No. 19-3836

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KARST ROBBINS COAL CO., INC. and
BITUMINOUS CASUALTY CORP.,

Petitioners

v.

MARLIN RICE 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

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BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF JURISDICTION.....1

STATEMENT OF THE ISSUES.....3

STATEMENT OF THE CASE.....5

A. Proceedings Below……..5

B. Statutory and Regulatory Background……7
1. The Administration of Black Lung Claims……...7
2. Modification Requests……..……. 8
3. Subsequent Claims……...10

STATEMENT OF THE FACTS.....12

A. Relevant Record Evidence…….....12

B. Decisions Below…….....12
1. The 1983 Claim……...12
2. The 2002 Claim…….....13
   a. The District Director's February 19, 2004 Proposed Decision and Order Denying Benefits……13
   b. The District Director's April 5, 2005 Proposed Decision and Order Denying Modification……14
   c. The District Director's Return of Mr. Rice's July 5, 2005 Application……14
   d. The District Director's September 24, 2007 Proposed Decision and Order Awarding Benefits……...15
   e. ALJ Johnson's September 26, 2008 Decision and Order Denying Benefits……..15
   f. The Board's October 21, 2009 Decision and Order Remanding the Case to the District Director……...17
   g. The District Director's October 18, 2011 Show Cause Order Returning the Claim to the Office of Administrative Law Judges….18

h. ALJ Johnson's May 6, 2013 Decision and Order on Remand Denying Benefits……..19
i. The District Director's March 13, 2014 Proposed Decision and Order Denying Modification……21
j. ALJ Daniel Solomon's August 1, 2017 Decision and Order Awarding Benefits……..21
k. The Benefits Review Board's January 23, 2019 Decision and Order Affirming the Award of Benefits……...22
l. The Benefits Review Board's July 9, 2019 Order on Reconsideration En Banc……..24

SUMMARY OF THE ARGUMENT…….....25

ARGUMENT……..26

A. Standard of Review…….....26
B. BITCO/KRCC's assertion that they should be dismissed from this case is without merit and should be rejected……...27
1. *Arkansas Coals, Inc. v. Lawson* permits reconsideration of the responsible operator designation in a subsequent claim……27
2. BITCO may not rescind its black lung coverage of KRCC……29
a. The BLBA and implementing regulations prohibit BITCO from rescinding its BLBA coverage……...30
b. BITCO is not entitled to rescission under Ky.Rev.St.§ 304.14-114…..36
c. BITCO is not entitled to rescission under the common law……..43
3. BITCO/KRCC fail to establish a due process violation……..47

CONCLUSION 52

STATEMENT REGARDING ORAL ARGUMENT…….53

CERTIFICATE OF COMPLIANCE.....54

CERTIFICATE OF SERVICE.....55

TABLE OF AUTHORITIES

CASES: PAGE

American Millenium Ins. Co., v. Berganza,
902 A.2d 266 (N.J. Super. AD 2006) 44

Arch of Ky., Inc. v. Director, OWCP,
556 F.3d 472 (6th Cir. 2009).....26

Arkansas Coals, Inc. v. Lawson,
739 F.3d 309 (6th Cir. 2014)..... passim

Bates v. Creek Coal Co., Inc.,
18 BLR 1-1 (1993) rev'd on other grounds, 134 F.3d 734 (6th Cir. 1997) 35

Betty B Coal Co. v. Director, OWCP,
194 F.3d 491 (4th Cir. 1999).....9, 48

Buck Creek Coal Co. v. Sexton,
706 F.3d 756 (6th Cir. 2013)..... 10, 11

Coffman v. Lien Enters., Inc.,
827 P.2d 68 (Kan. App. 1991) 45

Consolidation Coal Co. v. Borda,
171 F.3d 175 (4th Cir. 1999).....50

Consolidation Coal Co. v. Worrell,
27 F.3d 227 (6th Cir. 1994).....9

Cox v. Ben. Rev. Bd.,
791 F.2d 445 (6th Cir. 1995) 39, 40

Cumberland River Coal Co. v. Banks,
690 F.3d 477 (6th Cir. 2012)..... 10, 32

Director, OWCP v. Oglebay Norton Co.,
877 F.2d 1300 (6th Cir. 1989) 28

Dixie Fuel Co., LLC v. Director, OWCP,
820 F.3d 833 (6th Cir. 2016)..... 39, 40

Eastover Mining Co. v. Williams,
338 F.3d 501 (6th Cir. 2003)..... 26, 27

Energy West Mining Co. v. Oliver,
555 F.3d 1211 (10th Cir. 2009) 48, 51

General Star Indem. Co. v. Duffy,
191 F.3d 55 (1st Cir. 1991).....46

Island Creek Coal Co. v. Bryan,
937 F.3d 738 (6th Cir. 2019)..... 25, 37

Island Creek Coal Company v. Holdman,
202 F.3d 873 (6th Cir. 2000) 50

Karst-Robbins Machine Shop v. Caudill,
779 S.W. 2d 207 (Sup. Ct. Ky. 1989)..... 41,47

Lane Hollow Coal Co. v. Director, OWCP,
137 F.3d 799 (4th Cir. 1998)..... 48, 50

Lester v. Mack Coal Co,
21 Black Lung Rep. 1-126 (Ben. Rev. Bd. 1999).....36

Lovilia Coal Co. v. Williams,
143 F.3d 317 (7th Cir. 1998)..... passim

Mathews v. Eldridge,
424 U.S. 319 (1976).....47

National Mines Corp., v. Carroll,
64 F.3d 135 (3d Cir. 1995).....35

Nationwide Mut. Fire Ins. Co. v. Nelson,
912 F. Supp. 2d 452 (S.D. Ky. 2012) 42

Nat'l Ins. Assoc. v. Peach,
926 S.W. 2d 859 (Ky. Ct. App. 1996) 38

Old Ben Coal Co. v. Director, OWCP,
292 F.3d 533 (7th Cir. 2002).....9

Perkins v. A. Perkins Drywall,
615 So. 2d 187 (Fla. Dist. Ct. App. 1993) 44

Progressive Specialty Ins. Co. v. Rosing,
891 F. Supp. 378 (W.D. Ky. 1995)..... 39, 40

Rockwood Casualty Ins. Co. v. Director, OWCP,
917 F.3d 1198 (10th Cir. 2019) 30

State Compensation Fund v. Mar Pac Helicopter Corp.,
752 P.2d 1 (Ariz. 1988).....45

State Farm Fire & Casualty Co., v. Car/Bil, Inc.,
842 S.W.2d 128 (Mo.App. WD 1992).....44

State Ins. Fund v. Brooks,
755 P.2d 653 (Okla. 1998).....44

Tazco, Inc., v. Director, OWCP,
895 F.2d 949 (4th Cir. 1990).....35

Travelers Ins. Co. v. Blackstone Mining Co., Inc.,
2012 WL 2603623, *n.5 (Ky. Ct. Appeals 2012)..... 33 38, 41

United States v. Simpson,
538 F.3d 459 (6th Cir. 2005).....38

Williams v. Lovilia Coal Co.,
20 Black Lung Rep.1-58 (Ben. Rev. Bd. 1966).....35

Youghiogheny and Ohio Coal Co. v. Milliken,
200 F.3d 942 (6th Cir. 1999).....9

STATUTES: PAGE

Black Lung Benefits Act, as amended
30 U.S.C. §§ 901-944

26 U.S.C. § 9501(d)(1)(B) 30

30 U.S.C. §§ 901-944.....1

30 U.S.C. § 901(a) 30

30 USC § 921(c)(3).....14

30 U.S.C. § 922.....8

30 U.S.C. § 923(b) 7

30 U.S.C. §§ 931-936.....31

30 U.S.C. § 932(a) 2, 8

30 U.S.C. § 932(c) 30

30 U.S.C. § 933 (a) 30, 34

30 U.S.C.§ 933(a)(1)(2) 36

30 U.S.C. § 936.....32

Longshore and Harbor Workers' Compensation Act, as amended
33 U.S.C. §§ 901-950

33 U.S.C. § 921(a) 2

33 U.S.C. § 921(b)(3).....2, 8

33 U.S.C. § 921(c) 2, 8

33 U.S.C. § 922.....8, 9

33 U.S.C. § 933(d)(1).....36

Kentucky Statutes

KRS § 304.14-110.....passim

KRS § 304.14-110(1).....39

KRS § 304.14-110(2).....42

KRS § 304.14-110(3).....43

KRS § 342.395.....41

REGULATIONS:

20 C.F.R. § 718.203 ..... 14, 22

20 C.F.R. § 718.304 14

20 C.F.R. § 725.304(a).....7

20 C.F.R. § 725.305(d)(2).....10

20 CFR § 725.309 ..... 10, 17, 23

20 C.F.R. § 725.309(b) 10

20 C.F.R. § 725.309(c).....10

20 C.F.R § 725.309(c)(2).....11

20 C.F.R. § 725.309(c)(4).....11

20 C.F.R. § 725.309(c)(5).....11

20 C.F.R. § 725.309(c)(6).....50

20 C.F.R. § 725.309(d) 17

20 C.F.R. § 725.309(d)(4)..... 27

20 C.F.R. § 725.309(d)(6).....11

20 C.F.R. § 725.310 ..... 8, 9, 10

20 C.F.R. § 725.310(a).....8

20 C.F.R. § 725.310(b) 9

20 C.F.R. § 725.401 7

20 C.F.R. §§ 725.404-.414.....7

20 C.F.R. § 725.418(d) 8

20 C.F.R. § 725.419(a).....8

20 C.F.R. § 725.419(d) 5

20 C.F.R. § 725.451 8

20 C.F.R. § 725.455…….....8

20 C.F.R. § 725.481 8

20 C.F.R. § 725.482 8

20 C.F.R. § 725.495(a)(2)(i) 16

20 C.F.R. § 725.503(d) 10

20 C.F.R. § 725.503(d)(1).....10

20 C.F.R. § 726.203(a)..... 30, 31

20 C.F.R. § 726.203(c)..... 30, 31

20 C.F.R. § 726.203(c)(6).....31

20 C.F.R. § 726.203(d) 31, 37

20 C.F.R. § 726.207 33

20 C.F.R. § 726.210 ..... 31, 32

20 C.F.R. § 726.212 34

20 C.F.R. §§ 802.301-802.309.....8

20 C.F.R. § 802.407(a).....2

OTHER AUTHORITIES:

64 Fed. Reg. 55005 (Oct. 8, 1999).....35

65 Fed. Reg. 79977 (Dec. 20, 2000).....9

7 Steven Plitt, *et. al.,* Couch on Ins. § 101:3 (3d Ed.) 42

14 Larson's Workers' Compensation Law § 150.02[1].....44, 45

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by former coal miner Marlin Rice. On August 1, 2017, United States Department of Labor (DOL) Administrative Law Judge (ALJ) Daniel F. Solomon issued a decision and order awarding benefits.

Karst Robbins Coal Company, Inc. (KRCC) and its insurance carrier Bituminous Casualty Corporation (BITCO) appealed this decision to DOL's Benefits Review Board (Board) on August 25, 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 ALJ Solomon's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On January 23, 2019, the Board affirmed the award of benefits. BITCO/KRCC filed a timely motion for reconsideration on February 22, 2019, within the thirty-day period prescribed by 20 C.F.R. § 802.407(a). The Board denied the reconsideration motion on July 9, 2019. BITCO/KRCC then filed a petition for review with this Court on September 4, 2019. The Court has jurisdiction over the 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 where the injury occurred. Mr. Rice's exposure to coal mine dust – the injury contemplated by 33 U.S.C. § 921(c) – occurred in the Commonwealth of Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over BITCO/KRCC's petition for review.

STATEMENT OF THE ISSUES

1. BITCO/KRCC contend that the district director was collaterally estopped from identifying KRCC as the responsible operator, and BITCO as carrier, in Mr. Rice's current claim because Karst-Robbins Machine Shop (KRMS) (which BITCO did not insure) was identified as the responsible operator in Mr. Rice's initial claim, which was denied for failure to establish the presence of black lung disease. In *Arkansas Coals, Inc. v. Lawson,* 739 F.3d 309 (6th Cir. 2014), this Court held that collateral estoppel does not prohibit the designation of a new responsible operator when a prior claim is denied on medical entitlement grounds because the identification of the liable party is not necessary to the decision.

Does *Arkansas Coals* invalidate BITCO/KRCC's collateral estoppel argument?

2. BITCO seeks to rescind its insurance policy with KRCC because it claims that KRCC fraudulently underreported the number of workers who would be covered by the policy. The BLBA and its implementing regulations provide no exception to the requirement that an insurance carrier cover the entirety of a policyholder's liability. *Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998).

May BITCO rely on a Kentucky insurance statute and the common law to rescind its insurance contract with KRCC when doing so violates the BLBA and its

implementing regulations?

3. An ALJ assumed that BITCO could rescind its policy, but nonetheless determined that BITCO's evidence of KRCC fraud was not credible and was entitled to little weight.

Did BITCO forfeit its challenge to the ALJ's evidentiary finding by failing to specify the error in the ALJ's determination, and if not, is the ALJ's finding supported by substantial evidence?

4. BITCO/KRCC contend that they should be dismissed and liability transferred to the Black Lung Disability Trust Fund (Trust Fund) because their due process rights were violated by DOL's processing of Mr. Rice's case. Throughout these proceedings, BITCO/KRCC were timely notified of their potential liability and have been able to prepare a meaningful defense to Mr. Rice's claim for benefits and their designation as the liable parties. Neither ALJ Johnson (who issued two intermediate decisions) nor ALJ Solomon nor the Board found BITCO/KRCC's allegation of prejudice persuasive.

Has BITCO/KRCC established that their due process rights were violated?[1]

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[1] BITCO/KRCC also challenge ALJ Solomon's finding that Mr. Rice engaged in more than ten years of coal mine employment. The Director will not address this issue because it does not implicate BITCO/KRCC's designation as responsible operator and carrier.

STATEMENT OF THE CASE

A. Proceedings Below

Mr. Rice's initial claim for benefits was filed on October 6, 1983. A district director in DOL's Office of Workers' Compensation Programs (OWCP) issued a proposed decision denying the claim, and following a formal hearing, ALJ Earl Thomas denied benefits. Appendix (A) 102. The Board affirmed the denial, A 97, and this Court dismissed Mr. Rice's appeal for failure to pay the filing fee on December 16, 1991. A 95.

Mr. Rice filed a second claim for benefits on September 23, 2002. The district director issued a proposed decision denying benefits on February 19, 2004, Claimant's Separate Appendix (CSA) 254, which became final thirty days later when no party requested review. *See* 20 C.F.R. § 725.419(d).

On November 18, 2004, Mr. Rice filed another claim for benefits. The district director treated the filing as a request for modification of the prior denial, *see infra* at 10 (explaining that a claim filed within one year of a prior denial constitutes a modification request), but denied modification on April 5, 2005. CSA 264.

Mr. Rice next filed a claim on July 5, 2005. An OWCP claims examiner returned the application on August 3, 2005, noting Mr. Rice's counsel's preference not to proceed with modification. CSA 318.

On May 22, 2006, Mr. Rice filed yet another application for benefits. On September 24, 2007, the district director issued a proposed decision awarding benefits. CSA 289. Following BITCO/KRCC's request for a formal hearing, ALJ Paul Johnson treated the application as a subsequent claim and denied benefits. A 82. On appeal, the Board vacated the denial of benefits and remanded the case to the district director. A 71. It determined, *inter alia*, that the July 5, 2005 application constituted an unadjudicated request for modification, and therefore, the May 22, 2006 application merged with the pending modification request.

On remand, the district director concluded that Mr. Rice did not intend to have the July 2005 application treated as a modification request; consequently, the district director found that the May 22, 2006 claim was, in the first instance, properly considered a subsequent claim by ALJ Johnson. CSA 311. Following transmittal of the claim to the Office of Administrative Law Judges (OALJ) for adjudication, ALJ Johnson again denied benefits on May 6, 2013.[2] A 63.

Four months later, on October 23, 2013, Mr. Rice requested modification of ALJ Johnson's denial of benefits. The district director denied the request, CSA

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[2] The claim was initially referred to ALJ Solomon, who after cancelling the hearing, erroneously transmitted the claim to the Board. DX 105. The Board returned the claim to the OALJ, explaining that it lacked jurisdiction because no appeal had been filed. DX 107.

336, and following Mr. Rice's request for an ALJ hearing, ALJ Solomon awarded benefits. A 23. BITCO/KRCC appealed ALJ Solomon's decision to the Board, which affirmed on January 23, 2019. A 6. BITCO/KRCC moved for reconsideration, but the Board denied the motion on July 9, 2019. A 3.

BITCO/KRCC's petition for review to this Court followed.

B. Statutory and Regulatory Background

1. The Administration of Black Lung Claims

Administrative review of a miner's BLBA claim begins with an OWCP district director. A district director is authorized to assist claimants in the filing of their claims, 20 C.F.R. § 725.304(a), and is required to "take such action as is necessary to develop, process, and make determinations with respect to the claim." 20 C.F.R. § 725.401. Among other responsibilities, the district director develops medical evidence relating to a claimant's entitlement to benefits, including arranging a miner's DOL-sponsored complete pulmonary evaluation, and liability evidence relating to the identification of the responsible operator. 20 C.F.R. §§ 725.404-.414; *see also* 30 U.S.C. § 923(b) (requiring DOL to provide each miner with an opportunity to substantiate his or her claim with a pulmonary evaluation). The district director ultimately reviews the submitted evidence and issues a "proposed decision and order," which not only addresses the claimant's entitlement to benefits but also designates the "responsible operator liable for the payment of

benefits."[3] 20 C.F.R. § 725.418(d). Any party may request revision of the district director's proposed decision and order, or in the alternative, de novo review of the district director's determinations by an ALJ. 20 C.F.R. § 725.419(a).

If a party requests review by an ALJ, the ALJ will hold a hearing and issue a decision regarding the claim. 20 C.F.R. §§ 725.451, 725.455. "Any party dissatisfied with a decision and order issued by an [ALJ] may . . . appeal the decision and order to" the Board. 20 C.F.R. § 725.481; 33 U.S.C. § 921(b)(3) (incorporated by 30 U.S.C. § 932(a)). The Board then issues a decision after considering the record developed by the ALJ. *See* 33 U.S.C. § 921(b)(3); 20 C.F.R. §§ 802.301-802.309. Following review by the Board, a dissatisfied party may seek review in a federal court of appeals. 20 C.F.R. § 725.482; 33 U.S.C. § 921(c) (incorporated by 30 U.S.C. § 932(a)).

2. Modification Requests

The BLBA incorporates Section 22 of the Longshore Act, 33 U.S.C. § 922. 30 U.S.C. § 932 (a). Section 22 permits any party to a proceeding to request modification of the terms of an award or denial at any time prior to one year from

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[3] Among other requirements, a responsible operator must have employed the miner seeking benefits for a cumulative period of not less than one year and be capable of assuming its liability for the payment of continuing benefits. *Arkansas Coals*, 739 F.3d at 313. To meet the latter requirement, coal mine operators must receive permission to self-insure or obtain commercial insurance. *See infra* at 30-32 (discussing insurance requirements).

the date of the last payment of benefits or at any time before one year following the denial of a claim. 30 U.S.C. § 922; *see also* 20 C.F.R. § 725.310(a). Modification may be granted based on either a "change in conditions" or "mistake in determination of fact." 20 C.F.R. § 725.310. The party seeking modification bears the burden to establish either element. A modification request need not be formal in nature; a mere allegation that a claim was wrongly decided is sufficient to permit modification. *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 230 (6th Cir. 1994). On modification, an ALJ may simply re-weigh the evidence already of record, without the need for additional evidence, and come to the conclusion that a mistake in the prior determination was made and reach a different conclusion. *Youghiogheny and Ohio Coal Co. v. Milliken,* 200 F.3d 942, 955 (6th Cir. 1999).

Modification proceedings can only be initiated before the district director. 20 C.F.R. § 725.310(b); *see* 33 U.S.C. § 922; *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 956. Neither Section 22 nor Section 725.310 limits the number of times modification may be requested. *Youghiogheny and Ohio Coal Co.*, 200 F.3d at 956 (recognizing the absence of limits on requesting modification); 65 Fed. Reg. 79977 (Dec. 20, 2000); *accord Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 540 (7th Cir. 2002); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 500 (4th Cir. 1999).

The commencement date for the payment of benefits on a miner's claim

awarded on modification depends on whether a mistake of fact or change of conditions was found. 20 C.F.R. § 725.503(d). If based on a mistake of fact, benefits are payable beginning with the month the claim was filed or with the onset of total disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. § 725.503(d)(1). If based on a change of conditions, benefits begin with the onset date (provided onset occurred after the most recent denial) or the month in which modification was requested. 20 C.F.R. § 725.305(d)(2).

3. Subsequent Claims

A subsequent claim is one filed more than one year after the effective date of a final order denying a claimant's previously-filed claim. 20 C.F.R. § 725.309(c). If a claimant files a subsequent claim within one year of the denial of a prior claim, however, the later filing is treated as a request for modification under Section 725.310. 20 C.F.R. § 725.309(b).

Consideration of a subsequent claim involves two steps. First, to ensure that the previous denial's finality is respected, "a subsequent claim must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R § 725.309(c); *see Cumberland River Coal Co. v. Banks,* 690 F.3d 477 (6th Cir. 2012) (adopting Director's interpretation of § 725.309); *Buck Creek Coal Co. v. Sexton,* 706 F.3d 756, 759-60 (6th Cir. 2013)

(rejecting argument that the subsequent claim regulation violates *res judicata*). "If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement." 20 C.F.R. § 725.309(c)(4).

If the new evidence establishes a condition of entitlement previously decided against the claimant, the subsequent claim is allowed and all of the evidence, old and new, is considered to determine whether the claimant is entitled to benefits. 20 C.F.R. § 725.309(c)(2); *Arkansas Coals*, 739 F.3d at 314; 65 Fed. Reg. 79973 (Dec. 20, 2000) ("[O]nce a claimant has submitted new evidence in order to establish one of the elements of entitlement previously resolved against him, an administrative law judge must conduct a de novo weighing of the evidence relevant to the remaining elements, regardless of whether any of that evidence is newly submitted."). In doing so, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. § 725.309(c)(5); *Arkansas Coals*, 739 F.3d at 314. In addition, a party will be bound in the subsequent claim to findings that it stipulated to in the initial claim. *Id.* Aside from these exceptions, the findings of the previous claim are effectively reset.

In any case in which a subsequent claim is awarded, no benefits may be paid for any period before the denial of the prior claim. 20 C.F.R. § 725.309(c)(6).

STATEMENT OF THE FACTS

A. Relevant Record Evidence

BITCO/KRCC are not challenging Mr. Rice's entitlement to benefits. Opening Brief (OB) 2 ("This case does not challenge the claimant's entitlement to benefits."). A summary of the medical evidence and Mr. Rice's work and social histories is therefore unnecessary.

B. Decisions Below

1. The 1983 Claim

Mr. Rice filed his initial claim for benefits on October 6, 1983. Following the district director's proposed decision denying benefits, ALJ Thomas denied benefits, finding Mr. Rice failed to establish the existence of pneumoconiosis. A 106-109. ALJ Thomas also determined that KRMS would be liable for benefits if awarded. A 104-106. Agreeing with KRCC and BITCO, the ALJ found that KRMS was a viable corporate entity capable of assuming liability, that it was a separate corporate entity from KRCC, that KRMS hired and paid Mr. Rice, and that KRMS was an independent contractor providing services to a coal mine, namely supplying labor to KRCC. *Id*.

Mr. Rice appealed *pro se* to the Board, which employed a "general standard

of review" to see if ALJ Thomas' decision was rational, in accordance with law, and supported by substantial evidence." Federal Respondent's Separate Appendix (FRSA) 355. It affirmed the ALJ's finding of no pneumoconiosis and the denial of benefits, A 97-99, and therefore, "decline[d] to address additional issues raised by this claim." A 99 n.2. The Board proceedings concluded when it denied Mr. Rice's motion for reconsideration. A 96.

Mr. Rice appealed to this Court, which dismissed for failure to pay the filing fee. A 95.

2. The 2002 Claim

a. The District Director's February 19, 2004 Proposed Decision and Order Denying Benefits

Mr. Rice filed a subsequent claim for benefits on September 23, 2002. DX 1. The district director designated KRCC as the responsible operator. CSA 256. He explained that although Mr. Rice worked for KRMS, decisions in other black lung claims, as well as the testimony of KRCC's bookkeeper, demonstrated that KRMS and KRCC were the same entity. In addition, the district director observed that KRCC was, *inter alia*, financially capable of assuming liability because it was insured by BITCO. CSA 260. Regarding Mr. Rice's entitlement, the district director found that Mr. Rice established the presence of complicated pneumoconiosis, but determined it was caused by histoplasmosis, not coal mine

employment.[4] CSA 258-59. The district director accordingly denied benefits on February 19, 2004. CSA 254. Mr. Rice did not request an ALJ hearing and the decision became final.

b. The District Director's April 5, 2005 Proposed Decision and Order Denying Modification

On November 18, 2004, Mr. Rice submitted a new claim along with a letter from his counsel, Joseph E. Wolfe, that stated, *inter alia,* "If there is a present case pending on this claim, please do not file a modification; simply return the application." CSA 327. The district director treated the filing as a request for modification, *see supra* at 10, and after allowing for the submission of additional evidence, denied modification on April 5, 2005. CSA 264.

c. The District Director's Return of Mr. Rice's July 5, 2005 Application

On July 5, 2005, Mr. Rice filed another application along with a letter from his counsel containing language identical language to the November 22, 2004

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[4] Histoplasmosis is an infectious fungal disease that occurs mainly in the lungs, but can sometimes spread to other parts of the body. Merck Manual, Consumer Version found at https://www.merckmanuals.com/home/infections/fungal-infections/histoplasmosis?query=histoplasmosis#v787930.

Establishing the existence of complicated pneumoconiosis gives rise to an irrebuttable presumption of disability (or death) due to pneumoconiosis. 30 U.S.C. § 921(c)(3); 20 C.F.R. § 718.304. To be entitled to benefits, however, a claimant must also prove that the complicated pneumoconiosis arose out of coal mine employment. 20 C.F.R. § 718.203.

letter. CSA 320. A claims examiner noted that Mr. Wolfe stated that he did not want to file for modification, and returned the application on August 3, 2005. CSA 318.

d. The District Director's September 24, 2007 Proposed Decision and Order Awarding Benefits

Mr. Rice filed a new application for benefits on May 22, 2006. DX 4. The district director designated KRCC/KRMS as the responsible operator, reasoning that Mr. Rice's "duties were performed primarily for the benefit of [KRCC] and therefore he should be considered one of its employees and would be covered by the insurance policy issued by [BITCO]." CSA 296-97. The district director further determined that Mr. Rice had established a material change in conditions by proving he suffered from complicated pneumoconiosis arising at least in part from coal mine employment. CSA 296. The district director accordingly awarded benefits. CSA 289.

e. ALJ Johnson's September 26, 2008 Decision and Order Denying Benefits

KRCC and BITCO disputed the proposed decision and requested a formal hearing. ALJ Johnson first agreed with the district director's designation of KRCC as responsible operator. A 85-91. He determined that although KRMS paid Mr. Rice (and possibly could be liable), KRCC "controlled [his] labor, directed[ed] him where to go, what to do, and how to do it. . . . It is beyond doubt that [Mr. Rice's]

work was primarily for the benefit of KRCC." A. 87. Because KRCC was Mr. Rice's first-line or primary employer, ALJ Johnson ruled that KRCC was properly designated. A 86-88 (citing *inter alia* 20 C.F.R. § 725.495(a)(2)(i) (providing that where more than one potentially-liable operator employed the miner "most recently," liability is assigned to operator that "directed, controlled, or supervised the miner")).

The ALJ further rejected BITCO/KRCC's contentions that *res judicata* barred designating KRCC as responsible operator, that the district director failed to adequately investigate other carriers, and that if Mr. Rice were deemed to be KRCC's employee, BITCO's contract of insurance with KRCC should be rescinded because KRCC fraudulently underreported the number of its employees to BITCO. A 86-91. Although the ALJ found "little or no evidentiary support" for this last argument, he ruled that he lacked jurisdiction to consider it because it did not relate to Mr. Rice's underlying claim for benefits. A 89-91.

With respect to the merits of Mr. Rice's claim for benefits, ALJ Johnson determined that the May 2006 application comprised a subsequent claim, A 91, and denied benefits because Mr. Rice failed to establish a change in condition from his previous denial. A 93. In particular, ALJ Johnson observed that the sole basis for the prior denial was Mr. Rice's failure to establish that his totally disabling complicated pneumoconiosis arose from coal mine employment. A 92. This

element of entitlement, he reasoned, could not change over time in the absence of further coal mine employment (which had not occurred here). A 92-93.

f. The Board's October 21, 2009 Decision and Order Remanding the Case to the District Director

Mr. Rice appealed the denial of benefits to the Board, which remanded. A 71. The Board first ruled that ALJ Johnson erred in treating Mr. Rice's May 2006 application as a subsequent claim. It found that Mr. Rice's July 5, 2005 application (which the district director had returned) constituted an unadjudicated request for modification of the denial of his September 23, 2002 claim, and that the May 2006 application merged with the pending modification request. A 76 (citing 20 C.F.R. § 725.309(d) (now recodified as 20 C.F.R. § 725.309(a)). (The July 2005 application constituted a modification request because it was filed within one year of the district director's April 2005 denial of the 2002 claim.). The Board accordingly vacated ALJ Johnson's finding that the 2006 claim constituted an independent subsequent claim, and his denial of benefits (which was premised on that finding). It thus remanded to the district director for initiation of modification proceedings on the 2002 subsequent claim. *See supra* at 9 (explaining that modification proceedings must be initiated before the district director).

The Board went on to consider BITCO/KRCC's contention on cross-appeal that ALJ Johnson had erred in finding them liable for benefits. The Board affirmed the ALJ's finding that collateral estoppel did not preclude relitigation of the

responsible operator designation in a subsequent claim because that determination "was not necessary to support the denial of benefits." A 78. It further upheld as supported by substantial evidence the ALJ's finding that KRCC "directed, controlled, and supervised [Mr. Rice] in the performance his coal mine employment duties," and therefore was his primary employer and properly identified as the responsible operator. A 79. The Board reversed, however, the ALJ's finding that he lacked jurisdiction to resolve the contractual dispute between KRCC and BITCO, holding that an ALJ has the power to resolve all questions in respect to a claim. A 80.

g. The District Director's October 18, 2011 Show Cause Order Returning the Claim to the Office of Administrative Law Judges

The district director acknowledged the Board's mandate to initiate modification, but disagreed that the July 5, 2005 filing constituted an unadjudicated modification request. CSA 311-13. The district director produced a previously-undisclosed note of a telephone conversation with Mr. Wolfe, Mr. Rice's attorney, in which the lawyer requested that the July 2005 application be returned because he did not want to pursue modification.[5] CSA 319. The district

[5] The district director also produced a note of a November 20, 2004 telephone conversation in which Mr. Wolfe told a claims examiner that he intended the November 18, 2004 filing to be a request for modification because he planned to submit additional x-ray evidence. CSA 317, 326. (None was forthcoming, and the

director thus concluded that ALJ Johnson had properly treated Mr. Rice's May 2006 application as a subsequent claim (because it was filed more than one year after the April 2005 denial of Mr. Rice's 2002 claim). CSA 313. With no party objecting to the show cause order, the district director transferred the case to the Office of Administrative Law Judges.

h. ALJ Johnson's May 6, 2013 Decision and Order on Remand Denying Benefits

ALJ Johnson first addressed the responsible operator issue and declined to rescind the insurance contract between BITCO and KRCC. The ALJ again found "little evidentiary support" for BITCO's claim that KRCC fraudulently underreported the number of its employees. He criticized BITCO's evidence as "classic 'hearsay within hearsay,'" unrelated to Mr. Rice's claim, and lacking in specificity and foundation. A 66. He further determined that BITCO failed to "exercise due diligence in developing and presenting evidence on the issue of fraud while [Mr. Rice's] first claim was pending" (despite the evidence being available to BITCO), and therefore BITCO could not rely on this evidence to avoid liability on Mr. Rice's current claim. A 66. (In Mr. Rice's first claim, BITCO and KRCC

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district director denied modification.) These telephone conversations were necessary because it was not clear how to proceed with Mr. Wolfe's ambiguous filings and correspondence. *See infra* at 51 n.20.

did not allege fraud, instead arguing that KRMS was a legitimate and separate corporate entity that employed Mr. Rice. A 104-05.). Finally, the ALJ held that state law exclusions, such as rescission, were not allowed under the BLBA and its implementing regulations, and that a contract of insurance must fully cover the entirety of an employer's liability under the Act. A 67 (citing *inter alia Lovilia Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998) (holding that the BLBA required payment of benefits to all miners employed by a covered employer, regardless of whether premiums were collected on all their behalf)).

The ALJ also rejected BITCO's additional arguments for avoiding liability: he ruled that the district director properly investigated Mr. Rice's employment history, correctly designated KRCC, not KRMS, and found no prejudice to BITCO in the handling of the claim. A 68.

Turning to the merits of Mr. Rice's claim, ALJ Johnson again denied benefits, reiterating his prior finding that Mr. Rice had failed to establish the threshold requirement of a change in condition. A 68-69. He reasoned that the sole basis for the prior denial of the 2002 claim was Mr. Rice's failure to establish that his totally disabling complicated pneumoconiosis arose from coal mine employment, and that this element did not change because Mr. Rice had not engaged in coal mine employment since the prior denial. *Id*.

i. The District Director's March 13, 2014 Proposed Decision and Order Denying Modification

On October 23, 2013, Mr. Rice requested modification of ALJ Johnson's denial of benefits. The district director determined that although Mr. Rice had established the existence of complicated pneumoconiosis, he again failed to prove that it arose from coal mine employment. CSA 338. The district director accordingly denied modification for failure to establish a change in condition or a mistake of fact in ALJ Johnson's 2013 denial of benefits. *Id*.

j. ALJ Daniel F. Solomon's August 1, 2017 Decision and Order Awarding Benefits

Mr. Rice requested review of the district director's March 13, 2014 proposed decision and order denying benefits. Following a hearing, ALJ Solomon awarded benefits. A 23. ALJ Solomon accepted the parties' stipulation made at the hearing that the instant proceeding entailed a modification request. He then found several mistakes of fact in ALJ Johnson's prior denial. He determined that Mr. Rice had more than ten years of coal mine employment, not 8 years ten months as previously found, and that ALJ Johnson had failed to properly consider the medical opinion evidence. A 28, 30-31. He further ruled that ALJ Johnson had incorrectly considered Mr. Rice's May 2006 filing to be a subsequent claim rather than a modification request of the denial of his 2002 claim. A 28, 31.

ALJ Solomon, however, agreed with ALJ Johnson that KRCC was the

properly-named responsible operator and BITCO the correct carrier. A 33. He observed that the BLBA and implementing regulations prohibited BITCO from rescinding its insurance contract with KRCC, and that BITCO was not prejudiced by the alleged mishandling of Mr. Rice's 2005 modification request. A 33.

Turning to the medical merits, ALJ Solomon found that the x-ray evidence, as supported by the CT evidence and medical opinions, overwhelmingly established the presence of complicated pneumoconiosis. He further ruled, based on Mr. Rice's more than ten years of coal mine employment that the pneumoconiosis arose out of his coal mine employment. A 28-29, 31; *see* 20 C.F.R. § 718.203(b) (providing a rebuttable presumption for miners with ten or more years of coal mine employment that pneumoconiosis arose out such employment). ALJ Solomon also rendered "alternative findings" that the most recent evidence (pulmonary function studies and medical opinions) established that Mr. Rice was totally disabled due to pneumoconiosis. A 53-60. ALJ Solomon accordingly awarded benefits, and set August 2006 as the date for the commencement of benefits. A 50.

k. The Benefits Review Board's January 23, 2019 Decision and Order Affirming the Award of Benefits

The Board affirmed ALJ Solomon's award of benefits. A 6. It first ruled that it was unnecessary to determine the precise procedural posture of Mr. Rice's

claim because resolution would not affect the outcome of the case.[6] A 12-14. It explained that while ALJ Solomon considered the current filing as a request for modification of the September 23, 2002 subsequent claim, he awarded benefits based on evidence developed after the district director's February 19, 2004 denial. It thus reasoned that even if BITCO/KRCC were correct that the case was a subsequent claim arising from the 2006 application, "the [ALJ's] decision is based on newly-submitted evidence as required by 20 C.F.R. § 725.309(c)(4)." A 14. Furthermore, the Board emphasized that because the payment of benefits commenced in August 2006 (after the filing of the May 2006 claim), Mr. Rice had not been awarded any additional benefits based on the ALJ's treatment of the case as a modification of the 2002 claim rather than as a 2006 subsequent claim. *Id*.

The Board then rejected BITCO/KRCC's contentions that they are not the liable parties. The Board declined to revisit, as law of the case, its previous rejection of their collateral estoppel argument. A 15. It further affirmed ALJ Johnson's and ALJ Solomon's refusal to find the BITCO/KRCC insurance contract rescinded. It agreed that neither the BLBA nor implementing regulations allow an insurance carrier to nullify its federal black lung obligations by rescinding its

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[6] Mr. Rice argued that the case is a modification of the September 23, 2002 subsequent claim; whereas BITCO/KRCC claimed that the case is a subsequent claim based on Mr. Rice's May 22, 2006 application.

insurance contract with an insured employer. A 15-16 (citing *Lovila Coal Co. v. Williams*, 143 F.3d 317 (7th Cir. 1998)). As an additional ground, the Board affirmed ALJ Johnson's determination that BITCO's evidence of fraud was not credible and was entitled to little weight. A 15-16. It observed that BITCO had failed to raise a specific challenge to the ALJs' discrediting of its evidence, and therefore had waived its challenge to the evidentiary ruling. A 16 n.15. Finally, the Board rejected BITCO/KRCC's contention that its due process rights had been violated by the district director's initial omission of the notes of telephone conversations with Attorney Wolfe. A 16-17. It ruled that the oversight had not deprived BITCO/KRCC of a fair opportunity to present its defense throughout the proceedings and that it had experienced no prejudice from any delay.

Turning to the merits of Mr. Rice's claim, the Board affirmed ALJ Solomon's finding of more than ten years of coal mine employment and that Mr. Rice's complicated pneumoconiosis arose out of his coal mine employment. A 18-20. It accordingly affirmed the award of benefits. A 22.

l. Benefits Review Board's July 9, 2019 Order on Reconsideration En Banc

BITCO/KRCC moved for reconsideration, arguing for the first time that the case should be remanded for a new hearing and decision by a different ALJ because ALJ Solomon was not appointed in manner consistent with the Appointments Clause of the U.S. Constitution. The Board found that

BITCO/KRCC had forfeited the issue by waiting until the reconsideration stage to raise it and denied the motion. A 3. *Accord Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019).

SUMMARY OF THE ARGUMENT

BITCO/KRCC assert that they should be dismissed as the responsible operator and carrier in this case, and that the Trust Fund should be held liable for the payment of benefits. They proffer three arguments to support this assertion. None has merit.

First, BITCO/KRCC argue that because they were dismissed as operator/carrier from Mr. Rice's finally denied initial (1983) claim for benefits, the district director was collaterally estopped from relitigating the responsible operator determination in Mr. Rice's subsequent claim. This Court rejected this very argument in *Arkansas Coals, Inc. v. Lawson,* 739 F.3d 309 (6th Cir. 2014), reasoning that collateral estoppel poses no bar because the identification of the responsible operator is not a necessary finding when a prior claim is denied based on medical entitlement. *Id*. at 321. The denial of Mr. Rice's initial claim resulted from his failure to establish the existence of pneumoconiosis; consequently, the district director was permitted to designate KRCC as the responsible operator and BITCO as its carrier in Mr. Rice's subsequent claim.

Second, BITCO asserts that fraud committed by KRCC permits it to rescind

its insurance contract with the company. BITCO has never proved that the actions taken by KRCC actually constitute fraud. In addition, BITCO failed to promptly act to rescind the contract, despite knowing of the alleged fraud for 15 years before Mr. Rice's subsequent claim. And regardless, the BLBA, its implementing regulations, and the BLBA endorsement on the insurance contract itself make a carrier liable for all of a covered operator's liability, and thus prohibit BITCO from rescinding its contract with KRCC. *Lovilia Coal Co. v. Williams,* 143 F.3d 317, 323 (7th Cir. 1998).

Finally, BITCO/KRCC argue that DOL's handling of Mr. Rice's numerous filings violated their due process rights. Any missteps, however, did not rise to the level of a core due process violation, and BITCO/KRCC have failed to establish that any irregularity in the course of proceedings was so unfair as to "impugn the results" in this case. BITCO/KRCC's request that they be relieved of liability based on due process concerns must be rejected.

ARGUMENT

A. Standard of Review

Whether BITCO/KRCC should be dismissed as carrier and responsible operator in this case is primarily a question of law. The Court reviews the Board's legal conclusions *de novo*. *Arch of Ky., Inc. v. Director, OWCP*, 556 F.3d 472, 477 (6th Cir. 2009); *Eastover Min. Co. v. Williams*, 338 F.3d 501, 508 (6th Cir.

2003).

B. The Court should reject BITCO/KRCC's arguments to be dismissed from this case.

1. *Arkansas Coals, Inc. v. Lawson* permits reconsideration of the responsible operator designation in a subsequent claim.

KRMS, not KRCC, was identified as the responsible operator in Mr. Rice's 1983 claim. In his subsequent 2002 claim, and all proceedings thereafter, KRCC was so designated (with BITCO as KRCC's insurer). BITCO/KRCC argue that issue preclusion and "principles of finality" preclude relitigation of the responsible operator designation in Mr. Rice's subsequent claim.

This Court expressly rejected BITCO/KRCC's argument in *Arkansas Coals, Inc. v. Lawson,* 739 F.3d 309 (6th Cir. 2014). *Arkansas Coals* first held that the BLBA permits such reconsideration in a subsequent claim. *Id*. at 318 (once a change of condition is found in a subsequent claim, "under § 725.309(d)(4), *no findings,* which would include the designation of a responsible operator, are binding. This provides clear authority for relitigation of Arkansas Coals's liability."). More important, *Arkansas Coals* held that that collateral estoppel poses no bar to a new responsible operator designation under Section 725.309 because the identification of the responsible operator in a prior claim is not a necessary finding when the prior claim is denied on the merits. *Id*. at 321. As in *Arkansas Coals*, the identification of KRMS as the responsible operator in Mr.

Rice's 1983 claim was not necessary to its outcome because the claim was denied on its medical merits. A 99. The designation of KRCC as responsible operator, and BITCO as carrier, in Mr. Rice's subsequent claim was proper.

Nevertheless, BITCO/KRCC try to distinguish *Arkansas Coals* on procedural grounds, arguing that here, unlike in *Arkansas Coals*, Mr. Rice appealed the denial of the first claim and the Director,OWCP failed to cross-appeal or otherwise challenge KRCC's dismissal. OB at 19-20 (emphasizing that one of four elements of collateral estoppel is that estopped party had a full and fair opportunity to litigate issue in prior proceeding). While true, BITCO/KRCC do not explain why the Director would want to litigate the responsible operator issue in the 1983 claim: KRMS had been named, and KRMS, not the Trust Fund, was liable for the payment of benefits if awarded. And if the Board had overturned the KRMS designation, then KRCC could have been designated under the law prevailing at that time. *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300 (6th Cir. 1989).

In any event, this "incentive to litigate" distinction that BITCO/KRCC espouse is of no import. *Arkansas Coals* made crystal clear that for collateral estoppel to apply, a finding must be *necessary* to the outcome of the prior decision and that the identification of the responsible operator is not necessary when benefits are denied. To underscore that point here, when the Board affirmed the

denial of Mr. Rice's 1983 claim for failure to establish the existence of pneumoconiosis, it expressly declined to consider the other issues involved in the case. A 99.

Arkansas Coals is controlling precedent and mandates rejection of BITCO/KRCC's collateral estoppel argument. The Director therefore properly reconsidered the responsible operator designation in Mr. Rice's 2002 claim and thereafter, and correctly named KRCC because it was the most recent, financially-capable operator to employ Mr. Rice for at least one year.[7]

2. BITCO may not rescind its black lung coverage of KRCC.

BITCO asserts that it should be allowed to rescind its policy with KRCC because KRCC fraudulently underreported the number of miners it employed, and consequently, BITCO charged a premium that did not reflect its actual risk. OB 24-32. This argument should be rejected for three reasons. First, the BLBA and implementing regulations prohibit BITCO from rescinding its federal black lung coverage. Second, the BLBA and implementing regulations preempt the Kentucky insurance statute and common law on which BITCO relies. Third, even assuming these laws applied, BITCO has not proved its evidentiary case under them.

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[7] Through 2009, BITCO/KRCC argued that KRMS, not KRCC, was Mr. Rice's employer. A 79. It no longer raises that defense, notwithstanding its gratuitous criticisms of the finding in its statement of the case. *E.g.* OB 7 n.5.

a. The BLBA and implementing regulations prohibit BITCO from rescinding its BLBA coverage.

The BLBA provides benefits to miners who are totally disabled from pneumoconiosis. 30 U.S.C. § 901(a). Section 423 of the BLBA requires operators to secure the payment of black lung benefits either by self-insuring or by purchasing insurance from any entity "authorized under the laws of any State to insure workmen's compensation."[8] 30 U.S.C. § 933 (a). Section 423 (b) requires that to meet this requirement "every policy or contract of insurance must contain"

> (1) A provision to pay benefits required under section 932 of this title, notwithstanding the provisions of the State workmen's compensation law which may provide for lesser payments…
>
> ….
>
> (3) such other provisions as the Secretary [of Labor], by regulation, may require.

Id. Section 933(b) (1), (3).

In implementing the statute, the Secretary determined that drafting an insurance policy tailored to the BLBA might result in "unnecessary administrative delays and expense." 20 C.F.R. § 726.203(c). Accordingly, the Secretary allowed

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[8] Congress intended to have liability for federal black lung benefits fall on the miner's employer "to the maximum extent feasible." *See Arkansas Coals*, 739 F.3d at 313.); 30 U.S.C. § 932(c). Congress created the Black Lung Disability Trust Fund "as a fall back alternative" to assume liability when "there is no operator who is liable for the payment of such benefits." *Arkansas Coals*, 739 F.3d at 313; 26 U.S.C. § 9501(d)(1)(B); 30 U.S.C. § 932(c); *Rockwood Casualty Ins. Co. v. Director, OWCP*, 917 F.3d 1198, 1201 (10th Cir. 2019).

operators and insurers to use the existing standard workers' compensation policy subject to an endorsement providing, in relevant part, that the term "'workmen's compensation law' includes [P]art C of [T]itle IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 931-936, and any law amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force." 20 C.F.R. § 726.203(a). To avoid "undue disputes over the meaning of certain policy provisions and in accordance with the authority contained in [S]ection 423 (b) (3) of the Act," 20 C.F.R. § 726.203(c), the Department specified that the endorsement:

> shall, to the fullest extent possible, be construed to bring any policy or contract of insurance entered into by an operator for the purpose of insuring such operator's liability under [P]art C of [T]itle IV of the Act into conformity with the legal requirements placed upon such operator by [the BLBA and applicable regulations].

20 C.F.R. § 726.203(c)(6). Section 726.203(d) further provides that "nothing in this section shall relieve any operator or carrier of the duty to comply with any State's workmen's compensation laws, except insofar as the State law is in conflict with the provisions of this section." Finally, 20 C.F.R. § 726.210, in relevant part, provides:

> Every carrier seeking to write insurance under the provisions of this Act shall be deemed to have agreed that acceptance by the Office of a report of the issuance or renewal of a policy of insurance, as provided for by section 726.208 shall bind the carrier to full liability for the obligations under this Act, of the operator named in said report.

20 C.F.R. § 726.210.

In this case, the plain language of the relevant insurance policy requires BITCO to pay benefits to Mr. Rice. FRSA 1-2. The policy contains the endorsement required by 20 C.F.R. § 726.203(a), which provides that "workmen's compensation law" include the BLBA. *Id*. BITCO, by the language contained in its policy, thereby agreed to pay all benefits required by the BLBA.[9] These include benefits payable to Mr. Rice because ALJ Solomon found KRCC was both Mr. Rice's employer and primarily responsible for the payment of benefits. A 32-33. Indeed, despite contending otherwise for decades, BITCO/KRCC no longer dispute these factual determinations before this Court.

In a similar case involving another attempt by BITCO to avoid its insurance responsibilities under the BLBA, the Seventh Circuit reached the same conclusion

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[9] To the extent there is any ambiguity in the insurance contract, DOL's regulations require black lung coverage. As discussed *supra,* Section 726.203(c) (6) provides that the endorsement shall be construed "to the fullest extent possible" to conform the policy to the BLBA's requirements. Section 726.310 provides that insurers writing policies under the BLBA provisions agree to be bound "to full liability for the obligations under this Act of the operator." These provisions, issued under general authority to carry out the BLBA, 30 U.S.C. § 936, and specific authority to regulate the content of the BLBA insurance policies, see *id.* § 933, are reasonably calculated to proving benefits to claimants because they avoid undue disputes over the meaning of certain policy provisions. 20 C.F.R. § 726.203(c). Insofar as they are necessary to construe an insurance policy with the Secretary's endorsement, they are entitled to deference. *Cumberland River Coal*, 690 F.3d at 485.

that BITCO was required to pay benefits to an employee-miner who was not included on the operator's insurance policy. *Lovilia Coal Company v. Williams,* 143 F.3d 317 (7th Cir. 1998). There, the coal mine owner purchased state workers' compensation insurance and paid the necessary premiums for his employees but opted not to include himself on the policy. In finding BITCO liable for his BLBA benefits, the court held that "the very structure of the BLBA effectively requires that an insurance carrier provide benefits for all of a coal mine operator's black lung liability and that the insurance carrier bears the burden of collecting proper premiums for all covered miners." *Id*. at 323 *see also Travelers Ins. Co. v. Blackstone Mining Co., Inc.*, Nos. 2007-CA-001610-MR, 2009-SC-000015-DG, 2012 WL 2603623, at *1 n.5 (Ky. Ct. App. July 6, 2012) (unpublished) (agreeing that *Lovilia Coal* set forth the proper legal requirements of the BLBA, and recognizing that "the insurance policy must 'cover fully all of the coal operator's liabilities under the BLBA'"). In reaching this conclusion, the *Lovilia* court found that DOL's regulations require every policy conform to the requirements of the BLBA and that every carrier writing BLBA insurance shall be bound "*to the full liability for the obligations under this Act of the operator*. *Id*. at 322-323 (emphasis in original). *See also* 20 C.F.R. § 726.207 ("Any requirement under any

benefits order, finding or decision shall be binding upon the carrier in the same manner and to the same extent as upon the operator.").[10]

BITCO attempts to distinguish *Lovilia Coal* by claiming the decision did not "involve a situation where an employer fraudulently conceals risk."[11] OB 26. But the court's reasoning makes clear this happenstance would make no difference:

> Finally, the petitioners contend that they should not be held liable for the benefits because Bituminous did not charge premiums that accurately reflected the coverage of the policy sold. However, were we to accept this circular argument, we would in essence be freeing insurers of liability in any circumstance where an insurer contends that the premium charged did not "accurately reflect the coverage" of the policy sold. Lovilia sought insurance in order to discharge its duty to secure BLBA benefits, as required by 30 U.S.C. 933(a). Bituminous sold Lovilia a policy that did just that *because* it contained the [BLBA required] endorsement. By including the endorsement, Bituminous redefined the liability it assumed under the contract to include liability for benefits imposed on Lovilia by the BLBA. Under the Act, Lovilia bears liability for benefits owed its miners (and surviving spouses), and Williams was a miner within the terms of section 902(d). Whether Bituminous charged an appropriate premium is not relevant to whether the BLBA imposed liability on Lovilia.

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[10] The black lung regulations permit a carrier, upon proper notice, to cancel an insurance policy. 20 C.F.R. § 726.212. Canceling, however, does not relieve a carrier for any liability that may arise while the policy was in force. Notably, BITCO seeks rescission – to void its contract ab initio – not cancellation.

[11] As discussed *infra* at 42, KRCC did not conceal the "risk." The BLBA risk that BITCO insured against was exposure to coal mine dust, which it clearly knew about. BITCO's complaint relates to the degree of risk (the number of possibly-exposed KRCC employees). Moreover, BITCO failed to convince any adjudicator in these proceedings that KRCC committed fraud in its dealings with it. Stating an allegation as fact does not make it so.

143 F.3d at 324. Moreover, the Board in *Lovilia* expressly rejected BITCO's rescission-based-on-fraud argument. There, the Board recognized that a carrier's liability is not affected even if the operator provided false information regarding the number of its employees. *Williams v. Lovilia Coal Co.,* 20 Black Lung Rep.1-58, 1-62 (Ben. Rev. Bd. 1966) (citing *Bates v. Creek Coal Co., Inc.,* 18 BLR 1-1, 1-2 n.9 (1993), *rev'd* on other grounds 134 F.3d 734 (6th Cir. 1997).

BITCO's argument that it can simply rescind its contract with KRCC once benefits are due is contrary to the requirements of the Act and implementing regulations. *Lovilia Coal*, *supra*; *see also* 64 Fed. Reg. 55005 (Oct. 8, 1999) ("Because an insurance carrier assumes the responsibility for benefits ascribed to its insured operator, that responsibility must encompass every employee of the operator who qualifies as an eligible miner under the Act."); *Tazco, Inc., v. Director, OWCP,* 895 F.2d 949, 951 (4th Cir. 1990) (carrier takes on all the employer's responsibilities in connection with an insured claims and "is required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes"); *see also National Mines Corp., v. Carroll,* 64 F.3d 135, 140 (3d Cir. 1995) (relying on *Tazco* in explaining that "the [BLBA] and regulations do not contemplate limiting the carrier's exposure to indemnifying an

operator found liable for payments of benefits"). The Court should accordingly reject BITCO's attempt to rescind its insurance contract with KRCC.[12]

b. BITCO is not entitled to rescission under Ky. Rev. St. § 304.14-110.

BITCO argues that a Kentucky insurance statute, Ky. Rev. St. § 304.14-110,[13] permits rescission of its workers' compensation policy with KRCC, including the BLBA endorsement. This argument is meritless on several fronts.

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[12] BITCO briefly complains that the district director should have investigated KRCC's corporate officers and held them liable for Mr. Rice's benefits. OB 27-28 (citing 30 U.S.C. § 933(a)(1)(2) [*sic*], presumably 33 U.S.C. § 933(d)(1)). While Section 933(d)(1) may allow for corporate liability to pass through to its officers when the corporation fails to obtain BLBA insurance, that provision is inapplicable here as KRCC secured its liability for the payment of benefits, as the BLBA required, by insuring with BITCO. It was therefore improper to investigate (or designate) KRCC's corporate officers. *See Lester v. Mack Coal Co,* 21 Black Lung Rep. 1-126, 1-130 to 1-131 (Ben. Rev. Bd. 1999) (corporate officers do not fall within definition of "responsible operator" and thus not properly designated as such). As discussed above, BITCO's liability is the result required under its policy with KRCC, the Act, and the regulations.

[13] KRS § 304.14-110 Representations in applications

All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent; or

(2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with

As an initial matter, BITCO forfeited any reliance on KRS § 304.14-110 by raising the issue for the first time before this Court. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019) (party forfeited issue in court by failing to preserve it before Board). BITCO utilizes the Kentucky statute as its primary justification for rescission (OB 24), yet it did not cite the provision even once before the agency during 17-plus years of litigation. Raising KRS § 304.14-110 now for the first time is simply too late for the Court to consider it. *Id*.

Second, and more substantively, the BLBA and implementing regulations preempt the Kentucky law. *Lovilia Coal*, 143 F.3d at 324-325 (holding that BLBA "specifically relates to the business of insurance" and therefore preempts state law under the McCarran Act); *see also e.g.* 20 C.F.R. § 726.203(d) ("Nothing in this section shall relieve any operator or carrier of the duty to comply with any State's workmen's compensation laws, except insofar as the State law is in conflict with the provisions of this section."). BITCO does not argue otherwise, opting instead simply to ignore the issue, which it previously lost before the Seventh Circuit. To the extent that KRS § 304.14-110 permits rescission when the BLBA does not, the

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respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

BLBA governs. Accordingly, the Court should reject BITCO's KRS § 304.14-110 argument.

Further, BITCO's misinterprets KRS § 304.14-110. Citing the provision, it asserts that "it is well established that workers' compensation policies may be rescinded in Kentucky" for employer fraud. OB 24. This Court, however, has reached the opposite conclusions: "Under our reading of Kentucky insurance law . . . , it appears that the insurance companies would have to pay on claims submitted by employees of Simpson who were injured on the job even if Simpson had fraudulently misrepresented the number of employees covered." *United States v. Simpson*, 538 F.3d 459, 466 (6th Cir. 2005); *see also Nat'l Ins. Ass'n v. Peach*, 926 S.W. 2d 859, 863 (Ky. Ct. App. 1996) (finding no absolute right to rescission of coverage for third-party insurance claim, and holding that insurer, rather than innocent third-party, bears the risk of intentional misrepresentations of insured).[14] The proper recourse for BITCO would have been an action to collect unpaid premiums, not rescission of the workers' compensation policy. *Travelers Ins. Co.*, 2012 WL 2603623, at *2. That is precisely what a BITCO claims agent advised

[14] The innocent third-party here would be the Trust Fund, which would stand in the shoes of the defaulting BITCO, to pay Mr. Rice's benefits. Congress, however, cautioned against undue expansion of Trust Fund liability and wanted a miner's employer and insurer to assume liability "to the maximum extent feasible." *Arkansas Coals*, 739 F.3d at 313.

the BITCO home office to do *in 1985*, A 209, but the company apparently took no action other than offering to broaden coverage, which KRCC ignored. OB 29 (item 5).

Even if KRS § 304.14-110 provides an avenue for relief, BITCO has not made its case under the section. "Clear and convincing evidence" is necessary to prove fraud under subsection (1), *Progressive Specialty Ins. Co. v. Rosing*, 891 F. Supp. 378, 379 (W.D. Ky. 1995); yet, ALJ Johnson reasonably found BITCO's evidence not credible and entitled to little weight.[15] A 66; *see Dixie Fuel Co., LLC v. Director, OWCP*, 820 F.3d 833, 845-46 (6th 2016) (ALJ's role is to evaluate credibility of evidence). Moreover, the Board properly affirmed the ALJ's evidentiary determination because BITCO failed to specifically challenge it and thus preserve the issue. A 16 n.15 (*citing*, *inter alia*, *Cox v. Ben. Rev. Bd.*, 791 F.2d 445 (6th Cir. 1995) (upholding Board determination that party waived challenge to ALJ's decision by merely reciting evidence favorable to its case)). Before this Court, BITCO repeats the same mistake by simply reciting favorable evidence and not addressing the ALJ's (and Board's) criticisms. OB 29. The

[15] ALJ Johnson found "little evidentiary support" for BITCO's claim that KRCC fraudulently underreported the number of its employees. He criticized BITCO's evidence as "classic 'hearsay within hearsay,'" unrelated to Mr. Rice's claim, and lacking in specificity and foundation. A 66.

Court accordingly should decline to consider BITCO's contention that it established KRCC fraud. *Cox*, *supra* (declining to consider issue that Board properly found waived); *Dixie Fuel Co.*, 820 F.3d at 844 ("[A] generalized challenge to the ALJ's weighing of the evidence does not preserve the specific objections raised here, and we, thus, decline to consider them.").

Moreover, BITCO simply failed to establish one of the requisite elements of fraud, namely, that KRCC *knew* that its representation that it required workers' compensation coverage for 10 employees (rather than 160) was false or recklessly made. *Progressive Specialty, Inc.*, 891 F. Supp. at 379 (applying common law elements of fraud in interpreting Section 304.14-110). As BITCO describes it (OB 29 (items 2 and 3)), this supposed fraudulent scheme depended entirely on a *worker's voluntary* decision to forgo workers' compensation coverage. If a worker disclaimed workers' compensation coverage, he received disability coverage instead and became a KRMS employee. If he kept his workers' compensation coverage, he became a KRCC employee and was duly reported to BITCO. *Id*. Certainly, if KRCC intended to defraud BITCO, it would not have left the accomplishment of its fraudulent scheme to each worker's voluntary decision-making.[16] Second, BITCO offered no proof that KRCC knew when it entered into

[16] BITCO emphasizes that the KRCC/KRMS arrangement was intended to save

the BITCO insurance contract that the employee's voluntary forbearance of Kentucky workers' compensation coverage would not also extend to the BLBA endorsement or that the disability policy that KRMS procured for its workers would not cover BLBA benefits. (The Kentucky courts first opined on these issues in 2012. *Travelers Ins. Co.*, 2012 WL 2603623, at *2) And third, BITCO did not prove that KRCC knew at the time of the insurance contract that it (not KRMS) would ultimately be adjudged the employer of KRMS employees. Indeed, BITCO, despite having have full knowledge of the underlying facts surrounding the KRCC/KRMS relationship (see OB 29), litigated Mr. Rice's 1983 claim by arguing that KRMS was Mr. Rice's employer and that KRMS and KRCC were separate and distinct companies.[17] A 104. By BITCO's logic, if KRCC is guilty of fraudulent misrepresentations, it is as well. But that simply is not the case for BITCO (or KRCC). Fraud requires a knowing falsehood, and on that score, BITCO's evidence falters.

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money on workers' compensation coverage. OB 29 (item 1). But allowing employees to voluntarily opt out of such coverage (and saving money) is permitted under Kentucky insurance law. KRS § 342.395; *see Karst-Robbins Machine Shop v. Caudill*, 779 S.W. 2d 207, 209 (Ky. 1989) (Vance, J., concurring) (observing that employee's rejection of workers' compensation coverage should be enforced if knowing and voluntary).

[17] BITCO first raised its KRCC fraud charge in November 2003 following the district director's September 16, 2003 designation of KRCC as the responsible operator in Mr. Rice's 2002 claim. FRSA 359-367.

Nor has BITCO proved under KRS § 304.14-110(2) that the alleged misrepresentation was material to BITCO's acceptance of the relevant risk covered by the BLBA endorsement, *i.e.*, the exposure to coal mine dust. *See* 7 Steven Plitt, et al., Couch on Insurance § 101:3 (3d ed.), Westlaw (database updated Dec. 2019) ("The 'risk' covered by the policy is, in general, the category of loss or type of liability the insurer agreed to provide coverage for under the terms of the policy.").[18] There is no statement from a BITCO official or a policy underwriter indicating that BITCO would not have not entered into an insurance contract with KRCC had it known of the additional employees. *See Nationwide Mut. Fire Ins. Co. v. Nelson*, 912 F. Supp. 2d 452, 455-55 (S.D. Ky. 2012) (finding under subsection(2) that insurer would not have issued policy if insured had disclosed felony conviction where product manager testified that company "guidelines forbid issuing policies to individuals with a felony conviction in the last ten years."). Instead of making the requisite showing under subsection (2), BITCO's evidence demonstrates that *it would have assumed the risk*, albeit with a higher premium, had it known of the extra employees. BITCO offered that precise deal to KRCC, but KRCC did not accept. OB 29 (item 5).

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[18] As BITCO's name (*Bituminous* Casualty Company) suggests, it provides workers' compensation coverage to the coal mining industry in the normal course of business. *See* https://www.bitco.com/about/our-story.

Finally, BITCO's acknowledgment that it would have issued the policy at a higher premium dooms its attempt to rescind its workers' compensation policy. Section 304.14-110(3) makes plain that an insurer cannot bar recovery on a workers' compensation simply because it would have charged a higher premium. ("This subsection shall not apply to applications taken for workers' compensation insurance coverage.").

In sum, KRS § 304.14-110 is preempted by the BLBA and implementing regulations, and even if it were applicable, BITCO has not satisfied the requirements of the statute.

c. BITCO is not entitled to rescission under the common law.

BITCO's assertion that it has a common law right to rescind the workers' compensation insurance policy with KRCC due to KRCC's alleged misrepresentation is also without foundation. As an initial matter, the BLBA and implementing regulations preempt and prohibit any common law right to rescission. *See supra* pp 30-36.

Regardless, the general rule is that workers' compensation insurance contracts, unlike general insurance policies, cannot be rescinded for material representations made by the insured. As a leading academic expert on workers' compensation explains, the carrier stands in two relations: 1) to the employer to protect it from compensation liability and 2) to the employee to ensure he gets the

benefit called for by statute. 14 Larson's Workers' Compensation Law (2017), § 150.02[1] (Matthew Bender 2017). Thus:

> [as] between the insurer and the employee, then, defenses, based upon the misconduct or omissions of the employer are of no relevance. Fraudulent statements by the employer preceding and inducing the issuance of the policy are no defenses against the employee, nor does the failure by the employee to report all of claimant's wages for compensation premium purposes affect claimant's right to full benefits.

Id. at § 150.02[2]. *See also State Farm Fire & Casualty Co., v. Car/Bil, Inc.,* 842 S.W.2d 128, 131-32 (Mo. App. WD 1992) ("[t]he general rule is that fraudulent statements by an employer preceding and inducing the issuance of an insurance policy are not defenses against an employee…."); *American Millennium Ins. Co., v. Berganza,* 902 A.2d 266, 270 (N.J. Super. AD 2006) (insurer "had no right to deny its obligation to the insured employee based on the fraud committed by the employer in the application and questionnaire"); *State Ins. Fund v. Brooks,* 755 P.2d 653, 657 (Okla. 1998) ("An insurer's assertion that the employer had practiced fraud in the inducement constitutes no defense to a workers' compensation claim."); *Perkins v. A. Perkins Drywall,* 615 So. 2d 187, 191 (Fla. Dist. Ct. App. 1993) (recognizing general rule that fraudulent statements by employer inducing insurance cannot be used by carrier as defense against employee).

The decisions BITCO relies upon to establish that rescission is permitted where no statutory provision precludes it – *State Compensation Fund v. Mar Pac Helicopter Corp.,* 752 P.2d 1, 8 (Ariz. 1988) and *Coffman v. Lien Enters., Inc.,* 827 P.2d 68, 72 (Kan. App. 1991) – are inapposite. In *Mar Pac*, the court allowed the carrier to rescind its workers' compensation insurance contract due to a material misrepresentation because the court concluded that a specific state statute that allowed rescission of insurance policies applied to workers' compensation policies as well. Thus, that case does not present a "common law" remedy of rescission (and as shown above, *supra* at 36-43, BITCO has not satisfied the Kentucky statute, even if it applicable). *Mar Pac* also found no policy reason why liability should not shift to the special fund. Here, however, Congress has stated a clear policy preference for operators and their carriers to assume liability "to the maximum extent feasible." *Arkansas Coals*, 579 F.3d at 313.

Coffman addresses a specific exception to the no-rescission rule that is not applicable in this case – a policy may be void ab initio "if the employer attempted to insure against an accident that had already occurred, by predating the insurance and fraudulently concealing the known existence of an accident within the period so covered." 14 Arthur Larson, et al., Larson's Workers' Compensation Law §150.02[4] (2017). Here, Mr. Rice last worked in the coal mine employment in August 1983 for KRCC, and the BITCO/KRCC policy provided coverage for that

time period. A 106; FRSA 1. In short, BITCO's argument that it could rescind its workers' compensation policy with KRCC under common law is without merit.

Moreover, even if rescission were an appropriate remedy under the BLBA, BITCO's failure to promptly act upon learning of the alleged misrepresentation precludes the relief it now requests. *See, e.g., General Star Indem. Co. v. Duffy,* 191 F.3d 55, 59 (1st Cir. 1991) ("We recognize the general proposition … that an insurer may lose its right to rescind the coverage of an insurance contract if it knows of the facts that may warrant rescission and fails to disclaim within a reasonable time, or if it acts in any way inconsistent with the intention to disclaim."). BITCO's own evidence proves it was aware as early as September 1985 of the relationship between KRCC and KRMS. A 218-221. Indeed, a January 1986 BITCO memorandum explicitly acknowledges that, "[i]t is clear that there are many thousands of dollars that have not been paid in compensation premiums for which we have exposure to 160 employees." FRSA 354. Nevertheless, BITCO did not seek rescission during Mr. Rice's 1983 claim and waited until over 15 years later to do so when Mr. Rice filed his 2002 claim. Because BITCO did not act promptly to rescind its contract, it cannot do so now, even assuming it had such a right, which it does not.[19]

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[19] BITCO's contention (OB 30) that it acted promptly is disingenuous. It certainly

3. BITCO/KRCC fail to establish a due process violation.

BITCO/KRCC assert that "DOL's mishandling of the case" so "prejudiced its defense" that its liability for Mr. Rice's claim should transfer to the Trust Fund. OB 31-35. The Court should reject this overwrought contention.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (internal citation and quotation omitted). This case does not involve such a core due process violation. BITCO/KRCC were timely notified of their potential liability at the outset of Mr. Rice's claims; and throughout these proceedings, they have been timely notified and were provided ample opportunity to vigorously defend themselves, which they have obviously done.

BITCO/KRCC's complaint, instead, stems from an irregularity in the course of the administrative proceedings. BITCO/KRCC must, therefore, demonstrate that the process was infected by "some prejudicial, fundamentally unfair element."

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knew of the KRCC/KRMS relationship by autumn 1985, and could have obtained more information during Mr. Rice's 1983 claim or in KRCC's bankruptcy proceedings (which ran from 1990, FRSA 357, to August 2007). *See In re Karst Robbins Coal*, Case No. 90-60432 JL (Bankr. E.D. Ky.)). And BITCO could have filed a civil action for rescission. Finally, as its own internal memoranda demonstrate, BITCO was on notice of its potential BLBA liability to Mr. Rice and other KRMS employees since 1985, and that possibility alone provided sufficient reason to act.

Energy West Mining Co. v. Oliver, 555 F.3d 1211, 1219 (10th Cir. 2009) *citing Betty B Coal Company,* 194 F.3d at 501; *cf. Lane Hollow Coal Co. v. Director, OWCP,* 137 F.3d 799,808 (4th Cir. 1998) (noting prejudice requirement for non-core due process challenges). As the Tenth Circuit noted in *Oliver*, "…the Constitution is concerned with procedural outrages, not procedural glitches." The court further noted that litigation "is rarely pristine and is filled with risk." Due process does not protect against these sorts of missteps; rather the inquiry is only in "whether an adjudicative procedure as a whole is sufficiently fair and reliable." *Oliver*, 555 F.3d at 1219. It is BITCO/KRCC's burden to demonstrate that the "mishandling" it complains of was so egregious that it would be fundamentally unfair for it to live with the outcome of this proceeding. *Id.* BITCO/KRCC have not met this burden.

As the Board found, A 17-18, none of BITCO/KRCC's allegations of prejudice are compelling. First, BITCO/KRCC contend that the delay in disclosing the conversations between the claims examiner and Mr. Rice's attorney added ten years of litigation during which KRCC and KRMS were dissolved, and BITCO was thereby prevented from protecting itself from the alleged fraud that had occurred. OB 32. But BITCO's own evidence, as discussed *supra,* establishes that it knew of the relationship between KRCC and KRMS as early as autumn 1985, during the pendency of Mr. Rice's initial federal claim in which BITCO was

named by the district director as the carrier for KRCC. Given this admission, BITCO cannot argue that the delay complained of, which did not occur until after 2009, somehow prevented it from dealing with the alleged fraud. In addition, KRCC's bankruptcy dissolution occurred in 2007, prior to the Board's 2009 remand that led to the complained of delay, and 20-plus years after BITCO learned of KRCC's alleged reporting irregularities. Thus, any activities in this claim could not have had any impact on BITCO's ability to defend itself against the alleged fraud.

BITCO next alleges it was prejudiced because the delay permitted ALJ Solomon to recalculate the length of Mr. Rice's coal mine employment to BITCO/KRCC's detriment. OB 32. While the district director found 8 years and 10 months of coal mine employment established in Mr. Rice's prior claim, DX 1, Mr. Rice claimed ten years of coal mine employment on his 2006 claim for benefits, which was filed years prior to the allegedly prejudicial delay. DX 4. BITCO/KRCC did not contest this issue. DX 39. Thus, BITCO/KRCC had knowledge that there was an assertion of ten years of coal mine employment and should have been prepared for such a finding. BITCO/KRCC cannot show prejudice on this basis.

BITCO/KRCC argues that had the claim been properly processed and had the Board in 2009 affirmed Judge Johnson's 2008 denial, Mr. Rice would have

been required to file a new (subsequent) claim at a later point, precluding ALJ Solomon from revisiting the years of coal mine employment and restricting Mr. Rice's ability to recover benefits for any period pre-dating the denial of the prior claim. OB 32; *see* 20 C.F.R. § 725.309 (c) (6). This argument is meritless. Even had the Board affirmed ALJ Johnson's denial in 2009, there was nothing to prevent Mr. Rice from requesting modification of the denial. Indeed, Mr. Rice did just that after ALJ Johnson reaffirmed his 2008 denial in 2013. *Supra* at 21. In short, there can be no certainty that Mr. Rice's 2006 claim would have been finally denied had the Board addressed the merits of ALJ Johnson's decision and affirmed it. Thus, this claim likewise fails.

The cases that BITCO/KRCC rely on, and freely quote from, do not apply here. They concern core due process violations where an unreasonable delay in notification of potential liability or loss of crucial evidence prevented the liable party from mounting a meaningful defense. *Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 807 (4th Cir. 1998) (17-year delay in notifying responsible operator core due process violation); *Consolidation Coal Co. v. Borda*, 171 F.3d 175 (4th Cir. 1999) (same, 16 year delay in notifying responsible operator); *Island Creek Coal Company v. Holdman,* 202 F.3d 873, 883-84 (6th Cir. 2000) (loss of crucial evidence constitutes core due process violation). By contrast here, BITCO/KRCC were timely notified of their liability, and the omitted evidence –

internal notes explaining the basis for the district director's official actions – were hardly critical to BITCO/KRCC's defense: the Board ruled that the procedural posture of the case was immaterial to its outcome (A 12-14), and BITCO/KRCC apparently agrees since it has not challenged that finding on appeal.[20]

In sum, BITCO/KRCC have failed to demonstrate that the course of proceedings here was so unfair as to "impugn its results." *Oliver,* 555 F.3d at 1219. BITCO/KRCC's request that they be relieved of liability based on due process concerns must be rejected.

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[20] BITCO/KRCC criticize the telephone conversations between an OWCP claims examiner and Joe Wolfe, Mr. Rice's attorney, as improper *ex parte* contacts. Not so. Mr. Wolfe's filings (CSA 315, 320) were hopelessly ambiguous on their face, and required follow-up information to determine how to proceed. The filings included a new claim, appointment of representation, and selection of a Section 413(b) provider (s*upra* at 6) demonstrating Mr. Rice's intent to proceed. Yet Mr. Wolfe also directed that DOL return the materials and not proceed (with modification) if there was a current, pending claim. There was no pending claim at the time, suggesting that the new claim should go forward. On the other hand, if it did proceed, the claim would be treated as a modification request (because it was filed within one year of a prior denial, *supra* at 10), and Mr. Wolfe requested return of the filings in that event. Given this fundamental uncertainty, the claims examiner did nothing wrong in contacting Mr. Wolfe to ascertain claimant's intent behind the filings. *See supra* at 6-7 (explaining that district director assists in the filing of claims and develops such information as is necessary to process and decide a claim).

CONCLUSION

The Court should affirm the finding below that BITCO/KRCC are liable for the payment of Mr. Rice's BLBA benefits.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes oral argument is unnecessary.

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 12,065 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, copies of the Brief for the Federal Respondent were served electronically using the Court's CM/ECF system on counsel of record.

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