



BRB No. 18-0521 BLA
Case No. 2015-BLA-05627

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| MILLARD R. SLUSS |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| HOSANNA, LLC |) | |
| |) | |
| and |) | |
| |) | |
| AMERICAN MINING INSURANCE |) | DATE ISSUED: 01/11/2019 |
| COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Petitioners |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | ORDER |

Employer/carrier (employer) appeals the Supplemental Decision and Order Awarding Attorney’s Fees and the Order Denying Employer’s Motion for Reconsideration (2015-BLA-05627) of Administrative Law Judge Alan L. Bergstrom, rendered in connection with a miner’s claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).

On August 23, 2017, Judge Bergstrom issued a Decision and Order awarding benefits. Thereafter, he granted claimant’s counsel’s fee request in a Supplemental Decision and Order issued on November 29, 2017, and he denied employer’s motion for reconsideration of the fee award on June 28, 2018.

Meanwhile, employer appealed the underlying award of benefits in the miner's claim to the Board. On March 29, 2018, the Board issued an order remanding the case to Judge Bergstrom "to promptly reconsider the substantive and procedural actions previously taken and to issue a decision on the merits accordingly. 20 C.F.R. §802.405(a)." *Sluss v. Hosanna, LLC*, BRB No. 17-0661 BLA, slip op. at 1-2 (Mar. 29, 2018)(Order)(unpub.).

On remand, Judge Bergstrom issued a Decision and Order in which he reconsidered his initial decision, adopted and incorporated it by reference, and again awarded benefits. Decision and Order on Remand at 4-5. Employer timely moved for reconsideration.

Because Judge Bergstrom had retired, the case was reassigned to Administrative Law Judge Paul C. Johnson, Jr., who granted reconsideration and vacated Judge Bergstrom's decision awarding benefits on November 2, 2018. Specifically, Judge Johnson ruled that, because Judge Bergstrom took significant actions in the case while not properly appointed, employer was entitled to a new hearing before a new, and properly appointed, administrative law judge.¹ Order Granting Motion for Reconsideration and Denying Motion for Remand at 1-2; *see Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018).

Because the underlying award of benefits has been vacated and a new administrative law judge will issue a new decision on the merits of claimant's entitlement, Judge Bergstrom's fee award in this case must also be vacated.

Accordingly, we vacate Judge Bergstrom's Supplemental Decision and Order Awarding Attorney's Fees and Order Denying Employer's Motion for Reconsideration, and remand this case to the Office of Administrative Law Judges for reassignment to the new and properly appointed administrative law judge who will adjudicate the underlying

¹ Judge Johnson also vacated Judge Bergstrom's Supplemental Decision and Order awarding a fee and Order denying reconsideration of the fee award. Order Granting Motion for Reconsideration and Denying Motion for Remand at 2. Judge Johnson lacked jurisdiction over those fee orders, however, because they had already been appealed to the Board. *See Bartley v. L&M Coal Co.*, 7 BLR 1-243, 1-248 (1984); *Meeks v. Director, OWCP*, 6 BLR 1-794, 1-796 n.4 (1984); *see also Colbert v. Nat'l Steel & Shipbuilding Co.*, 14 BRBS 465, 468 (1981).

claim for benefits. If benefits are awarded, that administrative law judge should consider any attorney fee petitions filed at that time.²

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

² Any fee awarded is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).