No. 11-2049

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CANTERBURY COAL COMPANY

and

OLD REPUBLIC INSURANCE,

Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

LEO A. CHEMELLI,

Respondents

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

BRIEF FOR THE FEDERAL RESPONDENT

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

BARRY H. JOYNER
Attorney, U.S. Department of Labor
Office of the Solicitor, Suite N-2117
200 Consitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

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Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal involves a claim for compensation under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, filed by Leo A. Chemelli. Canterbury Coal Company, Mr. Chemelli's former

employer, has petitioned the Court to review an award of benefits on that claim. The Director, Office of Workers' Compensation Programs, responds in support of the award.

STATEMENT OF JURISDICTION

The Director accepts the Statement of Jurisdiction contained in Canterbury's opening brief.

STATEMENT OF THE ISSUES

This case involves a "subsequent claim" (*i.e.*, a claim filed more than one year after the denial of a previous claim) under 20 C.F.R. § 725.309.[1] The issues addressed in this brief are:

1) Does this Court's decision in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995), conclusively resolve the question of whether a subsequent claim is barred by res judicata or collateral estoppel?

2) Does permitting adjudication of a subsequent claim on the merits when the miner establishes a change in his physical condition violate a coal-mine operator's due process rights?

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[1] Except as otherwise noted, regulatory citations are to the 2011 version of the Code of Federal Regulations.

STATEMENT OF THE CASE

A Department of Labor (DOL) administrative law judge (ALJ) initially denied Mr. Chemelli's subsequent claim. After the Benefits Review Board remanded the claim for further consideration, the ALJ awarded benefits. Canterbury appealed, but the Board affirmed the ALJ's decision, and also denied the company's motion for reconsideration. Canterbury now seeks review by the Court.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

The BLBA provides benefits to miners who are totally disabled due to pneumoconiosis.[2] 30 U.S.C. § 901(a). To obtain benefits, a miner must prove that he has pneumoconiosis arising out of his coal-mine employment, and that he has a totally disabling pulmonary impairment due, at least in part, to pneumoconiosis. 20

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[2] "Pneumoconiosis" includes both "clinical pneumoconiosis" (diseases commonly recognized as pneumoconiosis by the medical community) and the broader category of "legal pneumoconiosis" (any chronic lung disease caused by dust inhalation in coal-mine employment). 20 C.F.R. § 718.201(a)(1), (2); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 312 (3d Cir. 1995).

C.F.R. §§ 718.202-.204; *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23 (3d Cir. 1997).

In this case, Mr. Chemelli's present (2005) claim is a subsequent claim—*i.e.,* a claim filed more than one year after the final denial of a previous claim. As a result, he faces an additional burden beyond proving the elements identified above. Consistent with res judicata principles, DOL's subsequent-claim regulation mandates that "[a] subsequent claim . . . shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement . . . has changed since [the denial of the prior claim]." 20 C.F.R. § 725.309(d); *see LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 313-14 (3d Cir. 1995) (res judicata does not bar subsequent claim because requiring miner to prove change in condition prevents mere relitigation of prior claim). Where, as here, the alleged change involves 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 [of

the elements decided against the claimant in the previous claim]."[3] 20 C.F.R. § 725.309(d)(3).

B. Proceedings Below

The facts relevant to this appeal are procedural in nature. Thus, we detail the relevant procedural history, but not the medical evidence of record.

Mr. Chemelli labored as an underground miner throughout a 39-year career, which ended in 1985. Director's Exhibit (DX) 6;[4] Joint Appendix at 30, 45. He had no other occupational dust exposure, but did smoke two or three cigarettes a day from 1950 to

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[3] The prior version of DOL's regulations classified subsequent claims as "duplicate" claims. 20 C.F.R. § 725.309 (1999). Under the prior regulation, a miner had to first prove a "material change in conditions" before a duplicate claim could be adjudicated on the merits. 20 C.F.R § 725.309(d) (1999). Although that regulation did not define "material change," this Court adopted the Director's "one-element" standard for establishing a material change—*i.e.*, that the miner had to establish at least one element of entitlement that had been decided against him on the previous claim, and had to do so based solely on evidence submitted in connection with the duplicate claim. *LaBelle Processing*, 72 F.3d at 317-18. The revised version of the regulation, although employing different terminology, codifies the one-element standard. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000). Thus, in relevant part, the revised regulation does not differ from the prior version.

[4] Exhibit numbers refer to the evidence admitted before the ALJ.

1963 (equating to a smoking history of less than three pack-years). JA at 45; *see* Claimant's Exhibit 1. He filed claims under the BLBA in 1988, 1990, 1997 and 2002. DX 1-3. All of these claims were ultimately denied. JA at 54, 80, 86, 102.

The most recent of these claims was denied by an ALJ on May 28, 2004. JA at 54. The ALJ found that although Mr. Chemelli had a totally disabling pulmonary impairment under 20 C.F.R. § 718.204, he failed to prove that he had pneumoconiosis under 20 C.F.R. § 718.202. JA at 15-22. The ALJ also found that Mr. Chemelli failed to establish that his disability was due to pneumoconiosis. JA at 23; *see* 20 C.F.R. § 718.204(c). Mr. Chemelli did not appeal this decision, and it became final.

He filed a new claim on August 29, 2005—more than one year after the denial of the previous claim. DX 5; *see* 20 C.F.R. § 725.309. A DOL district director denied this claim. DX 29. Mr. Chemelli then requested a hearing before an ALJ. DX 30.

The ALJ initially denied Mr. Chemelli's new claim. JA at 44. He found the evidence submitted in connection with the 2005 claim insufficient to establish either clinical or legal pneumoconiosis. JA at 48. As a result, he determined that Mr. Chemelli had not

established a change in condition, which would have allowed consideration of his subsequent claim on the merits. *Id.*

Mr. Chemelli appealed. The Board vacated the ALJ's denial of benefits and remanded for further consideration. JA at 34. The Board held that the ALJ had failed to explain his evaluation of the x-ray evidence with respect to clinical pneumoconiosis, or the medical-opinion evidence with respect to legal pneumoconiosis. JA at 37-40. The Board also rejected Canterbury's contention that Mr. Chemelli's 2005 claim was barred by res judicata, citing this Court's decision in *LaBelle Processing*. JA at 40, n. 9. Accordingly, the Board remanded the case for the ALJ to reconsider whether Mr. Chemelli had established a change in condition and, if so, whether he was entitled to benefits. JA at 40-41.

On remand, the ALJ awarded benefits. JA at 24. He found that the x-ray evidence associated with the 2005 claim was in equipoise, and thus insufficient to establish the presence of clinical pneumoconiosis. JA at 25; *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (absent any presumption, benefits claimant bears burden of persuasion in BLBA cases). Turning to the medical-opinion evidence, however, the ALJ found

that Mr. Chemelli has legal pneumoconiosis based on Dr. Cohen's opinion. JA at 2-6. Thus, since pneumoconiosis was an element of entitlement decided against Mr. Chemelli in the previous claim, the ALJ found that Mr. Chemelli had established a change in condition in his current claim. JA at 29-30. He also found, based on all evidence of record, that Mr. Chemelli has a totally disabling pulmonary impairment due to his pneumoconiosis and, accordingly, awarded benefits.[5] JA at 30-31.

Canterbury appealed, but the Board affirmed the ALJ's award of benefits.[6] JA at 11. The Board again rejected Canterbury's

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[5] The ALJ found that Mr. Chemelli was entitled to a presumption that his legal pneumoconiosis arose out of coal-mine employment under 20 C.F.R. § 718.203. This presumption, however, applies only when clinical pneumoconiosis is established. *Andersen v. Director, OWCP*, 455 F.3d 1102, 1105-06 (10th Cir. 2006). With legal pneumoconiosis, causation is subsumed in proof of the disease. *See* 20 C.F.R. § 718.201(a)(2); *Andersen*, 455 F.3d at 1107. The ALJ's application of the presumption, while redundant, was no more than harmless error. *See Sahara Coal v. Director, OWCP*, 946 F.2d 554, 558 (7th Cir. 1991) (harmless-error doctrine applicable to judicial review of administrative action).

[6] While Canterbury's appeal was pending before the Board, Congress amended the BLBA. In pertinent part, Section 1556 of the Affordable Care Act (ACA) reinstated the provisions of Section 411(c)(4) of the BLBA, 30 U.S.C. § 921(c)(4), for claims filed after (cont'd . . .)

assertion that Mr. Chemelli's 2005 subsequent claim was barred by res judicata. JA at 14-16. The Board also affirmed the ALJ's finding of a change in condition under Section 725.309 based on proof of legal pneumoconiosis, and his findings that Mr. Chemelli had established all other elements of his claim. JA at 16-20. Canterbury filed a motion for reconsideration, which the Board

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January 1, 2005, and pending on or after March 23, 2010. PUB. L. NO. 111-148, § 1556(a), (c) (2010). Where a miner had 15 or more years of underground coal-mine employment and establishes that he had a totally disabling pulmonary impairment, Section 411(c)(4) provides a presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. § 921(c)(4); *see generally Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479 (6th Cir. 2011). The party opposing entitlement may rebut the presumption by proving that the miner does not have pneumoconiosis or that his disability did not arise out of coal-mine employment. 30 U.S.C. § 921(c)(4); *see generally Morrison*, 644 F.3d at 479.

The Board determined that, because it affirmed the ALJ's pre-amendment award of benefits, it could adjudicate this case without reference to the ACA amendments. JA at 13-14. Likewise, the Court may affirm the award, and not address the amendment. If, however, the Court vacates the award, then remand would be in order. Based on Mr. Chemelli's claim-filing date, his 39 years of underground mining, and the uncontested finding of total disability, he plainly could invoke the Section 411(c)(4) presumption. Remand would be necessary for the ALJ to address whether Canterbury could rebut the presumption.

summarily denied. JA at 9. The company now petitions this Court for review. JA a 7.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. The Director is unaware of any other case or proceeding, whether completed, pending, or about to be presented before this or any other court or agency, that is in any way related to this case.

STANDARD OF REVIEW

The issues addressed in this brief involve questions of law. Legal issues are subject to the Court's plenary review. *Lombardy v. Director, OWCP*, 355 F.3d 211, 213 (3d Cir. 2004).

SUMMARY OF THE ARGUMENT

The ALJ awarded Mr. Chemelli's subsequent claim because Mr. Chemelli established a change of condition by proving that he now has pneumoconiosis, and established all other elements of entitlement. Contrary to Canterbury's contention, the subsequent claim is not barred by res judicata. The Court conclusively resolved this issue 16 years ago in *LaBelle Processing*, and the six other circuits to consider the question have reached the same result. There is no res judicata bar here because the subsequent claim is a

different cause of action (addressing whether Mr. Chemelli is now totally disabled due to pneumoconiosis) than that presented by Mr. Chemelli's prior claim. Likewise, collateral estoppel did not preclude the ALJ in the subsequent claim from finding the existence of pneumoconiosis because whether Mr. Chemelli now has the disease was not at issue in his prior claim. Finally, Canterbury's "due process" argument is simply a reprise of its res judicata argument in a different guise. The Court should affirm the decisions below.

ARGUMENT

Mr. Chemelli's claim is not barred by res judicata and the award of that claim does not violate Canterbury's due process rights.

The ALJ found that Mr. Chemelli now has pneumoconiosis—an element of entitlement decided against Mr. Chemelli in his previous claim. He also found that Mr. Chemelli established all other elements of his claim. Canterbury does not challenge the ALJ's factual findings and, thus, has waived any error contained in them. *See Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 n. 15 (3d Cir. 2010) (citation omitted) (issue waived if not raised in petitioner's opening brief to Court). Rather,

the company resurrects an old argument and asserts that Mr. Chemelli's subsequent claim is barred by res judicata or collateral estoppel, and that the award of his claim violated Canterbury's due process rights. These contentions are wholly without merit, and the Court should reject them.

A. Res Judicata/ Collateral Estoppel

Canterbury contends that Mr. Chemelli's subsequent claim is barred by res judicata (claim preclusion)—*i.e.*, because the ALJ denied Mr. Chemelli's previous (2002) claim, the 2005 subsequent claim is barred.[7] The company also contends that the subsequent claim is effectively barred by collateral estoppel (issue preclusion)—*i.e.*, because the ALJ who adjudicated the 2002 claim found that Mr. Chemelli did not have pneumoconiosis, he cannot establish the

[7] Res judicata bars a cause of action where "there exists (1) a final judgment on the merits in a prior suit involving (2) the same parties . . . and (3) a subsequent suit on the same cause of action." *Morgan v. Covington Township*, 648 F.3d 172, 177 (3d Cir. 2011) (citation and internal quotations omitted).

presence of the disease in his subsequent claim.[8] The Court can dispense with these arguments in short order.

Although Canterbury's brief is studiously indifferent to the fact, this Court has already rejected the argument that subsequent claims under Section 725.309 are barred by res judicata. *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 313-16 (3d Cir. 1995). And the six other circuit courts to consider the issue have reached the same result. *See U.S. Steel Min. Co., LLC, v. Director, OWCP*, 386 F.3d 977, 990 (11th Cir. 2004) (permitting subsequent claim where miner establishes change in condition "respects the principles of *res judicata*"); *Midland Coal Co. v. Director, OWCP*, 358 F.3d 486, 490 (7th Cir. 2004) ("traditional principle of *res judicata* do *not* bar a subsequent application for . . . benefits where a miner demonstrates a material change in at least one of the conditions of

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[8] Collateral estoppel bars relitigation of an issue conclusively determined in a prior cause of action. *Howard Hess Dental Labs., Inc., v. Dentsply Int'l, Inc.*, 602 F.3d 237, 247 (3d Cir. 2010) (citation omitted). "The following four elements are required for the doctrine to apply: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigation was fully represented in the prior action." *Id.* at 247-48 (citation and internal quotations omitted).

entitlement") (emphasis in original; citation omitted); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450 (8th Cir. 1997) (where miner establishes entitlement based on change in condition, "res judicata does not bar his claim"); *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1510 (10th Cir. 1996) ("[r]es judicata is not implicated when a miner brings a duplicate claim so long as [he] demonstrates that his . . . physical condition . . . has changed"); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc) ("[a] new . . . claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same"); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994) ("the doctrine of res judicata is not implicated by the claimant's physical condition or the extent of his disability at two different times").

The reason res judicata does not bar a subsequent claim is simple—the later claim is a separate cause of action. "The denial of [a prior] claim . . . established only that [the miner] was not *then* totally disabled by pneumoconiosis." *LaBelle Processing*, 72 F.3d at 314 (emphasis in original; citation omitted). In contrast, a subsequent claim is an "asserti[on] that [the miner] is *now* totally disabled due to . . . pneumoconiosis and that his disability occurred

subsequent to the prior adjudication." *Id.* (emphasis in original; citation omitted). As stated by Professor Larson, "[i]t is almost too obvious for comment that res judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times, *particularly in the case of occupational diseases*." 8 A. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 127.07[7] (2007) (emphasis added).

This principle is particularly apposite in BLBA claims. Canterbury's pre-emptive attempt at refutation (Pet. Br. at 21, n. 8) notwithstanding, it is well-settled that pneumoconiosis is a latent and progressive disease. 20 C.F.R. § 718.201(c); *Helen Min. Co. v. Director, OWCP*, 650 F.3d 248, ___, 2011 WL 1366355 *3 (3d. Cir. 2011); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209 (3d Cir. 2002); *LaBelle Processing*, 72 F.3d at 314-15. Thus, a miner may establish that he developed pneumoconiosis subsequent to the denial of his prior claim (which the ALJ found happened in this case) or that his disease progressed to the point of total disability subsequent to the prior claim, either being sufficient to establish a change in condition. *RAG American Coal Co. v. OWCP*, 576 F.3d 418, 423 (7th Cir. 2009) (citations omitted).

Canterbury's collateral estoppel argument fails for a similar reason—the issue on which Canterbury now seeks to preclude Mr. Chemelli is not the same as was decided in the prior claim.[9] The issue decided against Mr. Chemelli in his prior claim was whether he *then* had pneumoconiosis. The issue on which he established a change in condition in this subsequent claim is whether he *now* has pneumoconiosis. Thus, Canterbury cannot establish even the initial element of a collateral-estoppel defense— that "*the identical issue* was previously adjudicated."[10] *Howard Hess Dental Labs.,*

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[9] Canterbury's reliance on a footnote in *LaBelle Processing* in this regard is misplaced. In that footnote, the Court indicated that certain factual findings from the prior claim (such as whether the claimant was a miner) *might* have preclusive effect under the collateral-estoppel doctrine. 72 F.3d at 314, n. 10. That footnote addressed an issue (status as a miner) that generally is not subject to change. As discussed above, however, Mr. Chemelli's physical condition (including whether he has developed pneumoconiosis) is plainly a matter subject to change. Moreover, with respect to any issue on which it seeks preclusion, Canterbury would have to establish all elements of collateral estoppel—identity of issue, actual litigation, necessary determination, and representation of Mr. Chemelli in the prior claim. As discussed herein, Canterbury cannot establish either the first or third elements with respect to the ALJ's finding that Mr. Chemelli now has pneumoconiosis.

[10] There were alternative grounds for the denial of the 2002 claim—that Mr. Chemelli failed to prove that he has pneumoconiosis, and (cont'd . . .)

Inc., v. Dentsply Int'l, Inc., 602 F.3d 237, 247 (3d Cir. 2010) (emphasis added; citation omitted); *see generally Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09 (7th Cir. 1997) (discussing inapplicability of collateral estoppel where a claimant establishes a change in condition).

In sum, *LaBelle Processing* properly disposed of Canterbury's arguments 16 years ago. The Court is bound by that precedent in this appeal. *See Horsey v. Mack Trucks, Inc.*, 882 F.2d 844, 846 (3d Cir. 1989); 3d CIR. I.O.P. 9.1. Thus, Canterbury's arguments should be rejected.

B. Due Process

Finally, Canterbury asserts that the award of Mr. Chemelli's claim violates its due process rights. *See* U.S. CONST. AMEND V. The company's argument, however, essentially ignores due process

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(. . . cont'd)
that he failed to prove that his disability was due to the disease. Thus, neither finding was independently necessary to the denial of that claim. *See Peabody Coal Co. v. Spese*, 117 F.3d 1008-09 (7th Cir. 1997). Hence, Canterbury also failed to establish the third element (necessary determination) required for the application of collateral estoppel.

principles and jurisprudence. This is not surprising, as Canterbury cannot make out any due-process violation.

In the black-lung context, due process for coal-mine operators requires two things: 1) that the operator receive notice of a claim; and 2) that it have the opportunity to mount a meaningful defense to the claim. *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1219 (10th Cir. 2009); *see C & K Coal Co. v. Taylor*, 165 F.3d 254, 258-59 (3d Cir. 1999). There is no question that Canterbury received notice of Mr. Chemelli's subsequent claim, and was afforded (and took advantage) of the opportunity to contest it—and the company does not argue otherwise. As succinctly put by the Fourth Circuit, "[d]ue process requires nothing more." *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 504 (4th Cir. 1999).

In fact, the company's "due process" argument is simply a reprise of its res judicata argument in another guise. *Cf. RAG American Coal*, 576 F.3d at 428 n. 6 (rejecting similar "due process" argument as "nothing more than a variation of the operator's res judicata argument"). Indeed, Canterbury's tale is a veritable Cook's Tour of various putative authorities—from ancient Babylonian nostrums through the Code of Justinian to trial-by-combat in

medieval England—cited not just to show that finality is an important principle (a matter not open to serious question), but to demonstrate that subsequent claims under the BLBA (such as Mr. Chemelli's) are "an affront to the core principles of civilized society." Pet. Br. at 23.

In the Director's view, Section 725.309 and the case law of this Court and other circuits construing that regulation are more pertinent authorities. And, as set forth above, those authorities establish beyond any question that awards on subsequent claims are not barred by res judicata or other principles of finality.

The company's inflated rhetoric notwithstanding, Canterbury has received the full protection of finality. Because Mr. Chemelli's previous claims were finally denied, he is forever barred from receiving benefits for any period of time covered by those claims—even if he now came forward with incontrovertible proof that he was totally disabled by pneumoconiosis when he filed his first claim. *See* 20 C.F.R. § 725.309(d)(5); *LaBelle Processing*, 72 F.3d at 314. That Mr. Chemelli did not prevail on earlier causes of action, however, simply does not bar relief on his current claim.

CONCLUSION

The Director respectfully requests that the Court affirm the decisions of the ALJ and the Board awarding Mr. Chemelli's claim.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

PATRICIA M. NECE
Counsel for Appellate Litigation

s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor
Office of the Solicitor
Frances Perkins Building
Suite N-2117
200 Constitution Ave, N.W.
Washington, D.C. 20210
(202) 693-5660
joyner.barry@dol.gov

Attorneys for the Director, Office of Workers' Compensation Programs

COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 3,880 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Bookman Old Style.

2) On October 6, 2011, paper copies of the Director's brief were served by mail, postage prepaid, and an electronic copy of the brief in portable document format was served, via the CM/ECF system, on the following:

Mark E. Solomons, Esq.
Laura Metcoff Klaus, Esq.
Greenberg Traurig, LLP
2101 L Street, N.W.
Suite 1000
Washington, D.C. 20037
solomonsm@gtlaw.com
klausl@gtlaw.com

Cheryl Catherine Cowen, Esq.
769 Lippencott Road
Waynesburg, Pennsylvania 15370
ccowen@windstream.net

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s/Barry H. Joyner
BARRY H. JOYNER
Attorney
U.S. Department of Labor