

BRB Nos. 98-1270 BLA
and 98-1270 BLA-A

NANCY DONCHAK)	
(Widow of NICHOLAS DONCHAK))	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
BEAR RIDGE SHOPS, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Maureen E. Calder (Marshall, Dennehey, Warner, Coleman & Goggin), Scranton, Pennsylvania, for carrier.

Michelle S. Gerdano (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer's insurance carrier cross-appeals the Decision and Order (98-BLA-0106) of Administrative Law Judge Ralph A. Romano awarding benefits 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).¹ Inasmuch as employer failed to respond in any manner after receiving notification of this survivor's claim in order to contest claimant's entitlement to benefits and failed to appear at the hearing, the administrative law judge entered a default judgment against employer.² Accordingly, benefits were awarded. A

¹ Claimant is the surviving widow of the miner, Nicholas Donchak. The miner originally filed a miner's claim on June 5, 1973, which was ultimately denied on July 11, 1980, Director's Exhibit 22. No further action was taken on the miner's claim and it is not at issue herein. The miner died on September 17, 1976, Director's Exhibit 5. Subsequent to the miner's death, claimant filed a survivor's claim on October 4, 1976, which was ultimately denied by the Department of Labor on review on July 17, 1980, Director's Exhibit 23. No further action was taken on this survivor's claim. Claimant filed a second survivor's claim, at issue herein, on March 31, 1997, Director's Exhibit 1.

² Claimant's second duplicate claim, at issue herein, was initially denied by the Department of Labor, in part, as a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) on May 20, 1997, Director's Exhibits 10-11. A Notice of Claim and Operator Notification were sent by the Department of Labor to employer, Bear Ridge Shops, Incorporated, Director's Exhibits 14-15, but no insurance carrier for employer was ever identified or sent any notification of the instant claim by the Department of Labor. A Notice of Conference was sent to employer on July 9, 1997, Director's Exhibit 16, which was received by employer on July 10, 1997, as indicated by a certified mail receipt, Director's Exhibit 17. Employer failed to appear at the conference and the claim was again denied by the Department of Labor, in part, as a duplicate survivor's claim pursuant to Section 725.309 on September 4, 1997, Director's Exhibit 18. A second Operator Notification was sent to employer on September 11, 1997, Director's Exhibit 20, which was received by employer on September 12, 1997, as indicated by a certified mail receipt, Director's Exhibit 21.

The claim was referred for a hearing before the Office of Administrative Law Judges and the issues of whether the instant claim was a request for modification under 20 C.F.R. §725.310 or a duplicate claim under Section 725.309(d) were both raised as issues being contested by the Director, Director's Exhibit 24. Although notice of the hearing was sent to

subsequent motion for reconsideration filed by the Director was summarily denied by the administrative law judge. On appeal, the Director contends that the administrative law judge erred in awarding a default judgment against employer because employer failed to respond after receiving notification of this survivor's claim and failed to appear at the hearing. On cross-appeal, employer's insurance carrier contends that it was never properly notified of the instant claim by the Department of Labor and, therefore, requests that the case be remanded to allow it to defend the claim. Alternatively, employer's insurance carrier contends that the instant survivor's claim must be denied as a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d). Claimant responds to both the Director's appeal and employer's insurance carrier's cross-appeal, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director has also submitted a Motion to Remand in response to employer's insurance carrier's cross-appeal, acknowledging that employer's insurance carrier was not properly notified of the instant claim and noting that the Director has no objection to employer's insurance carrier's request that the case be remanded to allow it an opportunity to defend the claim.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

employer, the Director informed the administrative law judge by letter prior to the hearing that, inasmuch as employer had failed to respond to contest any issue in this case, the Director believed that employer had waived its right to contest its designation as responsible operator and, therefore, the Director informed the administrative law judge that the Director would not attend the hearing. Subsequently, only claimant's representative appeared at the hearing held on April 8, 1998, and requested that a default judgment be entered against employer, Hearing Transcript at 6. The administrative law judge inquired as to whether employer was insured and claimant's representative informed the administrative law judge that she had no idea, *id.*

The Director contends that pursuant to 20 C.F.R. §725.413(b)(3), if an employer fails to timely respond to a notification of a claim, it is deemed to have accepted the initial findings of the district director, which in this case included a finding that the instant survivor's claim must be denied as a duplicate survivor's claim pursuant to Section 725.309(d), *see* Director's Exhibits 10-11, 18. Moreover, the Director contends that pursuant to 20 C.F.R. §725.461(b), if an employer fails to appear at the hearing, it is deemed to have waived the right to present evidence, but is not prohibited from relying on the findings of the district director that claimant is not entitled to benefits. In response, claimant contends that pursuant to Section 725.413(b)(3), if an employer fails to timely respond to a notification of a claim, it is deemed to have waived its right to contest the claim and contends that employer failed to properly notify its insurance carrier of the instant claim or notify the district director of its insurance coverage. Claimant also contends that the Director did not oppose claimant's motion for a default judgment and, therefore, failed to contest claimant's entitlement to benefits.

Initially, we note that, although the unexcused failure of a party to attend a hearing constitutes a waiver of that party's right to present evidence at the hearing, *see* 20 C.F.R. §725.461(b); *see also Prater v. Clinchfield Coal Co.*, 12 BLR 1-121 (1989), the Board has declined to fashion any broader rule regarding the scope of any waiver which may be implicit in a party's failure to attend the hearing, *see Delara v. Director, OWCP*, 7 BLR 1-110 (1984). Moreover, claimant bears the burden of proving entitlement, even where employer offers no defense, *see* 20 C.F.R. §725.461; *see generally Young v. Barnes and Tucker Co.*, 11 BLR 1-148, 1-150 (1988), and the Board has held that, pursuant to Federal Rules of Civil Procedure 56, *see also* 20 C.F.R. §725.451(c), an administrative law judge must deny summary judgment if there are genuine unresolved factual issues as to any material fact, *see Montoya v. National King Coal Co.*, 10 BLR 1-59 (1986). Thus, inasmuch as the Director, contrary to claimant's contention, contested entitlement, *see* Director's Exhibit 24, and the issue of whether claimant established entitlement was unresolved at the time of the hearing, *see Young, supra; Montoya, supra*, we vacate the administrative law judge's awarding of default judgment against employer.

In addition, employer's insurance carrier correctly contends that it was never properly notified of the instant claim by the Department of Labor. Section 35 of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §935, as incorporated into the Act by 30 U.S.C. §932(a) provides that notice to employer shall be considered notice to the carrier. *See also* 20 C.F.R. §726.207. Nevertheless, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has noted with approval that both the United States Court of Appeals for the Fourth Circuit in *Tazco, Inc. v. Director, OWCP [Osbourne]*, 895 F.2d 949, 13 BLR 2-313 (4th Cir. 1990), and the United States Court of Appeals for the Sixth Circuit in *Warner Coal Co. v. Director, OWCP [Saylor; Slaton]*, 804

F.2d 346, 9 BLR 2-157 (6th Cir. 1986), have held that under the Act and regulations, employer's insurance carrier is subject to liability and, therefore, due process requires that an employer's insurance carrier be given adequate notice as a party to the litigation and an opportunity to defend on the question of its direct liability to the claimant, *see National Mines Corp. v. Carroll*, 64 F.3d 135, 140, 19 BLR 2-329, 2-342 (3d Cir. 1995). Inasmuch as the Director acknowledges that employer's insurance carrier was never notified of its potential liability in the instant case, *see* 20 C.F.R. §725.412(b); *see also Tazco, supra*, employer's insurance carrier was not provided adequate notice as required under 20 C.F.R. §725.412(b), *see Carroll, supra; Tazco, supra; Warner Coal, supra*.

Finally, we recognize that Section 725.309(d) may be applicable to the instant claim. Section 725.309(d) provides that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met, *i.e.*, that it is filed within one year after the denial of the initial claim. 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grounds, Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). In the instant case, claimant's first survivor's claim was finally denied by the district director on July 17, 1980, Director's Exhibit 23. Claimant apparently took no further action with respect to this claim, but rather filed a second survivor's claim on March 31, 1997, which was denied by the district director, in part, as a duplicate survivor's claim pursuant to Section 725.309(d), Director's Exhibits 10-11, 18. Moreover, the Director raised Section 725.309(d) as an issue to be considered by the administrative law judge at the hearing, Director's Exhibit 24. *See Watts, supra; see also Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark, supra*. Consequently, we remand the case to the district director to give employer's insurance carrier an opportunity to contest the instant claim on the merits and pursuant to Section 725.309(d).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge