No. 19-3142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GOOD COAL COMPANY, INC. and
AMERICAN INTERNATIONAL SOUTH/CHARTIS,

Petitioners

v.

BETTY SUE HAYNES, o/b/o and widow of ALBERT L. HAYNES and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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MISCELLANEOUS

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STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This case involves a May 2011 claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Albert L. Haynes, and a July 2011 claim for survivor's benefits under the Act filed by his widow, Betty Sue Haynes. On September 18, 2017, United States

Department of Labor (DOL) Administrative Law Judge (ALJ) Daniel F. Solomon issued a decision awarding benefits on both claims and ordering Good Coal Company, Inc. (Good Coal or the coal company), the miner's former employer, to pay them. Good Coal appealed this decision to DOL's Benefits Review Board on October 6, 2017, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

The Board affirmed ALJ Solomon's award on January 18, 2019, and Good Coal petitioned this Court for review on March 1, 2019, within sixty days of the Board's final decision. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred; and because Mr. Haynes had exposure to coal-mine dust – the injury contemplated by 33 U.S.C. § 921(c) – in the Commonwealth of Kentucky, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," and the "Heads of Departments." Good Coal argues that the award should be vacated because the ALJs who adjudicated

the case below were not properly appointed. The coal company, however, did not ever raise this Appointments Clause challenge before those ALJs, and did not raise it before the Board until more than six months after filing its petition for review and brief to the Board. Consistent with this Court's case law and its own longstanding precedent, the Board found the challenge untimely and declined to hear it.

The question presented is whether Good Coal forfeited its Appointments Clause challenge by failing to timely raise it before the administrative agency.[1]

STATEMENT OF THE CASE

Initial claim processing: Mr. Haynes filed his claim for BLBA benefits in May 2011, but died in June 2011, at which time Mrs. Haynes took over his claim and filed a separate widow's claim one month later. Upon consolidation and review of these claims, a district director of DOL's Office of Workers' Compensation Programs (OWCP) determined in April 2012 that neither Mr. Haynes nor Mrs. Haynes (together, Claimant) was entitled to benefits. At Claimant's request, the consolidated claims were forwarded on April 30, 2012, to the Office of Administrative Law Judges for a *de novo* hearing.

[1] Good Coal also challenges ALJ Solomon's decision on the merits. Opening Brief at (OB) 13-30. This brief does not address that argument.

Proceedings before ALJ Kirby: The hearing was held before Administrative Law Judge Christine L. Kirby in January 2015, and on October 20, 2015, she issued a decision denying benefits on both claims. Appendix (A.) 6. At no point during these proceedings before ALJ Kirby did Good Coal challenge her authority to hear the claims under the Appointments Clause.

First Proceedings before the Benefits Review Board: Claimant timely appealed ALJ Kirby's decision to the Benefits Review Board. In its response brief, Good Coal challenged ALJ Kirby's weighing of the medical evidence, but did not challenge her authority to hear the claims. On November 29, 2016, the Board vacated ALJ Kirby's decision based upon error in weighing the medical evidence and remanded the case to her for further review. A.39.

Proceedings before ALJ Solomon: Based upon ALJ Kirby's unavailability, the case was assigned to Administrative Law Judge Daniel F. Solomon, who on September 13, 2017, awarded benefits on both claims. Separate Appendix at (SA) 56. At no point during the proceedings before ALJ Solomon did Good Coal challenge his authority to hear the claims under the Appointments Clause.

Second Proceedings before the Benefits Review Board: Good Coal timely appealed ALJ Solomon's decision to the Board. In its brief, filed on December 15, 2017, the coal company argued that ALJ Solomon had erred in awarding benefits, but did not challenge his authority to hear the claims. Almost seven months later,

on July 9, 2018, Good Coal asked the Board for the first time to remand the case for a new hearing before a different ALJ because ALJ Solomon's appointment was invalid under the Appointments Clause.

The Board affirmed ALJ Solomon's award of benefits on January 18, 2019. SA 80. In a footnote, the Board denied Good Coal's Appointments Clause motion, holding that the coal company forfeited the issue when it failed to raise it in its opening brief. SA 83 n.5. In support, the Board cited *Lucia v. SEC*, __ U.S. __, 138 S.Ct. 2044 (2018), and this Court's decision in *Island Creek Coal Co. v. Wilkerson [Wilkerson]*, 910 F.3d 254 (2018).

Petition for review: In its opening brief, Good Coal asserts that, based upon the Supreme Court's decision in *Lucia*, ALJs Kirby and Solomon were not properly appointed, and that the remedy is to vacate the awards and remand the case for a hearing before a properly-appointed ALJ.

SUMMARY OF THE ARGUMENT

Good Coal has forfeited its Appointments Clause argument because it did not timely raise the issue before the agency. The company did not raise the issue before either of the ALJs who adjudicated the case or in its brief to the Board. It raised the issue for the first time in a motion to remand the case filed more than six months after Good Coal had filed its opening brief. The Board, adhering to its longstanding precedent, properly denied this motion, finding the Appointments

Clause argument waived because Good Coal had failed to raise it in its opening brief to the Board.

Under longstanding principles of administrative law, the coal company's failure to timely raise its Appointments Clause challenge before the agency means that it cannot raise that challenge now to this Court. Good Coal has forfeited the issue, and has pointed to no circumstance sufficient to excuse that forfeiture.

ARGUMENT

GOOD COAL'S ARGUMENT – THAT THE DECISIONS BELOW MUST BE VACATED BECAUSE THE ALJs WERE NOT APPOINTED IN ACCORDANCE WITH THE APPOINTMENTS CLAUSE – HAS BEEN FORFEITED AND THERE ARE NO GROUNDS TO EXCUSE THAT FORFEITURE.

A. Standard of review

Whether Good Coal has forfeited its Appointments Clause argument by failing to timely raise it below is a question of law. This Court reviews questions of law *de novo*. *Arch of Kentucky, Inc. v. Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 508 (6th Cir. 2003). However, the Court reviews for an abuse of discretion the Board's determination that Good Coal did not timely raise the challenge because it was not presented in the coal company's opening brief to the Board. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 639 (6th Cir. 2009) (finding no abuse of discretion in Board's excusing claimant's failure to preserve issue when Director had preserved

it); *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) ("[W]e afford considerable deference to the agency tribunal. In general, the formulation of administrative procedures is a matter left to the discretion of the administrative agency.") (internal quotation omitted).

B. Good Coal's challenge – that the decisions below must be vacated and the case remanded because the ALJs were not appointed in accordance with the Appointments Clause – has been forfeited.

1. Good Coal failed to timely raise its Appointments Clause challenge when this case was pending before the agency.

Good Coal failed to timely make an Appointments Clause challenge before either the ALJs or the Board. For more than six years – from April 2012 (when the district director forwarded the case for a formal ALJ hearing) until July 2018 (six-plus months after the coal company filed its opening brief) – Good Coal never challenged the authority of DOL ALJs to decide black lung cases generally or of ALJs Kirby and Solomon to decide this case. Good Coal waited until its July 2018 motion to remand to raise the Appointments Clause for the first time.[2]

By then, it was too late. The Board properly refused to consider Good Coal's new issue, explaining that, "[b]ecause [the coal company] first raised its

[2] The Director agrees that ALJs who preside over BLBA proceedings are inferior officers, and that the ALJs here were not properly appointed when they adjudicated the miner's and survivor's claims. To remedy this, the Secretary of Labor in December 2017 ratified the ALJs' appointments and the appointments of other then-incumbent DOL ALJs. *See infra* at 18.

Appointments Clause argument seven months after filing its opening brief in support of its petition for review, [the coal company] forfeited the issue." SA 83 n.5. As support, the Board cited *Lucia*, 138 S.Ct. at 2055 (requiring a "timely challenge" to an officer's appointment), and this Court's decision in *Island Creek Coal Co. v. Wilkerson [Wilkerson]*, 910 F.3d 254 (2018), holding that an Appointments Clause challenge was forfeited when not raised in an opening brief before the Court.

The Board also relied on its longstanding precedent that issues not raised in an opening brief are forfeited. SA 83 n.5 (citing *Williams v. Humphreys Enters., Inc.*, 19 Black Lung Rep. (MB) 1-111, 1-114 (1995) (declining to consider new issues raised by petitioner after it files its opening brief identifying the issues to be considered on appeal) and *Senick v. Keystone Coal Mining Co.*, 5 Black Lung Rep. (MB) 1-395, 1-398 (1982) (stating that the Board "will not normally address new arguments raised in reply briefs" and declining to do so)). *See also Caldwell v. North American Coal Corp.*, 4 Black Lung Rep. (MB) 1-135, 1-138 to 1-139 (1981) (same, while explaining that its "practice accords with the treatment of reply briefs in the United States Courts of Appeals"); *Ravalli v. Pasha Maritime Servs.*, 36 Ben. Rev. Bd. Serv. 91 (2002) (holding that issues may not be raised for the first time in a motion for reconsideration).

Following this policy, the Board has routinely declined to consider Appointments Clause challenges raised subsequent to a petitioner's opening brief. *See Pauley v. Consolidation Coal Co.*, BRB No. 17-0554 BLA (Apr. 25, 2018) (declining to consider Appointments Clause challenge raised for first time in post-briefing motion for abeyance), SA 109; *Eversole v. Shamrock Coal Co.*, BRB No. 17-0629 BLA (Apr. 24, 2018) (same), SA 99.

Even after the Supreme Court decided *Lucia*, the Board has continued to deny as untimely similar belated attempts to challenge an ALJ's authority under the Appointments Clause. *Motton v. Huntington Ingalls Indus.*, 52 Ben. Rev. Bd. Serv. 69, 69 n.1 (2018) (Appointments Clause challenge forfeited when first raised in post-briefing motion); *Luckern v. Richard Brady & Assoc.*, 52 Ben. Rev. Bd. Serv. 65, 66 n.3 (2018) (Appointments Clause challenge forfeited when first raised in reply brief); *Radcliff v. Energy West Mining Co.*, BRB No. 17-0484 BLA (June 19, 2019) (Appointments Clause challenge in motion for reconsideration forfeited), SA 111; *Tackett v. IGC Knott County*, 2019 WL 1075364, BRB No. 18-0033 BLA (Feb. 26, 2019) (Appointments Clause challenge not raised in initial appeal to BRB is untimely); *Conley v. National Mines Corp.*, BRB No. 17-0435 BLA (Jan. 7, 2019) (motion for reconsideration); *appeal docketed*, No. 19-3139 (6th Cir.), SA 94; *Eversole v. Shamrock Coal Co.*, 2018 WL 7046745, BRB No. 17-0629 BLA (Dec. 12, 2018) (post-briefing motion); *Beams v. Cain & Son, Inc.*, 2018 WL

7046795, BRB No. 18-0051 BLA (Nov. 26, 2018) (post-briefing motion); *McIntyre v. IGC Knott County*, 2018 WL 70466700, BRB No. 17-0583 BLA (Nov. 26, 2018) (post-briefing motion); *Elkhorn Eagle Mining Co. v. Higgins*, 2018 WL 3727423, BRB No. 17-0475 (July 30, 2018) (post-briefing motion), *appeal docketed*, No. 18-3926 (6th Cir.), *Elkins v. Dickenson-Russell Coal Co.*, 2018 WL 3727420, BRB No. 17-0461 BLA (July 5, 2018) (post-briefing motion); *Napier v. Star Fire Coals, Inc.,* BRB No. 17-0149 BLA (July 5, 2018) (motion for reconsideration), SA 101, *appeal docketed*, No. 18-3838 (6th Cir.).[3]

The Board procedure of declining to hear an issue not raised in an opening brief is certainly inoffensive as it closely parallels this Court's own rule on the

[3] The cited cases involve represented petitioners. The Board does not require *pro se* petitioners to file an opening brief and identify the issues on appeal; instead, the Board simply determines whether the ALJ's decision "is rational, in accordance with law and supported by substantial evidence." *Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995); 20 C.F.R. §§ 802.211(e), 802.220; *see generally Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*pro se* pleadings held to "less stringent standards" than those drafted by lawyers). In several cases, the Board has issued orders asking unrepresented petitioners if they want the *Lucia* issue to be considered, and explaining that the Board will consider *Lucia*'s application only if asked. Such orders are not inconsistent with the Board's longstanding rule that represented parties must raise all objections in an opening brief to preserve them for review. They merely allow unrepresented claimants an opportunity to raise a *Lucia* challenge when they would not normally be expected to file an opening brief.

subject. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999) (recognizing similarity between Board and Court rule that issues not raised in opening briefs are generally considered abandoned); *Caldwell*, 4 Black Lung Rep. at 1-138 to 1-139 (explaining that rule in courts of appeals is basis for Board practice); *see, e.g., Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 779 (6th Cir. 2018) ("[A]rguments made to us for the first time in a reply brief are waived."); *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010) (same); *accord Golden v. Comm'r*, 548 F.3d 487, 493 (6th Cir. 2008) ("[T]heir argument was forfeited when it was not raised in the opening brief."); *Pagan v. Fruchey*, 492 F.3d 766, 769 n.1 (6th Cir. 2007) (*en banc*) ("It is well established that issues not raised by an appellant in its opening brief . . . are deemed waived.").

Nor was the Board's refusal to afford special treatment to Appointments Clause challenges out of line. This Court confirmed that Appointments Clause challenges "are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture" in *Wilkerson*, 910 F.3d 254 at 256 (quoting *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 678 (6th Cir. 2018)). The *Wilkerson* panel declined to consider the petitioner's Appointments Clause challenge because it was not raised before the Court until petitioner's reply brief: "Time, time, and time again, we have reminded litigants that we will treat an argument as forfeited when it was not raised in the opening brief." 910 F.3d at 256 (internal quotation

omitted). *See Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009) (holding that petitioner "forfeited its [Appointments Clause] argument by failing to raise it in its opening brief"); *In re DBC*, 545 F.3d 1373, 1377, 1380 & n.4 (Fed. Cir. 2008) (refusing to entertain an untimely Appointments Clause challenge to the appointment of a Patent Office administrative judge); *see also Kabani & Co. v. SEC*, 733 F. App'x 918 (9th Cir. 2018) (citing *Lucia* and holding that petitioners "forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency"), *cert. denied*, 139 S. Ct. 2013 (2019).

As explained in *Greene*, 575 F.3d at 639, this Court will only overturn the Board's procedural rulings for an abuse of discretion. The Board's straightforward application here of its longstanding rule against petitioners raising new issues after filing an opening brief falls far short of that standard. Consequently, Good Coal failed to preserve its Appointments Clause challenge before the agency.

2. By failing to timely raise the issue before the agency, Good Coal forfeited its Appointments Clause challenge before this Court.

Good Coal's failure to preserve its Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles governing judicial review of administrative decisions, this Court should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Courts of Law," or the "Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia*, the Supreme Court held that SEC ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause. In so holding, the Supreme Court explained that it "has held that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief," and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." 138 S. Ct. at 2055 (emphasis added, internal quotation omitted).

To support that conclusion, the Court cited *Ryder v. United States*, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he – unlike other litigants – had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservation concerns had been raised in *Lucia's* merits briefing: as amicus, the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot

succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).[4]

Unlike the challenger in *Lucia*, Good Coal failed to timely raise and preserve its Appointments Clause challenge before the agency. It waited more than six years (from April 2012 to July 2018) to first raise the issue. As the Board properly concluded, by then it was too late.

Under longstanding principles of administrative law, Good Coal may not now raise before the Court an argument it failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. Based on the improper appointment, the district court invalidated the agency's order. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the

[4] Even if *Lucia*'s repeated references to timeliness could be considered *dicta*, "[a]ppellate courts have noted that they are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow*, 278 F.3d 581, 588 (6th Cir. 2002) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also Kabani & Co.,* 733 F. App'x at 919 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

agency's proceedings "while it has opportunity for correction [.]" *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Id.* at 37.[5]

This Court has consistently applied these normal principles of forfeiture, and explained that it is "well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 143 (6th Cir. 1997). And in cases under the BLBA, the Court will not consider issues that were not raised and preserved before the Board. *See*, *e.g.*, *Island Fork Construction v. Bowling*, 872 F.3d 754, 757-58 (6th Cir. 2017) ("Because KIGA did not raise the issue of its status before the ALJ or the Board, and instead participated in the proceedings, the challenge to personal jurisdiction was

[5] As previously discussed, Good Coal's initial raising of its Appointments Clause challenge in a motion to remand filed after its opening brief was not an "objection made at the time appropriate under its practice." *L.A. Tucker*, 344 U.S. at 37. Good Coal thus failed to exhaust its administrative remedies. *See Spectrum Health-Kent Community Campus v. N.L.R.B.*, 647 F.3d 341, 349 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the [NLRB]'s regulations require.").

forfeited."); *Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) ("Generally, this court will not review issues not properly raised before the Board."); *Hix v. Director, OWCP*, 824 F.2d 526, 527 (6th Cir. 1987) ("[W]e hold that even if a claimant properly appeals some issues to the Board, the claimant may not obtain [judicial] review of the ALJ's decision on any issue not *properly* raised before the Board.") (emphasis added).

These principles apply with full force to Appointments Clause challenges. As explained earlier, those challenges are not jurisdictional and receive no special entitlement to review. *See supra* at 11; *see also GGNSC Springfield LLC v. NLRB,* 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointment of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *Energy West Mining Co. v. Lyle on behalf of Lyle*, 929 F.3d 1202, 1206 (10th Cir. 2019) (refusing to consider Appointments Clause issue "[b]ecause Energy West did not invoke the Appointments Clause in proceedings before the Benefits Review Board"); *Turner Bros. Inc. v. Conley*, 757 F. App'x 697, 700 (10th Cir. 2018) ("Appointments Clause challenges are nonjurisdictional and may be waived or forfeited."). *Lucia* did not change this. This Court, as well as the Ninth and Tenth Circuits, have all held post-*Lucia* that Appointments Clause claims were forfeited when a petitioner failed to preserve them before the agency. *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (finding Appointments Clause

challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case); *Kabani & Co.*, 733 F. App'x at 919 ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros.*, 757 F. App'x at 699 (agreeing that "Turner Brothers' failure to raise the [Appointments Clause] issue to the agency is fatal").

Likewise, the Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d at 1377-81 (same).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)).

In fact, both the Secretary of Labor and the Board have taken appropriate remedial actions: the Secretary ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Sec'y of Labor's Decision Ratifying the Appointments of Incumbent U.S. Department of Labor Administrative Law Judges* (Dec. 20, 2017).[6] And the Board has held that where an ALJ was not properly appointed and the issue is timely raised, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, 2018 WL 82698645, at *2 (Ben. Rev. Bd. 2018) (*en banc*) (vacating improperly appointed ALJ's award and remanding the case for reassignment to a different ALJ); *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (same), SA 92; *Noble v. Cumberland River Coal Co.*, BRB No. 18-0419 BLA (Feb. 27, 2019) (same), SA 105. Had Good Coal timely raised the issue, it could have obtained appropriate relief. *Energy West Mining Co.*, 929 F.3d at 1206 (explaining that "the Board could have remedied a violation of the Appointments Clause by vacating the administrative law judge's decision and

[6] Available at: https://www.oalj.dol.gov/Proactive_disclosures_ALJ_appointments.html.

remanding for reconsideration by a constitutionally appointed officer"). But it did not do so.

Finally, Good Coal argues that *Wilkerson* contains an "implication" that issues need not be raised to the Board at all for a court to consider them. OB 12. As the company points out, the *Wilkerson* petitioner failed to raise the Appointments Clause issue either to the Board or in its opening brief to this Court, and the Court held that the petitioner's failure to raise the issue before the Court resulted in forfeiture. *Id.* But *Wilkerson's* text provides no support for the rule that Good Coal would extract from that decision – that new arguments can be freely raised at the court of appeals level so long as they are raised in a petitioner's opening brief, regardless of whether they were preserved below. And any such rule would be directly contrary to the case law just discussed – in particular, the numerous BLBA decisions of this Court declining to consider issues not timely raised before the Board, *supra* at 8-12. The *Wilkerson* panel had no need to directly address agency waiver because the petitioner had failed to satisfy the threshold requirement of timely raising the issue in its appeal to the Court. Good Coal's strained interpretation of that decision should be rejected.

In sum, parties run the risk of forfeiture if issues are not timely raised, whether before the agency or the Court. Good Coal's failure to timely present its Appointments Clause argument to the Board is quintessential forfeiture.

3. There are no grounds to excuse Good Coal's forfeiture.

Good Coal attempts to justify its administrative inaction by claiming that the Board could not cure the constitutional infirmity by appointing a new ALJ. OB 10-11. Notably, the liable operator in *Energy West Mining Co.* made this same argument in the Tenth Circuit to no avail. 929 F.3d at 1206. As that court understood, the coal company was simply mischaracterizing the relief it sought. Good Coal, like Energy West, does not ask this Court to appoint a new ALJ (OB 6-7), for this Court, like the Board, is not empowered to do so. Rather, Good Coal seeks a ruling that ALJs Kirby and Solomon were not constitutionally appointed, and that their decisions must therefore be vacated and a new decision rendered by a different, properly-appointed ALJ. But the Board has issued many such orders already, *supra* at 18, which would have spurred the Secretary of Labor (whose delegatee, the Director, is a party to this suit) to ensure the availability of properly-appointed ALJs, if he had not already done so, *id.*[7] If Good Coal had timely acted

[7] More generally, the Board has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Duck v. Fluid Crane and Constr. Co.*, 2002 WL 32069335, at *2 n.4 (Ben. Rev. Bd. 2002) (stating that the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"); *Shaw v. Bath Iron Works*, 22 Ben. Rev. Bd. Serv. 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Mach. & Shipyard*, 17 Ben. Rev. Bd. Serv. 196 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet Gen. Shipyards,* 16 Ben. Rev. Bd. Serv. 49 (1983) (addressing an issue involving due process); *see generally* 4 Admin L. &

before the agency, it could have obtained effective relief. *Energy West Mining Co.*, 929 F.3d at 1206.

Good Coal also attempts to justify its inaction by reliance on this Court's decision in *Jones Brothers*. OB 10. That decision, however, provides no excuse. Indeed, the decision confirms that Good Coal's forfeiture of its Appointments Clause challenge here should not be excused, as this case lacks the special distinguishing features that led the Court to excuse the forfeiture in that case. There, the Court held that a petitioner had forfeited its Appointments Clause claim by failing to argue it before the Federal Mine Safety and Health Review Commission, but that this forfeiture was excusable for two reasons.

First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers[.]"). Second, Jones Brothers' timely identification in its opening pleading of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (explaining that merely identifying the issue was a "reasonable" course for a "petitioner who

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Prac. § 11.11 (3d ed.) ("Agencies have an obligation to address constitutional challenges to their own actions in the first instance.").

wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it"). Given these circumstances, the Court exercised its discretion to excuse petitioner's forfeiture, but explained that this was an exceptional outcome: "[W]e generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, which identified the issue in its initial appellate filing, Good Coal did not timely identify the Appointments Clause issue to the Board. Moreover, the coal company could not have reasonably believed that the Board would have refused to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 18, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See supra* at 20 n.7 (citing instances where Board addressed constitutional issues). *Jones Brothers* is simply inapposite.

Moreover, Good Coal cannot plausibly claim to be surprised by *Lucia*. This Court considered and rejected that possibility in *Wilkerson*, explaining that "[n]o precedent prevented the company from bringing the constitutional claim before [*Lucia,*]" and that "*Lucia* itself noted that existing case law 'says everything

necessary to decide this case.'" *Wilkerson*, 910 F.3d at 257 (quoting *Lucia*, 138 S. Ct. at 2053). The panel also noted that the Tenth Circuit's decision in *Bandimere v. SEC*, 844 F.3d 1168, 1188 (2016), *cert. denied* 138 S.Ct. 2706 (2018), which reached the same conclusion as the Supreme Court in *Lucia*, was decided in December 2016, giving the *Wilkerson* petitioner enough time to properly raise the issue. Here, Good Coal also had more than enough time to raise the issue – *Bandimere* was decided before ALJ Solomon's decision awarding the claim in September 2017, and long before Good Coal filed its brief with the Board. Any suggestion that the coal company's forfeiture should be excused because *Lucia* was not foreseeable should be rejected.

Finally, if the Court were to excuse Good Coal's forfeiture, there would be real world consequences. There are hundreds of cases from around the country – arising under the BLBA, the Longshore Act, and its extensions – currently pending before the Board. But in the majority of these cases, no Appointments Clause claim has been raised. Should this Court excuse Good Coal's forfeiture here – where the coal company failed to timely raise the claim to the agency – it would be inviting every losing party at the Board to seek a re-do of years of administrative proceedings. For the Black Lung program, whose very purpose is to provide timely and certain relief to disabled workers, that is precisely the kind of disruption that forfeiture seeks to avoid. *See L.A. Tucker*, 344 U.S. at 37 (cautioning against

overturning administrative decisions where objections are untimely under agency practice).

In sum, the basic tenets of administrative law required Good Coal to timely raise its Appointments Clause challenge before the agency, but it failed to do so. The coal company's attempt to justify that failure is unavailing. The Court should therefore find that Good Coal forfeited its challenge to the ALJs' authority under the Appointments Clause.

CONCLUSION

The Court should affirm the Benefits Review Board's holding that Good Coal forfeited its Appointments Clause argument by failing to timely raise the issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 5791 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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