IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1109

BRICKSTREET MUTUAL INSURANCE COMPANY
Petitioner

v.

MARK A. VANDYKE, PARAMONT COAL COMPANY, LLC, 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

KATE O'SCANNLAIN
Solicitor of Labor
MAIA S. FISHER
Associate Solicitor
SEAN G. BAJKOWSKI
Counsel for Appellate Litigation
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5660

Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

Regulations

TABLE OF AUTHORITIES (continued)

Other Administrative Materials

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STATEMENT OF JURISDICTION

This case involves Mark VanDyke's claim for disability benefits under the Black Lung Benefits Act (BLBA or the Act) 30 U.S.C. §§ 901-944. BrickStreet Mutual Insurance Company's statement of jurisdiction is correct but incomplete because it omits the jurisdictional basis for the Benefits Review Board to decide the appeal from the October 20, 2016 decision awarding benefits by administrative law judge Larry W. Price (the ALJ). Joint Appendix (JA) 144-156. The Board had jurisdiction because 33 U.S.C. § 921(a), as incorporated into the BLBA by

30 U.S.C. § 932(a), allows an aggrieved party thirty days to appeal an ALJ's decision to the Board.

STATEMENT OF THE ISSUE

The Office of Workers' Compensation Programs, United States Department of Labor (OWCP) is responsible for identifying the liable parties at the initial stages of BLBA claim adjudication. Once a claim is transferred to an administrative law judge for a formal hearing, OWCP's liability determination is final. If the ALJ, Benefits Review Board, or reviewing court determines that OWCP identified the wrong party, liability instead falls on the Black Lung Disability Trust Fund.

Given these stakes, the BLBA's implementing regulations require potentially liable parties to submit all documentary evidence regarding their liability—and to identify any potential witnesses whose testimony pertains to that subject—while a claim is still pending before OWCP. Any liability evidence not submitted, or witness not identified, to OWCP cannot be considered by an ALJ absent extraordinary circumstances.

Petitioner BrickStreet, the insurer named as liable by OWCP, could escape liability for this claim by proving that Mr. VanDyke developed complicated pneumoconiosis before December 13, 2012 (the day it issued an insurance policy covering VanDyke's employer). After the case was referred to an ALJ, BrickStreet

deposed Dr. W. Eric Shrader, who testified that VanDyke likely had complicated pneumoconiosis in October or November of 2012. BrickStreet failed to identify Dr. Shrader as a liability witness while the case was pending before OWCP. The ALJ ruled that Dr. Shrader's deposition testimony was not admissible as liability evidence and concluded that BrickStreet was liable for the claim.

The question presented is whether the ALJ was required to consider Dr. Shrader's deposition testimony despite the fact that BrickStreet failed to identify him as a liability witness while the claim was pending before OWCP.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Liability for BLBA benefits

The BLBA provides benefits to coal miners who are totally disabled by pneumoconiosis. 30 U.S.C. §§ 901(a), 922, 932(c). Miners who suffer from a particularly severe form of that disease known as "complicated" pneumoconiosis are irrebuttably presumed to be totally disabled by pneumoconiosis, and therefore entitled to benefits. 30 U.S.C. § 921(c)(3); *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 20 (1976). BrickStreet concedes that VanDyke is entitled to BLBA benefits on this ground. Pet. Br. 13. It argues only that it is not liable to pay those benefits.

In general, the last potentially liable operator to employ a miner is the "responsible operator" liable for any BLBA benefits awarded to that miner. 20 C.F.R. § 725.495(a)(1).[1] There is, however, a longstanding exception to this rule for awards involving complicated pneumoconiosis. Because miners with complicated pneumoconiosis are automatically entitled to benefits, employment after a miner develops complicated pneumoconiosis cannot be the basis for liability. *See Truitt v. North American Coal Co*., 2 Black Lung Rep. (MB) 1-199 (Ben. Rev. Bd. 1979), appeal dismissed *sub nom. Director, OWCP v. North American Coal Co.,* 626 F.2d 1137 (3d Cir. 1980). In such cases, the potentially liable operator that employed the miner when he or she developed complicated pneumoconiosis is liable. *Id.* There is no dispute that Paramont was VanDyke's last mining employer or that his complicated pneumoconiosis developed during or

[1] An employer is a potentially liable operator if (1) the miner's disability arose, in whole or in part, out of his or her work for the operator; (2) it employed the miner for at least one year; (3) it employed the miner for at least one day after December 31, 1969; (4) it operated a coal mine after June 30, 1973; and (5) it is financially capable of assuming liability for the miner's benefits. 20 C.F.R. § 725.494. There is no dispute that Paramont satisfies this definition. While Paramont argues that its liabilities have been expunged in bankruptcy, Paramont Br. 15 (pending acceptance by the Court), the company is still financially capable of assuming liability because its BLBA liabilities are commercially insured. *See* 20 C.F.R. § 725.494(e)(1).

shortly after his work for the company. The question is whether BrickStreet is the liable insurer.

Coal-mine operators are required to secure the payment of BLBA benefits by either procuring commercial insurance coverage or obtaining permission from the Department of Labor to act as a self-insurer. 30 U.S.C. § 933(a); 20 C.F.R. § 726.1. An insurance carrier is automatically a party to any BLBA claim covered by one of its policies. 20 C.F.R. § 725.360(a)(4). "[U]nlike an indemnification policy, the Black Lung Benefits scheme contemplates that the insurer, as a party, may be liable in the original claims proceeding." *Tazco, Inc. v. Director, OWCP*, 895 F.2d 949, 951-52 (4th Cir. 1990) (citations omitted); *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.").

In general, the insurance policy that was in effect when the miner was last exposed to coal-mine dust in the insured operator's employ (typically the miner's last day of employment) covers the claim. *See* 20 C.F.R. § 726.203 (required BLBA insurance endorsement). But, as with determining the responsible operator, that general rule does not necessarily apply in claims involving complicated pneumoconiosis. *Swanson v. R.G. Johnson Co.*, 15 Black Lung Rep. 1-49, 51 (Ben. Rev. Bd. 1991). In such cases, liability falls on the policy that was in effect

when the miner's disease advanced to the complicated stage. *Id.* A carrier that only assumed the risk after that happens is not liable.

2. Procedures for determining the liable party

BLBA claims are initially filed with an OWCP district director.[2] As detailed below, the program regulations require the parties to develop and submit all documentary evidence concerning the liable parties, and to identify any potential witnesses concerning that issue, during this initial adjudication stage. Liability evidence not submitted to the district director, and the testimony of witnesses not identified to the district director, cannot be considered by an ALJ during the formal adjudication absent extraordinary circumstances.

The reason for these requirements is simple: after the district director designates a responsible operator and refers the claim for a hearing, OWCP has no further opportunity to impose liability on another entity.[3] If the ALJ (or Board, or reviewing court) determines that another party is liable for the claim, OWCP cannot impose liability on that other party. 20 C.F.R. § 725.407(d). Instead, the claim will be paid by the Black Lung Disability Trust Fund. This prevents the

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[2] District directors often delegate responsibility for developing individual BLBA cases to OWCP claims examiners, as happened here. *See* JA 45, 53.

[3] The regulations carve out one limited exception to this rule that does not apply here. *See* 20 C.F.R. § 725.409(c) (involving cases dismissed by OWCP as abandoned).

claimant from needing to litigate the claim a second time against another operator or insurer. *See generally* Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended: Final Rule, 65 Fed. Reg. 79919 at 79990-91, ¶ (b) (Dec. 20, 2000); *Director, OWCP, v. Trace Fork Coal Co.*, 67 F.3d 503, 507-08 (4th Cir. 1995) (addressing responsible operator identification under prior regulations).

Notice of Claim: Once a BLBA claim is filed, the district director determines if there are any potentially liable operators on the claim. 20 C.F.R. § 725.407(a); *see supra* at 4 n.1. If the district director identifies a potentially liable operator, he or she issues a Notice of Claim requesting the operator to accept or contest liability for the claim. 20 C.F.R. § 725.407(b), (c). That operator's insurance carrier, if any, is entitled to separate notice of the claim as well. 20 C.F.R. § 725.407(b); *see Tazco*, 895 F.2d at 953.

The notified operator has thirty days to respond to the Notice. 20 C.F.R. § 725.408(a)(1). If the operator challenges its identification, it must answer five "assertions" concerning its status as a potentially liable operator. 20 C.F.R. § 725.408(a)(2)(i)-(v).[4] The operator has ninety days in which to submit evidence

[4] Section 725.408 (listing the assertions an operator must respond to at the Notice of Claim stage) and Section 725.497 (listing the requirements of a potentially responsible operator, *see supra* at 4 n.1) differ in one respect. Section 725.408(a)(2)(iii) requires the operator only to state whether the miner was exposed to coal-mine dust in its employ. Section 725.494(a) requires the miner's

supporting its denial of any assertion. 20 C.F.R. § 725.408(b)(l). Failure to submit documentary evidence within that time period precludes the admission of any evidence contradicting the five assertions in "any further proceedings." 20 C.F.R. § 725.408(b)(2).

Schedule for the Submission of Additional Evidence: After the notified operator or operators have responded to the Notice of Claim and the initial development of evidence addressing the claimant's entitlement to benefits, the district director makes preliminary determinations in a document called a Schedule for the Submission of Additional Evidence (SSAE). The SSAE contains the district director's initial designation of the responsible operator and initial opinion on the claimant's entitlement to benefits. 20 C.F.R. § 725.410(a).

The operator designated in the SSAE has thirty days to object to the district director's proposed finding. 20 C.F.R. § 725.412(a)(1). If it objects, the operator then has a minimum of sixty days to submit "evidence relevant to the liability of the designated responsible operator." 20 C.F.R. § 725.410(b). At this time, any other party must also "submit any evidence regarding the liability of the designated

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disability to arise out of employment with the operator and provides a rebuttable presumption to that effect. Whether the miner's disability arose out of his employment with that entity, however, may require evidence that is not readily available to the company from review of its own records. That issue is therefore deferred until the next stage of the process. *See* 65 Fed. Reg. at 79986 ¶¶ (e), (g).

responsible operator or any other operator." 20 C.F.R. § 725.414(b)(2). This includes not only documentary evidence, but also "the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. § 725.414(c).[5]

This is the last step of evidentiary development on the liability issue before the district director. Liability testimony by any witness who was not identified to the district director at this stage cannot be considered by an ALJ absent extraordinary circumstances. 20 C.F.R. § 725.414(c) ("Absent such notice, the testimony of a witness relevant to the liability of . . . the designated responsible operator shall not be admitted in any hearing unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances."). Such a witness is barred from testifying at the hearing or by deposition. *See* 65 Fed. Reg. at 80001 ¶ (b). The same rule applies to documentary evidence relevant to liability that was not submitted to the district director. *See* 20 C.F.R. § 725.456(b)(1) (Documentary evidence pertaining to liability that was not submitted to the district director "shall not be admitted into

[5] While the regulations explicitly refer to evidence regarding the identity of the responsible operator, they also apply to evidence relevant to an insurer's liability. *See* JA 151-52; *Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, 2012 WL 5267588 (Ben. Rev. Bd. Sept. 19, 2012). BrickStreet does not dispute this issue in its brief to the Court. *See infra* at 21 n.15.

the record in the absence of extraordinary circumstances."); *accord* 20 C.F.R. § 725.414(d).

Proposed Decision and Order: After considering the evidence submitted after the SSAE, the district director will issue either a new SSAE designating a different responsible party or a Proposed Decision and Order (PDO). This PDO contains the district director's final determinations on liability and the claimant's entitlement to benefits. 20 C.F.R. § 725.418. The PDO must dismiss all other previously-notified potentially liable operators as parties to the claim. 20 C.F.R. § 725.418(d). The remaining parties have thirty days to request a formal, de novo hearing before an administrative law judge. 20 C.F.R § 725.419(a). If the ALJ, the Benefits Review Board, or a reviewing court ultimately determines that the district director named the wrong liable party, the Black Lung Disability Trust Fund is obligated to pay benefits to the claimant if the claim is awarded.

B. Summary of Relevant Facts and Procedural History[6]

1. VanDyke's employment history and Paramont's insurance status

VanDyke worked as a coal miner for over 30 years, ending on December 14, 2012. JA 11, 77, 118, 131. At that time, he had been employed by Paramont for

[6] This brief only addresses BrickStreet's argument that the ALJ should have considered Dr. Shrader's 2015 deposition testimony before determining whether it is liable for this claim. Accordingly, only the evidence and holdings relevant to that issue are summarized herein.

several years. JA 118, 131. Paramont's BLBA liabilities were commercially insured. As of December 13, 2012, those liabilities were covered by a BrickStreet policy. JA 40. Previously, Paramont was insured under policies issued by a different insurance carrier. *See* Director's Exhibit (DX) 22; Paramont Br. 9.

2. Proceedings before the OWCP district director

Notice of claim: VanDyke filed this claim for BLBA disability benefits on January 29, 2013. JA 1-4. On February 20, 2013, the district director issued a Notice of Claim naming Paramont, as insured by BrickStreet, as a potentially liable operator.[7] JA 44-46. Paramont and BrickStreet responded through counsel.[8] JA 45-50. Paramont and Brickstreet conceded that Paramont was a potentially liable operator and admitted to all five issues that must be challenged at the Notice of Claim stage. JA 49-50.[9]

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[7] The district director had initially issued a Notice of Claim on January 29, 2013, that incorrectly stated that Paramont was self-insured through its parent, Alpha Natural Resources. JA 35-37. Alpha's representative pointed out the mistake and the district director subsequently issued a corrected notice of claim on February 20. JA 40.

[8] At the district director level, both BrickStreet and Paramont were represented by the firm that represents Paramont in this appeal, PennStuart. See DX 23; DX 42. At the ALJ level and beyond, BrickStreet was represented by JacksonKelly. JA 102, 107.

[9] In particular, Paramont and BrickStreet admitted that (1) Paramont operated a coal mine after June 30, 1973; (2) Paramont employed VanDyke as a miner for at least one year; (3) VanDyke was exposed to coal-mine dust in the course of that employment; (4) VanDyke worked for the company for at least one day after

Dr. Shrader's December 2012 note: Along with his claim form, VanDyke submitted a note from a treating physician, Dr. W. Eric Shrader. JA 34. The note is dated December 19, 2012, and states: "Mr. VanDyke has advanced coal worker's pneumoconiosis with interstitial fibrosis. He can not be exposed to respirable dust and is disabled from his pulmonary disease." *Id.*

Schedule for the Submission of Additional Evidence: Following further evidentiary development, an OWCP claims examiner issued a Schedule for the Submission of Admissible Evidence on August 20, 2013. JA 51-61. The SSAE preliminarily concluded that VanDyke was entitled to BLBA benefits because he suffered from complicated pneumoconiosis. JA 51, 56. This conclusion was not based on Dr. Shrader's note. Rather, it was based on Dr. Kathleen DePonte's readings of chest x-rays taken in January and June 2013, after the claim was filed. JA 56. Dr. DePonte interpreted both x-rays as positive for complicated pneumoconiosis. *Id.*; JA 18, 21, 29.[10]

December 31, 1969; and (5) Paramont was capable for assuming liability for the payment of benefits, if awarded. JA 49; *see* 20 C.F.R. § 725.408(a)(2).

[10] One way a miner can establish the existence of complicated pneumoconiosis is by presenting x-ray evidence of large opacities in the lung greater than one centimeter in diameter that "would be classified in Category A, B, or C" under the uniform classification system used to evaluate x-rays. 20 C.F.R. § 718.304(a). Dr. DePonte interpreted all the x-rays introduced as evidence in this case as showing size A or B opacities. *See* JA 132 (summarizing the x-ray evidence).

The SSAE also stated that, based on the evidence developed to that point, Paramont was the responsible operator. JA 52, 58. The company was found to be financially capable of paying the claim because it was insured by a BrickStreet policy on the miner's last day of employment. JA 57. The SSAE also noted that "[t]he potentially liable operator/carrier had failed to submit evidence" on the five liability issues that must be addressed at the Notice of Claim stage. JA 58. As for any other liability issues, the SSAE notified the parties that they had until September 19, 2013, to submit any documentary evidence relevant to liability and to identify any witnesses who would testify to liability if the case was referred to an ALJ. JA 52-53. The SSAE also explained the consequences of failing to timely identify witnesses or submit documents relevant to liability:

> Absent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once the case is referred to the Office of Administrative Law Judges.

JA 53 (citing 20 C.F.R. § 725.456(b)(1)).

Paramont and BrickStreet responded to the SSAE, contesting the miner's entitlement to benefits.[11] JA 63. Neither Paramont nor BrickStreet identified any

[11] Paramont gave a contradictory response concerning its liability for the claim – it checked a box on the Operator Response form provided by OWCP agreeing that it was liable, but also submitted an attachment in which it denied liability without explanation. JA 63, 65.

witnesses that could testify on the liability issue or submitted any documentary evidence on the subject after the SSAE.

Proposed Decision and Order: On December 30, 2013, the claims examiner issued a PDO finding that the miner was entitled to benefits because he suffers from complicated pneumoconiosis. JA 68, 75-77. As with the SSAE, this finding was based on interpretations of x-rays taken in January and June 2013. JA 75. The PDO also identified Paramont as the responsible operator. JA 68.

Paramont and Brickstreet contested the proposed award. JA 80-83. The case was therefore transferred to the Office of Administrative Law Judges for a formal hearing. *See* JA 131.

3. Proceedings before the Administrative Law Judge

Dr. Shrader's deposition: BrickStreet deposed Dr. Shrader on March 26, 2015. JA 86-101. Dr. Shrader testified that he practices family medicine and had been treating VanDyke since January 2005. JA 89-90. He indicated that he provided the 2012 note at the miner's request. JA 92. When asked whether the note's stated diagnosis of "advanced coal worker's pneumoconiosis" was equivalent to a diagnosis of complicated pneumoconiosis or progressive massive fibrosis, Dr. Shrader replied that his note transcribed a 2007 chest x-ray report, and that the report had not used those terms. JA 94-95. He agreed when asked if the 2007 x-ray report was "just not clear" on the issue. JA 95.

Dr. Shrader was asked to review Dr. DePonte's and Dr. Michael Alexander's interpretations of x-rays taken in January 2013, June 2013, and January 2014. JA 96. He stated that they were all consistent with a diagnosis of complicated pneumoconiosis. JA 96-97. Dr. Shrader replied "no" when asked if the masses in VanDyke's lungs could have appeared "overnight" and agreed when asked if the miner "had complicated coal worker's pneumoconiosis or progressive massive fibrosis in his lungs by October or November of 2012[.]" JA 97.

Hearing before ALJ Price: The hearing was held on April 20, 2016. JA 104. BrickStreet conceded that VanDyke had complicated pneumoconiosis but disputed its liability for the claim. JA 112, 115. BrickStreet pointed out that it did not insure Paramont until December 13, 2012, and argued that Dr. Shrader's deposition testimony established that VanDyke had complicated pneumoconiosis before that date. JA 115.

Counsel for the Director, who did not attend the hearing, filed a post-hearing brief arguing that Dr. Shrader's deposition could not be considered for liability purposes because he had not been identified as a liability witness while the case was at the district director level, as required by the regulations. Director's July 25, 2016 Letter Br. at 3-4. BrickStreet filed a reply brief, arguing that the deposition testimony could be considered for liability purposes because the district director was aware of Dr. Shrader's 2012 note. BrickStreet's August 8, 2016 Letter Br.

BrickStreet did not argue that extraordinary circumstances existed that would justify the submission of Dr. Shrader's deposition testimony under 20 C.F.R. § 725.414(c). *Id.*

ALJ's Decision and Order awarding benefits: On October 20, 2016, the ALJ issued a decision finding that the Miner is entitled to benefits because he suffers from complicated pneumoconiosis. JA 130-143. This conclusion was based on the unanimous x-ray evidence. JA 132, 138. The ALJ found that VanDyke was entitled to BLBA benefits as of January 13, 2013, the date of the first x-ray in the record diagnosing complicated pneumoconiosis. JA 141.

The ALJ declined to consider Dr. Shrader's deposition as evidence regarding BrickStreet's liability for the miner's benefits, finding that it was not timely submitted to the district director as required by the regulations. JA 139-140.[12] Relying on this Court's decision in *Marfork Coal Co. v Weiss,* 251 Fed. App'x 229 (4th Cir. 2007), the ALJ explained that the disclosure requirements apply to medical evidence about the onset date of a miner's complicated pneumoconiosis

[12] The ALJ mistakenly treated Dr. Shrader's deposition as documentary evidence under 20 C.F.R. § 725.456 rather than as witness testimony under section 20 C.F.R. § 725.457. JA 153, fn.14. The Board correctly pointed out that this error was harmless, as both regulations forbid the admission of liability evidence that was not timely identified to the district director in the absence of exceptional circumstances. JA 153 n.15; *compare* 20 C.F.R. §§ 725.414(c), 725.457(c) (witness testimony) *with* 20 C.F.R. §§ 725.414(b), 456(b) (documentary evidence).

that is submitted to challenge a party's liability for a claim. JA 140. Accordingly, the ALJ concluded that Dr. Shrader's deposition was not admissible for purposes of determining whether BrickStreet could escape liability for the miner's benefits. *Id.*[13] Noting that "no admissible medical evidence of record diagnoses Claimant with complicated pneumoconiosis prior to BrickStreet's effective date of coverage[,]" the ALJ held that BrickStreet was the liable insurance carrier. JA 140-41, 142.

4. Proceedings before the Benefits Review Board

BrickStreet appealed to the Board, which affirmed the award and the ALJ's liability findings in an unpublished opinion on December 21, 2017. JA 144-157. The Board rejected BrickStreet's argument that the rules requiring the disclosure of liability evidence to the district director do not apply to Dr. Shrader's deposition testimony. JA 151. Relying on this Court's precedent, the Board observed that a carrier is "required to discharge the statutory and regulatory duties imposed on the

[13] The ALJ also stated that, even if Dr. Shrader's deposition was admissible for liability purposes, it was not sufficient to establish that VanDyke had complicated pneumoconiosis before the BrickStreet policy became effective. JA 141. The ALJ did not, however, recount or analyze the key aspect of Dr. Shrader's deposition testimony: his affirmative answer when asked if the miner "had complicated coal worker's pneumoconiosis or progressive massive fibrosis in his lungs by October or November of 2012[.]" JA 97. As a result, if the Court disagrees with the Director and holds that Dr. Shrader's deposition was admissible for liability purposes, the claim should be remanded with instructions for the ALJ to consider this issue.

employer, thus stepping into its shoes" and therefore must comply with same statutory and regulatory requirements imposed on the employer. JA 151 (quoting *Tazco, Inc. v. Director, OWCP*, 895 F.2d 949, 951 (4th Cir. 1990)). The Board explained that the regulations specifically require that the district director notify the carrier of its potential liability, and that pursuant to such notification the carrier automatically becomes a party to the claim. JA 151-152 (citing 20 C.F.R. §§ 725.360(a)(4), 725.407(b)). The Board also pointed out that "the [Schedule for the Submission of Admissible Evidence] states that 'any party that wishes to submit liability evidence or identify liability witnesses' must notify the district director's office within the appropriate time frames." JA 152. Further, the Board noted that it had already held that the liability evidence disclosure rules apply to insurers as well as operators. JA 151-52 (citing *Olenick v. Olenick Bros. Coal Co.,* BRB No. 11-0833 BLA, 2012 WL 5267588 (Ben. Rev. Bd. Sept. 19, 2012)).

After ruling that the disclosure rules apply to BrickStreet, the Board turned to the question of whether it had violated them. The Board ruled that BrickStreet was required to identify Dr. Shrader as a liability witness while the case was pending before the district director under 20 C.F.R. § 725.457(c)(1). Because BrickStreet failed to do so, and did not argue that the testimony should be considered due to extraordinary circumstances, the Board held that the ALJ had properly excluded the deposition testimony. JA 152-153. This appeal followed.

SUMMARY OF THE ARGUMENT

The decisions below are correct and should be affirmed. No party identified Dr. Shrader as a potential liability witness at the district director level. BrickStreet nevertheless asked the ALJ to rely on Dr. Shrader's deposition testimony to find that it was not the insurer liable for VanDyke's BLBA benefits. This is explicitly forbidden by the regulations in the absence of extraordinary circumstances, a standard BrickStreet did not even attempt to meet. The ALJ appropriately declined to consider Dr. Shrader's testimony on the liability issue.

ARGUMENT

A. Standard of review

Whether Dr. Shrader's deposition testimony was admissible for purposes of determining BrickStreet's liability for this claim is a question of law. This Court reviews the Board's legal conclusions *de novo. Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282 (4th Cir. 2010); *Milburn Colliery v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998). The Director's interpretation of the BLBA in its implementing regulations, on the other hand, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Elm Grove Coal Co. v. Director,* 480 F.3d 278, 293 (4th Cir. 2007). And her interpretation of those regulations is entitled to "substantial deference unless it is plainly erroneous or inconsistent with the regulation," even if that interpretation is

expressed in a legal brief. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see Auer v. Robbins,* 519 U.S. 452, 461-62 (1997).

B. Dr. Shrader's deposition testimony was not admissible for purposes of determining BrickStreet's liability because he was not identified as a potential liability witness at the district director level

As detailed above, the BLBA's implementing regulations require parties to identify potential liability witnesses at the district director level. Absent extraordinary circumstances, witnesses who are not identified to the district director cannot be considered by the ALJ in determining which employer or carrier is liable for the claim. 20 C.F.R. §§ 725.414(c), 725.457(c)(1).[14]

[14] Section 725.457(c)(1) provides, in relevant part:

> [A]ll parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator of the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

Section 725.414(c) provides, in relevant part:

> In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director.

Dr. Shrader's deposition is plainly inadmissible under these rules.[15] BrickStreet admits that it did not identify Dr. Shrader as a liability witness to the district director. Pet. Br. 30. It obviously seeks to admit Dr. Shrader's testimony as evidence relevant to its liability for this claim. And it does not argue that extraordinary circumstances existed to justify its failure to timely identify Dr. Shrader as a potential liability witness. Given these facts, the ALJ had no choice but to follow the regulations and exclude the deposition testimony from his liability analysis.

The decisions below are also supported by *Marfork Coal Co. v. Weis*, 251 Fed. App'x 229 (4th Cir. 2007). *Marfork Coal* involved an x-ray reading purportedly establishing that the miner had complicated pneumoconiosis before he started working for Marfork Coal. Marfork did not have the x-ray when the case

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[15] On their face, sections 725.457(c)(1) and 725.414(c) address testimony relevant to the identity of the responsible operator. The Board held, in accord with its own precedent, that the regulatory disclosure requirements apply equally to testimony about the identity of the responsible insurance carrier. JA 151-52 (citing *Olenick v. Olenick Bros. Coal Co.*, BRB No. 11-0833 BLA, 2012 WL 5267588 (Ben. Rev. Bd. Sept. 19, 2012)). BrickStreet does not challenge this ruling in its brief. In any event, the ruling is correct. In BLBA claims, insurers are "required to discharge the statutory and regulatory duties imposed on the employer, thus stepping into its shoes." *Tazco*, 895 F.2d at 951; *see also* 30 U.S.C. § 935, as incorporated by 33 U.S.C. § 932(a); 20 C.F.R. § 726.207. Moreover, the policy underlying the disclosure requirement—ensuring that OWCP has all the liability evidence before it makes its final liability determination in the proposed decision and order—applies equally in the case of an insurance carrier challenging its liability. *See* 65 Fed. Reg. at 80001.

was pending before the district director, and therefore did not submit it at that time. *Id.* at 232-33. When it attempted to submit the x-ray at the ALJ level, the ALJ ruled that it was inadmissible on that ground. *Id.* at 233. This Court agreed. *Id.* at 236. *Marfork Coal* involved documentary evidence, not witness testimony. But that is no ground to distinguish the case, because the regulations governing witness testimony are essentially identical.[16] Thus, while it is unpublished, *Marfork Coal* lends further support to the Director's interpretation of the liability evidence disclosure regulations.

BrickStreet makes a variety of arguments in an attempt to escape the result compelled by the regulations, (*see* Pet. Br. 29-34), none of which is persuasive. First, BrickStreet argues that the notice requirement only applies to liability evidence addressing the "five liability grounds operators (or their insurance carriers) risk admitting if not specifically rejected" under section 725.408(a). Pet. Br. 29. Not so. It is true that the regulations require the liable party to submit liability evidence only about these five issues (including whether it employed the miner for at least one year and is financially able to assume liability for benefits*) in response to a Notice of Claim*. 20 C.F.R. § 725.408(a)(2), (b). But after that initial phase is over and OWCP issues a Schedule for the Submission of Additional

[16] *See supra* at 16 n.12.

Evidence, the obligation widens. After the SSAE issues, "*all parties* shall notify the district director" of "any potential witness" whose testimony pertains to liability. 20 C.F.R. § 725.414(c) (emphasis added). Nothing in section 725.414(c) suggests that it is limited to the five specific liability grounds that operators must address at the Notice of Claim stage. Moreover, that interpretation would defeat the purpose of the liability evidence disclosure rules, which is to ensure that OWCP has all the evidence relevant to liability before making its final responsibility determination in a proposed decision and order.

BrickStreet alternately argues that it was not required to identify Dr. Shrader as a potential liability witness because the forms OWCP provided for it to respond to the Notice of Claim and SSAE did not "require[] an affirmative response to whether complicated pneumoconiosis was present." Pet. Br. 33. This, according to BrickStreet, creates a "loophole" that allows it to submit the deposition at the ALJ level and thus escape liability. *Id.*

The SSAE itself closes this alleged loophole by explaining: "[a]ny party that wishes to submit liability evidence or submit liability witnesses, must mail the evidence or identification to this office[.]" JA 53. And, in any event, the BLBA's controlling procedural rules are found in the implementing regulations, not OWCP's forms. Only a minority of BLBA claims involve complicated pneumoconiosis, and only fraction of those present scenarios where complicated

pneumoconiosis impacts the identity of the liable operator or carrier. It is therefore no surprise that the forms do not explicitly address the issue.

BrickStreet also claims that it did not need to identify Dr. Shrader as a liability witness because OWCP was aware of his existence by virtue of the doctor's December 2012 note. Pet. Br. 32.[17] But this fact is irrelevant. Absent extraordinary circumstances, the regulations forbid "testimony relevant to . . . liability" from any witness who was not "identified as a potential hearing witness while the claim was pending before the district director" from an ALJ's consideration. 20 C.F.R. § 725.457(c)(1); *accord* 20 C.F.R. § 725.414(c). No party identified Dr. Shrader as a potential liability witness until after the case was transferred from the district director to the ALJ. JA 113-115. His testimony is therefore not admissible for liability purposes.[18]

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[17] Because the December 2012 note was submitted to the district director, it is admissible for all purposes (including liability). But, as the ALJ pointed out, that note does necessarily diagnose complicated pneumoconiosis, and says nothing at all about the onset date of that disease. JA 34, 133-34, 141. Nor did OWCP, VanDyke, Paramont, or BrickStreet treat that note as relevant to the liability issue at the district director level.

[18] To the extent that BrickStreet suggests that the ALJ's application of the liability evidence disclosure rules violated its right to cross-examine witnesses, the company misses the mark. Dr. Shrader's 2012 note was submitted into evidence by the claimant and considered by the OWCP claims examiner as entitlement evidence. BrickStreet had a right to depose him on those issues. But, because no party designated Dr. Shrader as a liability witness, it could not use the doctor's testimony in an attempt to escape liability for this claim.

BrickStreet claims that the Director's view—that Dr. Shrader's testimony is admissible for entitlement purposes but not for liability purposes—creates a "Hobson's choice" based only on an "overly technical and strained interpretation" of the regulations. Pet. Br. 35. But it is compelled by the plain language of the regulations. And those same regulations gave BrickStreet a perfectly reasonable means to escape the supposed dilemma. All it had to do was send a letter to the district director stating that Dr. Shrader was a potential witness with information about the insurer's liability for this claim before the claim was referred to the ALJ. *See* 20 C.F.R. § 725.414(c).

If BrickStreet had done that and OWCP nevertheless issued a proposed decision and order naming it as the liable insurer, it would have been free to rely on Dr. Shrader's deposition testimony to argue that it is not responsible for VanDyke's claim at the ALJ level. For whatever reason, BrickStreet never sent that letter. The regulations spell out the consequence of that choice: Shrader's testimony cannot be considered for liability purposes.

The liability evidence disclosure rules are not a mere technicality or trap for the unwary litigant. They are an important part of the BLBA's evidence development scheme. It bears emphasis that, after OWCP issues a proposed decision and order designating a responsible operator, OWCP has no further opportunity to impose liability on another entity if an ALJ, the Board, or a

reviewing court rules that OWCP made a mistake. In that event, the Trust Fund assumes liability for the claim.

By limiting liability determinations to the initial stage of claim adjudication, the Department of Labor accepted the risk of increased Trust Fund liability in order to provide more expeditious and fair claim adjudications. *See generally* 65 Fed. Reg. at 79990-91, ¶ (b); *Director, OWCP, v. Trace Fork Coal Co*, 67 F.3d 503, 508 (4th Cir. 1995) (Holding, under the prior regulations, that it would be unfair to force claimants to re-litigate their entitlement to benefits against another operator if OWCP's liability determination is overturned). But, because the Trust Fund may end up being liable if OWCP's designation is overturned, it is essential that potentially liable parties raise their defenses (and submit supporting evidence) at the proper time. In that way, OWCP can investigate and consider the defenses, and if found valid, identify a different party.[19] Those procedures were not followed here. The consequence is that Dr. Shrader's deposition testimony is inadmissible for liability purposes.

[19] The witness identification rules in particular prevent parties from avoiding "the required evidentiary development before the district director by submitting its evidence to the administrative law judge in the form of witness testimony." 65 Fed. Reg. at 80001 ¶ (b).

C. The ALJ properly ruled that Dr. Shrader's deposition is inadmissible for liability purposes despite the fact that the Director did not object to its admission at the hearing

In addition to its substantive attacks, BrickStreet argues that the ALJ's decision was procedurally invalid. First, it claims that Dr. Shrader's deposition testimony should have been considered by the ALJ because the Director did not object to its admission at the hearing. Pet. Br. 20-29. But section 725.457(c)(1)'s language is mandatory: "No person shall be permitted to testify as a witness . . . pursuant to a deposition . . . unless that person meets the requirements of § 725.414(c)." Thus, an "administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony." *Miller v. Scottie Coal Co.*, BRB No. 16-0089 BLA, 2016 WL 8260798, *3 (Ben. Rev. Bd. Nov. 15, 2016) (citing *Smith v. Martin County Coal Corp.*, 23 Black Lung Rep. 1-69, 74 (Ben. Rev. Bd. 2004)). Whether the Director or any other party objected to the deposition's admission at the hearing is therefore irrelevant.

In any event, the Director did raise the issue before the ALJ. The fact that she did so in a post-hearing letter brief rather than orally at the hearing caused no prejudice to BrickStreet. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 621 (4th Cir. 2006) (applying harmless error rule to BLBA claim). The carrier had a full and fair opportunity to respond to the Director's arguments in its own post-hearing reply brief, and did so. *See* BrickStreet's August 8, 2016 Letter Brief.

BrickStreet nevertheless claims that the Director's failure to raise the issue at the hearing robbed it of the opportunity to argue that extraordinary circumstances existed to justify its late admission of Dr. Shrader's deposition. Pet. Br. 22, 32-33. But the carrier could have made an extraordinary-circumstances argument in that post-hearing reply. It chose not to do so. And, even now, BrickStreet identifies no extraordinary circumstance that would have justified admitting liability testimony by a witness who was not identified to the district director. The petitioner should not be heard to complain that it did not have the opportunity to raise an argument that does not exist.

BrickStreet also makes the related procedural argument that the ALJ erred by ruling on the admissibility of Dr. Shrader's deposition in the decision and order. Pet. Br. 25-26. In the carrier's view, the ALJ should have issued a separate order on that issue before resolving the merits of the claim. BrickStreet cites no regulation requiring ALJs to make this kind of evidentiary ruling in a preliminary order. Instead, it claims that this result is required by the Board's decision in *L.P. [Preston] v. Amherst Coal Co.*, 24 Black Lung Rep. 1-55, 2008 WL 3860952 (Ben. Rev. Bd. 2008) (en banc). But that case is simply not on point.

Preston is inapposite because it did not involve the requirement that parties identify liability witnesses at the district director level. In fact, it did not involve liability evidence at all. *Preston* addressed a separate set of evidentiary rules that

restrict the amount of *entitlement* evidence each party is allowed to submit. 2008 WL 3860952 at *5. These rules limit each party to a certain number of x-ray readings, medical opinions, pulmonary-function tests, and the like that can be submitted for purposes of proving that the claimants is or is not entitled to benefits. *See* 20 C.F.R. § 725.414(a).[20] In *Preston*, the Board noted that these medical-evidence-limiting rules require ALJs to make determinations about "whether the evidence proffered by the parties complies with the limitations or, if not, is admissible for good cause." 2008 WL 3860952 at *5. These determinations, in turn, establish the evidentiary record. The Board suggested that an ALJ "should render his or her evidentiary rulings before issuing the Decision and Order." *Id.* This would ensure that the parties "have the opportunity to make good cause arguments" for exceptions to the rule, and to "otherwise resolve issues regarding the application of the evidentiary limitations[.]" *Id.*

The Board's recommended practice makes sense in many cases involving the medical evidentiary limitations. For example, an ALJ's determination that one

[20] These limitations on medical evidence were designed to even the playing field between employers and claimants, reduce the costs of developing black lung claims, and ensure that claims are decided based on the quality of the evidence rather than its quantity. *See Elm Grove Coal Co. v. Director, OWCP*, 480 F.3d 278, 296 (4th Cir. 2007) (citing Regulations Implementing the Federal Coal Mine Safety and Health Act of 1969, as Amended: Proposed Rule, 62 Fed. Reg. 3337 at 3338 (Jan. 22, 1997)).

party's medical expert relied on an x-ray that exceeded the evidentiary limitations might raise a host of interrelated questions (including whether that portion of the expert's report can be excised, whether the affected party should be allowed to designate an alternate report that does not rely on the inadmissible evidence, and how the opposing party should be allowed to adjust its own entitlement evidence in response).

The regulations governing the admission of liability evidence do not present similar issues because they do not limit the amount of evidence a party can submit. There are only two questions to answer: (1) was the witness identified, or the document submitted, at the district director level, and (2) if not, is that failure justified by exceptional circumstances. As this case indicates, these questions are not trivial, but they do not present the type of interconnected evidentiary issues that applying the numerical limitations on medical evidence can sometimes cause. It is therefore no surprise that BrickStreet cites no authority applying *Preston's* recommended procedural scheme in the liability context.

Nor does BrickStreet explain how a preliminary order of the type suggested by *Preston* could have changed the outcome here. The Director's post-hearing brief put BrickStreet on notice that there was a dispute about whether Dr. Shrader's deposition testimony was admissible. BrickStreet argued that the liability evidence disclosure rules did not bar the admission of that testimony in its reply brief. It

could have also argued that extraordinary circumstances existed sufficient to invoke the exception to the disclosure rule, but chose not to do so. Thus, BrickStreet had the same opportunity to respond to the admissibility issue here as it would have had if the ALJ addressed the matter in a preliminary order. In short, *Preston* is in no way inconsistent with the decisions below.

To summarize, the rulings below were both substantively correct and procedurally proper. BrickStreet asked the ALJ to rely on Dr. Shrader's deposition testimony to find that it was not liable for this claim. This is squarely forbidden by the regulations because no party had identified Dr. Shrader as a liability witness at the district director level. BrickStreet was given ample opportunity to convince the ALJ that the regulations did not apply or that extraordinary circumstances existed that would justify an exception to the liability evidence disclosure rules. The ALJ and Board correctly found those arguments to be unpersuasive. This Court should affirm their decisions.[21]

[21] If this Court disagrees and holds that Dr. Shrader's deposition testimony should have been admitted, the claim should be remanded for the ALJ to consider whether BrickStreet is the liable carrier. *See supra* at 17 n.12.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted,

KATE O'SCANNLAIN
Solicitor of Labor

MAIA S. FISHER
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2119
200 Constitution Avenue, NW
Washington, D.C. 20210
(202) 693-5651

Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is unnecessary in this case, because "the facts and legal arguments are adequately presented in the briefs and record." Fed. R. App. P. 34(a)(2)(C). If the Court disagrees, the Director stands ready to participate.

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, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 7,782 words as counted by Microsoft Office Word 2010.

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Scarpino.ann@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

William S. Mattingly, Esq.
Jackson Kelly PLLC
175 East Main Street
Suite 500
Lexington, KY, 40507
wmmattingly@jacksonkelly.com

Joseph E. Wolfe, Esq.
Wolfe, Williams & Reynolds
470 Park Avenue
P.O. Box 625
Norton, VA 24273-0625
jwolfe@wwrrlawfirm.com

Timothy W. Gresham, Esq.
Penn Stuart
P.O. Box 2288
Abingdon, VA 24212-2288
tgresham@pennstuart.com

/s/ Ann Marie Scarpino
ANN MARIE SCARPINO
Attorney
U.S. Department of Labor
BLLS-SOL@dol.gov
Scarpino.ann@dol.gov