witness. *See generally Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d. 278, 297 n.18 (4th Cir. 2007) (relevancy alone is insufficient to establish good cause for admission of evidence in excess of evidentiary limitations into the record).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge