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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 291
October 2018

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I. Longshore and Harbor Workers' Compensation Act and Related Acts

A. U.S. Circuit Courts of Appeals[1]

There are no published decisions to report.

B. Benefits Review Board

***Gindo v. Aecom National Security*, __ BRBS __ (2018).**

The Board affirmed the ALJ's findings that claimant's depressive disorder and post-traumatic stress disorder ("PTSD") are occupational diseases; that he voluntarily retired from the workforce; and that claimant's average weekly wage ("AWW") had to be determined under § 10(d)(2)(B).

Claimant worked in Iraq for employer until his contract was terminated in 2011. He returned to the U.S. and received unemployment benefits until 02/16/2013. In 2014, he reported psychological symptoms. On 07/23/2014, he was diagnosed with totally disabling major depressive disorder and PTSD. Claimant filed a claim for compensation, and the parties stipulated that he has been temporary total disabled ("TTD") commencing on 07/23/2014.

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at __) pertain to the cases being summarized and, where citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

The ALJ found that claimant's injury is an "occupational disease" and that he voluntarily retired from the workforce, and therefore his AWW had to be determined under § 10(d)(2)(B) and § 10(i) based on the applicable National Average Weekly Wage ("NAWW"). The ALJ further found that, as a voluntary retiree with an occupational disease, claimant is not entitled to compensation at this time because his condition had not yet reached permanency. Claimant appealed, arguing that he is entitled to TTD compensation based on his AWW with employer.

The Board initially affirmed the ALJ's finding that claimant's depressive disorder and PTSD are occupational diseases.[2] It reasoned that:

> "Occupational disease" has been defined as a disease caused by the hazardous conditions of employment, which are peculiar to the employee's employment as opposed to other employment generally. Hazardous activity need not be exclusive to the particular employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment or with everyday life. Typically, the onset of an occupational disease is gradual, not sudden. 33 U.S.C. §913(b)(2) (time for filing claim when disease *does not immediately result* in disability or death); *but see* Larson's §52.04[3] (as both types of injuries may be work-related, gradual onset is no longer necessary to distinguish "disease" from "accident").

Slip op. at 4 (*quoting Suarez v. Service Employees Int'l, Inc.*, 50 BRBS 33, 37 (2016)) (additional citations omitted)(emphasis in the original). An occupational disease is often characterized by what it is not. As this case arose in the Fifth Circuit, the Board applied the definition of "occupational disease" employed by that circuit, stating that:

> Claimant's condition is not due to a physical accident to his body and results from exposure to external, environmentally hazardous conditions of employment. The [ALJ] rationally found that claimant's working conditions were "peculiar to" his work in a war zone, i.e., they are not typical of the vast majority of jobs. . . . The [ALJ] also properly determined that claimant was not aware that the stressful conditions to which he was exposed had harmed him until well after he last worked in Iraq, i.e., there was a delayed onset. [*C*]*f. Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016) (immediate onset of psychological condition following accident). Thus, in claimant's case, as in, for example, an asbestosis case, the dangers of the employment were not known to be

[2] The ALJ found that claimant's conditions are "diseases" because they are listed as "mental disorders" in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed. 1994) ("DSM-V"). The BRB stated that the ALJ's interpretation of the DSM-V definition of "mental disorder" as equating to "disease" may be overbroad, but did not reach the issue here.

> harmful to claimant until he was diagnosed, i.e., both the injury (disabling response to the harm) and the knowledge of it and its work-relatedness, occurred a significant period after the exposure.

Slip op. at 6-7. Accordingly, the claim comes within the purview of § 10(i) because claimant suffers from an occupational disease which did not immediately result in disability.

Section § 10(i) provides that, in a claim for an occupational disease that does not immediately result in death or disability, the time of injury for the purposes of determining AWW is the date on which the employee becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. In this case, claimant's "date of awareness" is 07/23/14, as this is the date he became aware that he has a disabling, work-related injury.

Next, the Board affirmed the ALJ's finding that claimant is a "voluntary retiree" and that his AWW must be determined based on the NAWW pursuant to § 10(d)(2)(B), because his disability due to his occupational disease became manifest more than one year after his voluntary retirement. "Retirement" is defined as a voluntary withdrawal from the workforce with no realistic expectation of return. 20 C.F.R. § 702.601(c). When an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability ("PPD") based on the extent of his medical impairment under the American Medical Association ("AMA") guidelines and is not based on economic factors. 33 U.S.C. §§ 902(10), 908(c)(23), 910(d)(2). Claimant is a voluntary retiree if he withdraws from the workforce for reasons other than the condition which is the subject of the claim. Where a claimant's retirement is due, at least in part, to his occupational disease, claimant is not a voluntary retiree and the post-retirement injury provisions do not apply; he may be entitled to an award based on his loss of wage-earning capacity. 33 U.S.C. § 908(a), (c)(21).

In this case, the ALJ found that claimant (who was born in 1957) voluntarily retired from the workforce as of 02/16/2013, when he last received unemployment benefits. This finding was rational and supported by substantial evidence, and the Board may not reweigh the evidence or draw its own inferences. The ALJ rationally rejected claimant's vague testimony that he continued to look for work thereafter. Although there was some vague evidence that claimant co-owned some businesses, there was no evidence that he performed work for, or derived income from, them. Further, the ALJ properly rejected claimant's alternative contention that his retirement was involuntary, as the medical evidence indicated that his symptoms started later and that he became unable to work on 07/23/2014, when he was diagnosed as totally disabled due to his psychiatric conditions. Thus, because claimant's disability due to his occupational disease became manifest more

than one year after his voluntary retirement, his AWW must be calculated based on the applicable NAWW pursuant to § 10(d)(2)(B).[3]

Finally, the Board affirmed the ALJ's finding that claimant is not entitled to disability compensation benefits at the present time, because his condition had not yet reached permanency. It stated that:

> As claimant has not been diagnosed with a permanent impairment due to his occupational disease pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, we affirm the ALJ's denial of benefits, pursuant to Sections 2(10) and 8(c)(23). Because claimant is a voluntary retiree with an occupational disease, his entitlement to disability compensation is statutorily limited to an award under Section 8(c)(23). 33 U.S.C. §902(10). Thus, *Moody v. Huntington, Ingalls Inc.*, 879 F.3d 96 (4th Cir. 2018) and *Christie v. Georgia-Pacific Co.*, 898 F.3d 952 (9th Cir. 2018) are not applicable in this case.

Slip op. at 11 (footnote and additional citation omitted).[4]

[Section 2(2) INJURY – "Occupational disease;" Sections 10(d)(2) and 8(c)(23) - Occupational Disease – Retiree Provisions; Section 10(a) - Average Weekly Wage - Time of Injury in Occupational Disease Cases]

***Hale v. BAE Systems San Francisco Ship Repair*, __ BRBS __ (2018).**

Agreeing with the OWCP Director, the Board affirmed the ALJ's finding that claimant entered into an unapproved third-party settlement and that, consequently, her entitlement to death benefits under the LHWCA was barred under § 33(g)(1).

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[3] If claimant's date of awareness occurred within one year after his retirement, or if claimant was disabled by his occupational disease before his date of awareness/manifestation, his AWW could be calculated by one of the methods in subsections (a), (b), or (c) of § 10. Slip op. at 11 n.18 (*citing* 33 U.S.C. § 910(d)(2)(A); *Roberts v. Sea-Land Services, Inc.,* 566 U.S. 93, 106 n.7, 46 BRBS 15, 19 n.7(CRT) (2012)).

[4] The BRB noted that if claimant's date of awareness occurred within one year after his retirement, or if claimant was disabled by his occupational disease before his date of awareness/manifestation, his AWW could be calculated by one of the methods in subsections (a), (b), or (c) of Section 10 of the Act. *See* 33 U.S.C. §910(d)(2)(A); *see generally Roberts v. Sea-Land Services, Inc.,* 566 U.S. 93, 106 n.7, 46 BRBS 15, 19 n.7(CRT) (2012).

Pursuant to § 33(a), a "person entitled to compensation" ("PETC") under the LHWCA may proceed in tort against a third party who may be liable for damages for the work-related injuries. Section 33(g) protects an employer's right to offset any third-party recovery against its liability for compensation under the LHWCA. It provides that a claimant, under certain circumstances, must either give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. Pursuant to § 33(g)(1), prior written approval of the settlement is necessary when the PETC enters into a settlement with a third party for less than the amount to which she is entitled under the Act. Failure to obtain such approval results in the forfeiture of benefits under the Act. Section 33(g) is an affirmative defense, and the employer bears the burden of proving that the bar applies.

In this case, decedent was allegedly exposed to asbestos while working for a number of shipyard employers. In 2007, he filed suit in state court against several third-party defendants. While his suit was pending, he died from lung cancer. On 05/16/2012, the state court appointed decedent's daughter, Brandie Pittman, as successor-in-interest in his third-party suit. Thereafter, Ms. Pittman filed a wrongful death suit against various third-party defendants. Additionally, on 07/20/12, decedent's widow and the mother of Ms. Pittman, filed a claim for death benefits under the LHWCA. Earlier, on 04/12/2012, claimant had signed two disclaimers which purported to renounce her interest in the third-party actions and in decedent's estate in favor of her pursuit of death benefits under the LHWCA. The disclaimers were not filed in any court, nor provided to any other party.

Ms. Pittman thereafter executed settlements with third parties. On 05/17/2012, she executed a settlement that released CBS Corporation from liability for personal injury and wrongful death in exchange for $2,000. Further, on 04/30/2014, Ms. Pittman executed a settlement with Pfizer, Inc. In return for $7,000, as "personal representative of the estate of [decedent]," and "on behalf of the estate, for myself, and the decedent's heirs," Ms. Pittman released "any and all claims of any kind whatsoever" including "future lost wages or prospective earnings, the loss of companionship and consortium and funeral expenses[,]" and "all further or future Claims . . . including death. . . ." She recognized that the "[r]elease is binding on me, the decedent's heirs, executors, beneficiaries, administrators, successors and assigns in every way. . . ."

Following a hearing, the ALJ found that claimant was bound by the CBS and Pfizer agreements, and that her claim under the LHWCA was barred under § 33(g)(1). Claimant appealed.

The Board initially stated that the issue in this case was whether claimant, or someone with the authority to do so on her behalf, "enter[ed] into a settlement with a third person." 33 U.S.C. § 933(g). Claimant argued she did not "enter into" any third-party settlements under the Act, and she did not authorize anyone to do so for her. She alternatively argued that if California law governs the interpretation of the settlements, they

are ambiguous, and the ALJ erred by disregarding parole evidence establishing that she was not a party to the settlements.

The Board initially determined that the meaning of "entered into" under § 33 is clear:

> Under a plain reading of Section 33, to "enter" into something means to become a participant in, or as it relates to agreements, to become a party to the agreement. *Black's Law Dictionary* (10th ed. 2014); *Webster's II New Riverside University Dictionary* (1984). Thus, the critical inquiry is whether a settlement of a third-party claim or lawsuit has been effected: "entering into" a third-party settlement means assessing whether a third-party settlement, to which the claimant is bound, exists or has been fully executed.

Slip op. at 11-12 (footnote and additional citations omitted). Because contracts are matters of state law, state law governs the determination of whether a settlement has been "entered into" or "effected." In this case, "[a]s the Pfizer release was executed in California and, presumably, would be enforced by California courts, California law determines whether it constitutes a fully-executed settlement for the purposes of Section 33." *Id.* at 13. In California, as elsewhere, a contract exists if there are parties capable of contracting, consent, a lawful object, and sufficient consideration. The Pfizer settlement met all of these elements. It released Pfizer from all liability, including liability for any claims claimant may have been entitled to file, for consideration, and the parties did not return to the *status quo ante*. Moreover, there is no allegation that the parties lacked the authority to consent or that the agreement is unlawful or otherwise unenforceable. Ms. Pittman received the settlement proceeds "on behalf of the family." Thus, the Pfizer agreement is a fully-executed settlement.

Next, the Board concluded that the ALJ rationally found that claimant was a party to the settlement. Interpreting a contract is a judicial function, and the court is to give effect to the parties' mutual intentions as of the time the contract was executed. Generally, intent is a legal question determined by the terms of the contract. In this case, claimant argued that the contract is ambiguous because she did not sign the document and, therefore, the ALJ should have considered parole evidence, such as the disclaimers and the hearing testimony that she was excluded from the settlement agreement. The Board rejected claimant's assertion of ambiguity. It reasoned that the Pfizer document is a global release with straightforward intent: it protects the company from "any and all" claims brought by decedent's heirs including claims for lost wages, loss of consortium, and death. The Board concluded that as claimant is decedent's surviving spouse, she is an "heir" under California law, and the plain language of the Pfizer agreement establishes that she is a party to the settlement. Regardless, to the extent the crossed-out signature line renders the Pfizer release "ambiguous," substantial evidence would support the ALJ's finding that parole evidence does not aid claimant. The ALJ properly rejected claimant's assertion that she did not participate in the settlement. Claimant made no public effort to be excluded from the

Pfizer release and did not inform Pfizer of her signed disclaimers or have them included in the settlement. Further, the ALJ reasonably found that claimant and Ms. Pittman were not credible witnesses with respect to the events surrounding the third-party agreements. It appears she knowingly let Pfizer believe she was a participant to maximize recovery. Significantly, the same law firm represented claimant and decedent's estate in all of the relevant litigation; by its own admission, the firm was well aware of the application of § 33(g) to this case but did not seek to avoid the forfeiture.

Accordingly, the ALJ properly found that employers have shown the existence of a fully-executed third-party settlement with Pfizer which extinguished claimant's claim against the third party for decedent's death and, thus, affects employers' rights under the Act. Because the aggregate of the Pfizer and CBS settlements in this case is less than the amount to which claimant would be entitled under the Act, the Board did not address the nature of the CBS agreement. The ALJ's finding that claimant's claim was barred under § 33(g)(1) was affirmed.

[Section 33(g)(1) – ENSURING EMPLOYER'S RIGHTS – Written Approval of Settlement]

***Luckern v. Richard Brady & Associates*, __ BRBS __ (2018).**

Agreeing with the OWCP Director, the Board held that claimant, who was engaged in renovating an existing carpentry building used to build ship components, satisfied the "status" requirement of § 2(3) of the LHWCA because his work was essential to the shipbuilding process.

The Board initially addressed employer's request, made in its reply brief, that the case be remanded for adjudication by a different ALJ pursuant to *Lucia v. SEC*, __ U.S. __, 138 S. Ct. 2044 (2018). The Board granted the Director's motion to strike this argument on the ground that employer did not raise any issue concerning the ALJ's appointment in its initial brief to the Board, and thus forfeited its Appointments Clause argument. 20 C.F.R. § 802.211. It reasoned that the Appointments Clause issue is "non-jurisdictional," and thus is subject to the doctrines of waiver and forfeiture. Moreover, contrary to employer's contention, *Lucia* does not represent a "change in law" such that it is entitled to raise the issue at this juncture.

Claimant injured his back while working at Portsmouth Naval Shipyard. His direct employer was Bri-Weld Industries.[5] Bri-Weld's work at the shipyard consisted of renovating

[5] Bri-Weld was working under a contract with Brookstone Builders, who was a sub-contractor to Richard Brady & Associates. Brady was the only employer that carried insurance coverage. Thus, the ALJ found that, under § 4(a), Brady, as the general contractor, and its carrier are responsible for any compensation owed to claimant.

the existing carpentry building that is used to build parts for ships and submarines. The building remained in operation while claimant was working there. It was undisputed that the shipyard is a covered situs under § 3(a). Employer asserted, however, that claimant did not meet the status requirement for coverage under § 2(3). The ALJ granted claimant's motion for summary decision on this issue and awarded benefits. Employer appealed.

For a claimant to be covered under the Act, he must meet the "status" requirement set forth in § 2(3), which defines "maritime employment" as "any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. §902(3). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, dismantling or repairing of vessels. The Board observed that a summary decision was proper in this case as both parties agreed that no relevant facts were in dispute, and the issue of whether a claimant's work qualifies as "maritime employment" is a question of law.

The Board rejected employer's contention that claimant was not engaged in maritime employment because he was a temporary worker whose job involved maintenance work on a building that happened to be in a shipyard but whose work was not otherwise related to repairing or building ships. Workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and loading/unloading are generally covered under the Act. Further, the First Circuit, within whose jurisdiction this case arose, has held that a maintenance mason whose duties primarily involved repairing masonry in shipyard buildings was engaged in covered employment because his work was a necessary link in the chain of shipbuilding work. *See Graziano v. General Dynamics Corp.*, 663 F.2d 340 (1st Cir. 1981). It reasoned that the maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself. Similarly, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750 (5th Cir. 1981), the Fifth Circuit rejected a challenge to the status of a carpenter who was injured while building a scaffold for use in a pier repair project. The court held that the skills being essentially nonmaritime is immaterial; rather, it is the purpose of the work that is the key. "These cases demonstrate that a claimant's work need not be 'inherently maritime' if it is performed on structures that are themselves essential to the loading, unloading, building, repairing or dismantling of ships." Slip op. at 5.

In this case, the ALJ correctly concluded that the carpentry building is essential to the shipbuilding process because it is used to build components installed on ships. The ALJ "properly concluded that case precedent establishes that a person such as claimant, who

repairs or remodels such buildings, is engaged in maritime employment because his work also is essential to the shipbuilding process." Slip op. at 6 (citations and footnote omitted).[6]

In addition, the fact that claimant was only temporarily working at the shipyard does not defeat his claim. Employer's reliance on *Weyher/Livsey Constructors, Inc. v. Prevetire,* 27 F.3d 985, 28 BRBS 54(CRT) (4th Cir. 1994), and *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001), is misplaced. These cases do not turn on the temporary nature of the claimants' work but rather on the Fourth Circuit's precedent that new construction does not have a current maritime purpose. Here, in contrast, claimant was hired to renovate an existing building that served a maritime purpose at the time of his injury. "Employees, like claimant, who are hired to maintain an already functioning essential shipyard building are covered under the Act." Slip op. at 6.

[Section 2(3) Status – Maritime Employment; PROCEDURE – *Lucia v. SEC*]

Ed. Note: In a black lung case, *Miller v. Pine Branch Coal Sales, Inc.*, __ BLR __, BRB No. 18-0323 BLA (Oct. 22, 2018)(en banc), the Board addressed the issue of Department of Labor administrative law judges' appointments in light of *Lucia v. SEC*, 585 U.S. __ , 138 S.Ct. 2044 (2018). This decision is summarized below.

[6] The Board noted that while the ALJ stated that claimant was a "harbor worker," case precedent generally describes such a person as one who builds or repairs "harbor facilities" such as bulkheads, piers, and docks. Nonetheless, the BRB observed that it is the employee's duties, and not his job title or classification, that determines coverage under the Act.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *KenWest Terminals, LLC v. Salyers*, Fed. Appx. , 2018 WL 4847112 (Oct. 5, 2018), a panel of the U.S. Court of Appeals for the Sixth Circuit considered an appeal of a federal black lung benefits award. Below, because the miner had worked for at least 15 years in qualifying coal mine employment and was totally disabled due to a respiratory or pulmonary impairment, the claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). The burden then shifted to the employer to either disprove the existence of both clinical and legal pneumoconiosis or establish that no part of the miner's total disability was due to his pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i)–(ii). The administrative law judge found that, while the employer disproved the existence of clinical pneumoconiosis, it neither disproved the existence of legal pneumoconiosis – in the form of COPD – nor established that no part of the miner's total disability was due to this legal pneumoconiosis. Therefore, the judge found that the employer did not rebut the presumption. The Benefits Review Board ("Board") affirmed the judge's award.

Initially, the court rejected the employer's argument that the miner did not perform the work of a coal miner while under its employ. The court concluded that the miner satisfied the definition of a miner under the Black Lung Benefits Act ("Act") because, "[a]t KenWest, [he] prepared raw coal every day by crushing and sizing it before loading it onto barges for transport." Slip op. at 2.

Next, the court rejected the employer's argument that its doctors did not need to address the etiology of the miner's COPD. The court noted that, by simply addressing coal workers' pneumoconiosis – i.e., clinical pneumoconiosis – the employer's doctors failed to opine as to whether the miner's COPD represented legal pneumoconiosis. It further found no error in the judge's finding that the employer's doctors' opinions at disability causation were "unhelpful," as neither physician concluded that the miner suffered from legal pneumoconiosis or discussed the impact that his COPD had on his totally disabling impairment.

Accordingly, the court affirmed the judge's finding that the employer failed to rebut the 15-year presumption of total disability due to pneumoconiosis arising out of coal mine employment. Therefore, it affirmed the award of benefits.

[Fifteen-year presumption at 20 C.F.R. § 718.305]

In *Day v. Johns Hopkins Health Sys. Corp*, F.3d , 2018 WL 5306886 (Oct. 26, 2018), a panel of the U.S. Court of Appeals for the Fourth Circuit addressed an appeal from the U.S. District Court for the District of Maryland. The plaintiffs, the survivors of two coal miners who sought black lung benefits under the Act, filed a lawsuit against Dr. Wheeler and Johns Hopkins Health System et al. for his actions as an expert in federal black lung benefits cases. Specifically, the plaintiffs alleged that Dr. Wheeler's opinions were "biased toward the industry"; for example, he "concluded that the X-ray results in each case were

not consistent with black lung disease and could instead be explained by other conditions, even when proper application of medical standards would lead to a contrary opinion." Slip op. at 2. The lawsuit included (1) state law claims for fraud, tortious interference with economic interests, negligent representation, and unjust enrichment; as well as a (2) federal claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"). Below, the district court dismissed all claims based on the Witness Litigation Privilege.

A majority of the panel affirmed the judgment of the district court. First, the majority concluded that the actions of Dr. Wheeler and others at Johns Hopkins, as alleged by the plaintiffs, fall within the scope of the privilege. *Id*. at 4-6. Second, the majority held that RICO did not abrogate the historic common law protections afforded by the privilege, noting "the complete absence of direction on the subject of witness immunity, as well as the explicit decision to not include perjury within the definition of racketeering activities . . . ." *Id*. at 6-7.

Judge King dissented, explaining that he would vacate the lower court's dismissal of the complaint, reinstate the alleged claims, and remand the matter for further appropriate action.

B. Federal District Courts

Two unpublished decisions issued by federal district courts arose out of claims filed by former black lung claimants seeking additional compensation for the failure to timely pay compensation. *See* *Vialpando v. Chevron Mining, Inc.*, No. 18-251-BRB-SCY, 2018 WL 5017754 (D.N.M. Oct. 16, 2018); *Burton v. Drummond Co., Inc.*, No. 2:18-CV-00795-RDP, 2018 WL 4951972 (N.D. Ala. Oct. 12, 2018); 33 U.S.C. §914(f), 20 C.F.R. §725.607. In *Vialpando*, the court concluded that the miner is entitled to additional compensation on overdue payments, plus interest, in accordance with Section 914(f) of the Act. Similarly, the court in *Drummond* rejected the employer's request to dismiss the case, concluding that it has subject matter jurisdiction over the claim and that the miner's widow has stated a claim upon which relief can be granted.

C. Benefits Review Board

In *Miller v. Pine Branch Coal Sales, Inc.*, ___ BLR ___, BRB No. 18-0323 BLA (Oct. 22, 2018)(en banc), the Board addressed the issue of Department of Labor administrative law judges' appointments. The *Miller* case was before the Board for the second time. In its initial appeal of a June 27, 2017 Decision and Order awarding benefits in this subsequent claim, the employer challenged – based on the Appointments Clause of the U.S. Constitution – the administrative law judge's ability to hear and decide the case. The Director, Office of Workers' Compensation Programs ("Director"), responded by asking the Board to vacate the award and remand the case to the judge to reconsider his decision and those prior actions taken, and to ratify them if appropriate. The Board granted the Director's request to remand, and thus remanded the case to the judge for him to reconsider his prior actions and to then issue a decision.

On remand, the judge reviewed the actions he had taken previously, ratified them, and issued a new Decision and Order on Remand awarding benefits on March 29, 2018.

The employer appealed, once again arguing that the judge was without authority to hear and decide the case and that the case must therefore be remanded for reassignment to a new administrative law judge. The Director agreed that, in light of *Lucia v. SEC*, 585 U.S. ___ , 138 S.Ct. 2044 (2018), the case should be remanded to the Office of Administrative Law Judges for reassignment to a new, properly appointed, administrative law judge.

The Board concluded that "*Lucia* dictates that when a case is remanded because the administrative law judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge." Slip op. at 4. However, the Board declined to address, as premature, the employer's contentions that the Secretary of Labor's December 21, 2017 ratification letters of appointment are constitutionally deficient or that any removal protections afforded administrative law judges are unconstitutional. *Id.*

In light of the above, the Board vacated the judge's Decision and Order on Remand and remanded "this case to the Office of Administrative Law Judges for reassignment to a new administrative law judge . . . ." *Id.* at 5.

[New: *Lucia* v. SEC]