No. 18-72257

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES ZUMWALT,
Claimant, to the Use of,
JEFFREY M. WINTER,
Attorney for Claimant,
Petitioners,

v.

NATIONAL STEEL & SHIPBUILDING COMPANY, 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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STATEMENT OF JURISDICTION

This appeal arises under the Longshore and Harbor Workers' Compensation Act (LHWCA). 33 U.S.C. §§ 901-950. After successfully prosecuting a claim for LHWCA benefits filed by Charles Zumwalt against his former employer, the National Steel and Shipbuilding Company, Mr. Zumwalt's attorney filed an application for attorney's fees for legal services performed before the Department of Labor Administrative Law Judge who adjudicated the claim, Steven Berlin. Excerpts of Record (ER) at 26. ALJ Berlin had jurisdiction to adjudicate the LHWCA claim under 33 U.S.C. § 919(d) and the attorney-fee application under 33 U.S.C. § 928(a).

In a decision filed on September 23, 2016, ALJ Berlin awarded attorney's fees. ER at 24-43. Unsatisfied with the hourly rate and the number of hours allowed by the ALJ, Claimant filed a motion for reconsideration on October 6, 2016. *See* ER at 21. In a decision filed on October 24, 2016, the ALJ denied the motion as untimely, citing the ten-day limit for such a motion in a LHWCA case established by 20 C.F.R. § 802.206(b)(1). ER at 19-23.

On October 26, 2016, Claimant filed a notice of appeal with the Benefits Review Board. *See* ER at 17. The Board possesses subject-matter jurisdiction to hear appeals from ALJ decisions under the LHWCA. 33 U.S.C. § 921(b)(3). The time limit for filing such an appeal is thirty days from the filing of the ALJ's decision. 33 U.S.C. § 921(b)(3). A timely motion for reconsideration of the ALJ's decision suspends the time for appeal, 20 C.F.R. § 802.206(a), which begins to run after the filing of the ALJ's decision on reconsideration. 20 C.F.R. § 802.206(d),(e).

On April 26, 2017, the Board dismissed Claimant's appeal as untimely. ER at 15-17. The Board found the appeal to have been filed more than thirty days after ALJ Berlin's September 23, 2016 decision, and further found that Claimant's untimely motion for reconsideration did not toll the time for filing his appeal. 20 C.F.R. § 802.206(a).

On May 26, 2017, Claimant filed a timely motion for reconsideration, with a suggestion for reconsideration *en banc*, of the Board's decision. *See* 33 U.S.C. § 921(b)(5) (permitting aggrieved party thirty days to file motion for reconsideration *en banc*); 20 C.F.R. § 802.407(a), (b). This motion suspended the time for Claimant to seek

judicial review in this Court until the issuance of the Board's decision on reconsideration. 20 C.F.R. § 802.406.

On June 13, 2018, the Board issued a decision granting reconsideration *en banc*, but denying the relief requested, and re-affirming its original decision dismissing Claimant's appeal as untimely. ER at 4-11. Claimant filed a timely motion for reconsideration of that decision on July 13, 2018. With that motion still pending, Claimant filed a petition for review with this Court on August 13, 2018.

This Court has subject-matter jurisdiction to review final Board decisions when, as here, the injury occurred within this Court's geographic jurisdiction (here, California, *see, e.g.,* Claimant's Opening Brief (OB) at 3). 33 U.S.C. § 921(c). Such a petition must be filed within sixty days of the Board's decision. *Id.* When, as here, the sixtieth day after the Board's decision (here, August 12, 2018) falls on a Sunday, the petition must be filed on the next business day (here, Monday, August 13, 2018). Fed. R. App. P. 26(a)(1)(C). Thus, Claimant's August 13, 2018 petition for review was timely filed.

The Court may nevertheless lack jurisdiction over claimant's August 13, 2018 petition in light of Claimant's second motion for

reconsideration that was then pending at the Board. *See* 20 C.F.R. § 802.406; *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 617 (9th Cir. 1999) ("a motion for reconsideration renders the underlying Board decision nonfinal and thus precludes judicial review of that action") (quoting *Bridger Coal Co./Pacific Minerals, Inc. v. Director, OWCP*, 927 F.2d 1150, 1152 (10th Cir. 1991) (dismissing as premature an appeal of a Board decision while a timely motion for reconsideration was pending at the Board)).

The Board denied Claimant's second motion for reconsideration on September 6, 2018. ER at 1-3. Claimant then filed an amended petition for review on November 5, 2018, within sixty days after the Board's September 6, 2018 decision. Thus, if the Court lacks jurisdiction over Claimant's August 13, 2018 petition for review, it has jurisdiction over Claimant's November 5, 2018 amended petition for review—and *vice versa*. *See Bridger Coal Co.*, 927 F.2d at 1152 (appeal filed within sixty days of Board's order permitting withdrawal of motion for reconsideration is timely).

Accordingly, the Court has jurisdiction to review the Board's June 13, 2018 decision and order on reconsideration *en banc*.

Whether the Court has jurisdiction to review the Board's September 6, 2018 order denying Claimant's second motion for reconsideration, however, depends on whether Claimant's second motion for reconsideration suspended the time to appeal to this Court, where, as here, the second motion did not actually seek reconsideration of anything, but rather sought to raise a new issue for the first time. Fortunately, resolution of this jurisdictional question makes no difference to the outcome of this case. The only issue raised in Claimant's second motion for reconsideration was whether ALJ Berlin's appointment was constitutionally valid. The Board denied the motion on the ground that a party may not raise an issue for the first time in a motion for reconsideration, much less a second motion for reconsideration. ER at 2 n.2. As discussed in Argument I, below, it makes no difference whether Claimant first raised the Appointments Clause issue in his second motion for reconsideration with the Board or in his opening brief in this Court. Either way, Claimant forfeited the issue.

STATEMENT OF THE ISSUES

The Appointments Clause provides that inferior officers are to be appointed by "the President," the "Heads of Departments," or the "Courts of Law." Claimant argues in his opening brief that the ALJ's attorney-fee decisions should be vacated because the ALJ was not properly appointed. Claimant did not raise this argument at any point during the litigation of his claim for LHWCA benefits, and did not raise it during the subsequent attorney's fee litigation until his second petition for reconsideration to the Board. The questions presented are:

1. Has Claimant forfeited his Appointments Clause argument by failing to timely raise it before the agency?

2. Was Claimant's motion for reconsideration of the ALJ's attorney-fee decision untimely?

An addendum containing the text of the statutory and regulatory provisions necessary to decide this case is included at the end of this brief.

STATEMENT OF THE CASE

1. The Facts and Procedural History

The Statement of Jurisdiction contains the relevant facts and procedural history.

2. The ALJ's and Board's Decisions on the Merits

Claimant filed his LHWCA claim in October 2006 and amended it in January 2007. *See* OB at 7. The case was first docketed in the Department of Labor's (DOL's) Office of Administrative Law Judges (OALJ) in January 2011. *See* ER at 28. ALJ Berlin conducted a hearing in March 2012 and issued a decision awarding benefits in May 2014. ALJ Berlin issued a decision on cross-motions for reconsideration in July 2014. Claimant and Employer both appealed to the Board, which issued a decision in July 2015, affirming in part, vacating in part, and remanding to ALJ Berlin for further consideration. On remand, Claimant and Employer reached an agreement, which ALJ Berlin embodied in a decision awarding benefits in December 2015, thus ending the merits phase of the litigation. ER at 26.

3. The ALJ's Decision on Attorney's Fees

Claimant's attorney filed an application for attorney's fees for legal services performed before ALJ Berlin. In a decision filed on September 23, 2016, ALJ Berlin awarded attorney's fees totaling $89,645.90, which was less than Claimant sought because the ALJ reduced the hourly rate and the number of hours. ER at 26-43.

4. The ALJ's Denial of Claimant's Motion for Reconsideration

Claimant filed a motion for reconsideration of ALJ Berlin's attorney-fee decision on October 6, 2016. In his decision denying reconsideration, ALJ Berlin first found the motion untimely, citing 20 C.F.R. § 802.206(b)(1)'s ten-day limit on motions for reconsideration. ER at 22. Additionally, ALJ Berlin found that even if the motion had been timely filed, he would have denied it on the merits for reasons specified in his decision denying reconsideration. ER at 22-23.

The district director filed ALJ Berlin's decision denying reconsideration on October 24, 2016. ER at 19-20. Claimant filed a notice of appeal with the Board on October 26, 2016. ER at 17.[1] In the

[1] Employer filed a cross-appeal with the Board.

notice, Claimant stated his intent to appeal both ALJ Berlin's initial decision and his denial of reconsideration.

5. The Board's Decisions on Attorney's Fees

The Board issued three decisions in the attorney-fee phase of this case.

A. The Board's first decision

On April 26, 2017, the Board dismissed Claimant's appeal as untimely. ER at 15-17. Initially, the Board held that Claimant's October 6, 2016 motion for reconsideration of ALJ Berlin's September 23, 2016 decision was untimely because the motion was filed outside the ten-day limit of the LHWCA-specific Board regulation, 20 C.F.R. § 802.206(b)(1). ER at 16. Because the motion was untimely, the Board reasoned, it did not suspend the time for appealing to the Board pursuant to 20 C.F.R. § 802.206(a). Therefore, the Board concluded, Claimant's October 26, 2016 appeal was filed outside the thirty-day limit of 20 C.F.R. § 802.205(a), and was therefore untimely. ER at 17.[2]

[2] The Board also found that Employer's cross-appeal was untimely. ER at 17.

In so concluding, the Board "reject[ed] the parties' contentions that claimant's motion for reconsideration was timely filed with the [ALJ] pursuant to 29 C.F.R. §§ 18.32(c), 18.93." ER at 16.[3] The Board observed that whereas section 802.206(b)(1) limits a motion for reconsideration to ten days from the date the ALJ's decision was "filed," section 18.93 limits a motion for reconsideration to ten days from the date of "service on the moving party." ER at 16. Citing 29 C.F.R. § 18.10(a), which declares the inapplicability of the OALJ regulations in cases where "a specific Department of Labor regulation governs the proceeding," the Board held that section 802.206(b)(1) "takes precedence over the general OALJ regulation." ER at 16.[4]

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[3] 29 C.F.R. Part 18 provides Rules of Practice and Procedure for Administrative Hearings Before the OALJ. Section 18.93 states that a motion for reconsideration of an ALJ's decision must be filed "no later than 10 days after service of the decision on the moving party." Section 18.32(c), in turn, states that three additional days are added after time would ordinarily expire when service is made (pursuant to section 18.30(a)(2)(ii)(C)) by mail. In a footnote, the Board declined to resolve whether section 18.30(a) applies to service of papers by an ALJ, as opposed to papers filed with an ALJ. ER at 16 n.1.

[4] Section 18.10(a) states in relevant part:

> "To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation

B. The Board's decision on reconsideration *en banc*

The Board granted Claimant's motion for reconsideration *en banc*, but its decision re-affirmed its original order dismissing Claimant's appeal as untimely. ER at 4-14. In its decision on reconsideration, the Board rejected claimant's contentions that: (1) his motion for reconsideration of the ALJ's decision was timely under the OALJ regulations, and (2) his motion was timely under the holding in *Galle v. Director, OWCP*, 246 F.3d 440, 448-50 (5th Cir. 2001) (applying Federal Rule of Civil Procedure 6(a), which then excluded intermediate weekends and legal holidays from computation of periods less than eleven days).

Initially, the Board recognized that FRCP 6(a) was amended in 2009 to include intermediate weekends and holidays in computing time, and that the OALJ regulation allowing motions for reconsideration (*i.e.*, section 18.93) was promulgated in 2015. ER at 8. The Board also

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> governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation."

recognized this Court's unpublished decision in *Shah v. Worldwide Language Resources, Inc.*, 703 F. App'x 624 (9th Cir. 2017).

In *Shah*, the Board held that claimant's motion for reconsideration of the ALJ's decision was untimely under both the pre-2009 and current versions of FRCP 6(a), and therefore did not toll the time for appeal to the Board. This Court reversed the Board, citing *Bowman v. Lopereno*, 311 U.S. 262, 266 (1940), for the proposition that the time for filing an appeal was suspended because the ALJ entertained the untimely motion for reconsideration on the merits. The Board distinguished the Court's decision in *Shah* from the present case, explaining that ALJ Berlin here specifically denied Claimant's motion for reconsideration as untimely, thus rendering ALJ Berlin's alternative rejection of the motion on the merits insufficient to "supplant his primary finding." ER at 9.

Next, the Board addressed Claimant's contention that the OALJ regulations allowed three additional days to file his motion for reconsideration. The Board again emphasized the difference between the Board regulation at section 802.206(b)(1) and the OALJ regulation at section 18.93: the former requires that a motion for reconsideration

be filed not later than ten days after "filing" of the ALJ's decision, whereas the latter required that such a motion be filed no later than ten days after "service" of the ALJ's decision. ER at 10.

The Board recognized this Court's decision in *Nealon v. California Stevedore & Ballast Co.*, 996 F.2d 966, 968 (9th Cir. 1993), holding that under LHWCA section 19(e) (33 U.S.C. § 919(e)), "filing" of an ALJ's decision is not accomplished until service on the parties has been effected.[5] In this case, the Board stated, Claimant conceded that ALJ Berlin's attorney-fee decision was both "filed" and "served" on September 23, 2016. Thus, the Board held that that date triggered the ten-day limit to file a motion for reconsideration. ER at 10-11.

Next, the Board re-affirmed its holding that section 802.206(b)(1) is a "governing regulation" within the meaning of section 18.10(a) of the OALJ regulations, and therefore takes precedence over the OALJ

[5] In LHWCA claims, ALJ decisions are filed by OWCP officials called district directors (formerly known as deputy commissioners). 33 U.S.C. § 919(e); *see* 20 C.F.R. §§ 701.301(a)(7), 702.105 (changing "deputy commissioner" to "district director"). LHWCA section 19(e) provides that an ALJ's decision "shall be filed in the office of the [district director], and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

reconsideration and service regulations on which Claimant relied. ER at 10-11.[6]

The Board then rejected Claimant's reliance on *Galle*. Holding that to the extent *Galle* requires reference to FRCP 6(a)'s method for computing the ten-day deadline, the amended Rule 6(a) "is now the appropriate reference." ER at 12. Rule 6(a), as amended in 2009, includes intermediate weekends and holidays in computing time. Thus, the Board explained, application of FRCP 6(a) would not render Claimant's October 6, 2016 motion for reconsideration of the ALJ's Friday, September 23, 2016 decision timely. ER at 13.

Finally, having again concluded that the ALJ properly rejected Claimant's motion for reconsideration as untimely, the Board again concluded that the untimely motion did not toll the thirty-day deadline for appeal. ER at 13. The Board therefore reaffirmed its dismissal of

[6] In a footnote, the Board rejected Claimant's interpretation of the OALJ regulations, stating that the service-by-mail provision of section 18.30(a)(2)(ii)(C), as referenced in section 18.32(c)'s three-extra-days provision, applies to "service *on the parties* of items filed *with* the OALJ," and "does not refer to service *by* either the district director or the [ALJ]." ER at 12 n.13 (emphases in original).

claimant's October 26, 2016 appeal of ALJ Berlin's September 23, 2016 attorney-fee decision as untimely. *Id.*

C. The Board's decision denying Claimant's second motion for reconsideration

In his second motion for reconsideration, Claimant raised only one issue—an issue he had never previously raised—the constitutional validity of ALJ Berlin's appointment. Citing the Supreme Court's June 21, 2018 decision in *Lucia v. SEC*, 138 S. Ct. 2044, Claimant asked the Board to vacate its decisions as well as ALJ Berlin's attorney-fee decisions, and to remand the case for a properly appointed ALJ to consider the attorney-fee application. The Board denied the motion based on the "well established" principle that "a party cannot raise a new issue to the Board for the first time in a motion for reconsideration," noting further that Claimant here attempted to raise a new issue for the first time in his second motion for reconsideration. ER at 1-3.

SUMMARY OF THE ARGUMENT

Claimant has forfeited his Appointments Clause argument. Claimant did not object to ALJ Berlin's appointment at any time during the years-long merits phase of the litigation, which included an appeal

to the Board resulting in a remand to ALJ Berlin. Nor did Claimant object to ALJ Berlin's authority to adjudicate his attorney-fee application, either initially or in his motion for reconsideration. Likewise, Claimant did not raise his Appointments Clause argument to the Board in his appeal of ALJ Berlin's attorney-fee decision, or in his motion for reconsideration *en banc* of the Board's decision. When Claimant finally raised the issue for the first time in his second motion for consideration with the Board, the Board correctly refused to consider it, holding that Claimant had failed to timely raise the issue. This Court should reach the same conclusion.

Claimant also failed to timely file his motion for reconsideration of ALJ Berlin's attorney-fee decision. The time limit for such a motion in a LHWCA case is ten days. Claimant concedes that he filed his motion on the thirteenth day, but argues that either the OALJ regulations afforded him three extra days, or FRCP 6(a) excluded the four intermediate weekend days from the time computation.

Neither argument has merit. The OALJ regulations differ materially from the Board regulation regarding the timeliness of a motion for reconsideration. And the OALJ regulations expressly provide

that program-specific statutes and regulations take precedence over any OALJ regulation that is inconsistent with such statutes and regulations. The LHWCA-specific Board regulation therefore controls. Nor does FRCP 6(a) aid Claimant inasmuch as it has not excluded intermediate weekends in the computation of time periods since it was amended in 2009.

Claimant also failed to timely raise his argument that ALJ Berlin did not realize he possessed discretion to entertain an untimely motion for reconsideration. Claimant could have made that argument in his appeal of ALJ Berlin's attorney-fee decision to the Board. Not only did Claimant fail to do so, he also failed to raise the issue in either of his two motions for reconsideration at the Board. Thus, Claimant may not raise the issue for the first time in this Court.

ARGUMENT

I.

CLAIMANT HAS FORFEITED HIS APPOINTMENTS CLAUSE ARGUMENT BY FAILING TO TIMELY RAISE IT BEFORE THE AGENCY

A. Standard of Review

Whether Claimant has forfeited an argument by failing to timely raise it below is a question of law. This Court reviews questions of law *de novo*. *SSA Terminals v. Carrion*, 821 F.3d 1168, 1171 (9th Cir. 2016). This Court also reviews questions of constitutional law, including Appointments Clause questions, *de novo*. *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016); *see Willy v. Administrative Rev. Bd.*, 423 F.3d 483, 490 (5th Cir. 2005) (reviewing constitutional Appointments Clause challenge *de novo*). This *de novo* standard of review also applies to Arguments II and III, below.

B. Claimant Forfeited His Appointments Clause Argument by Failing to Raise it Until His Second Motion for Reconsideration to the Board in the Collateral Attorney's Fee Litigation.

Claimant's failure to preserve his Appointments Clause claim results in its forfeiture before this Court. Under longstanding principles that govern judicial review of administrative decisions, this Court

should not reach a claim that could and should have been preserved before the agency, but was not.

The Appointments Clause provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, sec. 2, cl. 2. In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court held that Securities and Exchange Commission ALJs are inferior officers who must be appointed consistent with the Constitution's Appointments Clause.[7] In so holding, the Supreme Court explained that it "has held that one who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief[,]" and that Lucia was entitled to relief because he "made just such a *timely* challenge" by raising the issue "before the Commission." *Id.* at 2055 (emphasis added, quotation marks omitted). To support that conclusion, the Court cited

[7] The Director agrees that ALJs who preside over LHWCA proceedings are inferior officers, and that ALJ Berlin was not properly appointed when he adjudicated either the merits or attorney-fee phase of this case. In December 2017, the Secretary of Labor ratified his appointment and the appointments of other Department of Labor ALJs. *See infra* at 27 & n.11.

Ryder v. United States, 515 U.S. 177 (1995), which held that the petitioner was entitled to relief on his Appointments Clause claim because he—unlike other litigants—had "raised his objection to the judges' titles before those very judges and prior to their action on his case." *Ryder*, 515 U.S. at 181-83. And forfeiture and preservations concerns had been raised in *Lucia's* merits briefing, as amici the National Black Lung Association urged the Supreme Court to "make clear that where the losing party failed to properly and timely object, the challenge to an ALJ's appointment cannot succeed." Amici Br. 15, *Lucia v. SEC*, No. 17-130, 2018 WL 1733141 (U.S. Apr. 2, 2018).

Unlike the challenger in *Lucia*, Claimant failed to timely raise and preserve his Appointments Clause challenge before the agency. The claim was pending before the agency for over seven years before Claimant first raised the issue. The merits phase of the litigation before ALJ Berlin began in early 2011 and concluded near the end of December 2015. It included an appeal to the Board of ALJ Berlin's first decision, resulting in a remand to ALJ Berlin for further consideration. Claimant did not raise any challenge to the constitutional validity of

ALJ Berlin's appointment at any time during the merits-phase of the litigation before ALJ Berlin or the Board.

The collateral litigation over attorney's fees before the ALJ and Board has now stretched over another three years. The Claimant did not mention the Appointments Clause in his fee petition, his amended fee petition, or his motion for reconsideration of ALJ Berlin's attorney-fee decision. Nor did he do so in his appeal or first motion for reconsideration to the Board. It was not until his second motion for reconsideration to the Board—filed in July 2018—that Claimant argued for the first time that ALJ Berlin's appointment was constitutionally defective.

This was simply too late. As the Board explained, "it is well established that a party cannot raise a new issue to the Board for the first time in a motion for reconsideration." ER at 2 (citing *Ravalli v. Pasha Maritime Services*, 36 BRBS 91 (2002)); *Witherow v. Rushton Mining Co.*, 8 BLR 1-232, 1-233 (1985); *see SSA Terminals, LLC v. Bell*, 653 F. App'x 528, 532 (9th Cir. 2016) (Board properly affirmed ALJ's refusal to consider issue raised for first time on reconsideration).

Under longstanding principles of administrative law, Claimant may not now raise in court an argument he failed to preserve before the agency. In *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35 (1952), a litigant argued for the first time in court that the agency's hearing examiner had not been properly appointed under the Administrative Procedure Act. The Supreme Court held that the litigant forfeited this claim by failing to raise it before the agency, and explained that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made" during the agency's proceedings "while it has opportunity for correction[.]" *Id.* at 36-37. Although the Court recognized that a timely challenge would have rendered the agency's decision "a nullity," *id.* at 38, it refused to entertain the forfeited claim based on the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice," *id.* at 37.

This Court has consistently applied these normal principles of forfeiture, *see N.L.R.B. v. Southeast Ass'n for Retarded Citizens, Inc.*, 666 F.2d 428, 432 (9th Cir. 1982) (quoting *L.A. Tucker Truck Lines, Inc.*,

344 U.S. at 37), and emphasized that "[a]ll issues which a party contests on appeal must be raised at the appropriate time under the agency practice." *Inter-Tribal Council of Nevada v. U.S. Dept. of Labor*, 701 F.2d 770, 771 (9th Cir. 1983) (holding that, because petitioner failed to raise the issue of the Secretary's authority to recoup allegedly misspent funds in either its pre-hearing statement or at the hearing before the ALJ, the Court could not consider the issue on appeal). And in cases under the Longshore Act, the Court will not consider issues that were not raised and preserved before the Board.[8] *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 251 (1942) (failure to raise issue of widow's capacity to file claim below waived);[9] *Kalama Services, Inc. v. Director, OWCP*, 354 F.3d 1085, 1094 (9th Cir. 2004) ("Kalama did not

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[8] Claimant's failure to raise his Appointments Clause challenge before ALJ Berlin during either the merits litigation or the attorney's fee proceeding arguably constituted forfeiture in and of itself. *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989) (issue raised for first time in appeal to the Board waived). The Court need not reach that question, however, because Claimant failed to meet even the minimum obligation of timely raising the issue to the Board.

[9] When *Parker* was decided, deputy commissioners, rather than ALJs, conducted hearing in Longshore Act cases, and any party aggrieved by the deputy commissioner's decision could seek review in the U.S. district court. The underlying principle, however—that issues must be raised before the agency—remains the same.

raise this argument before the BRB. Therefore, the argument is waived."); *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827 (9th Cir. 1981) (employer could not contest situs element of coverage under the Longshore Act where it had not raised the issue before the ALJ or challenged it on appeal to the Board); *accord Aetna Cas. & Sur. Co. v. Director, OWCP*, 97 F.3d 815 (5th Cir. 1996) (argument not raised before the Board, and raised for the first time on appeal, was waived); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37 (1st Cir. 1982) (argument that worker had a pre-existing permanent total disability was not raised before the Board and was therefore waived).[10]

[10] The courts of appeals apply this same principle when reviewing Board decisions issued under the Black Lung Benefits Act, which incorporates the LHWCA's judicial review provision, 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921). *See Brandywine Explosives & Supply v. Director, OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) ("Generally, this court will not review issues not properly raised before the [Benefits Review] Board.") (quotation and citation omitted, alteration in original); *McConnell v. Director, OWCP,* 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (refusing to consider argument not raised before Board); *see also Micheli v. Director, OWCP,* 846 F.2d 632, 635 (10th Cir. 1988) (refusing to review ALJ's finding that was not appealed to Board); *accord Hix v. Director, OWCP,* 824 F.2d 526, 527 (6th Cir. 1987); *Arch Mineral Corp. v. Director, OWCP*, 798 F.2d 215, 220 (7th Cir. 1986); *Director, OWCP v. North American Coal Corp.,* 626 F.2d 1137, 1143-44 (3d Cir. 1980).

These principles apply with full force to Appointments Clause challenges. The courts of appeals have consistently held that Appointments Clause challenges are "nonjurisdictional" and receive no special entitlement to review. *E.g., GGNSC Springfield LLC*, 721 F.3d 403, 406 (6th Cir. 2013) ("Errors regarding the appointments of officers under Article II are 'nonjurisdictional.'") (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 878-79 (1991)); *see also Gordon*, 819 F.3d at 1191 n.5 ("We may address [the Appointments Clause] issue . . . because Gordon 'properly raised' it in the district court"). Thus, even after *Lucia*, this Court, as well as the Tenth and Sixth Circuits, have all held that Appointments Clause claims may be forfeited when a petitioner fails to preserve them before the agency. *Kabani & Co., Inc. v. SEC*, 733 F. App'x 918 (Mem.), 2018 WL 3828524 at *1 (unpub.) (9th Cir. Aug. 13, 2018) ("[P]etitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency."); *Turner Bros., Inc. v. Conley*, __ F. App'x __, 2018 WL 6523096, *1 (unpub.) (10th Cir. December 11, 2018) (agreeing that "Turner Brothers' failure to raise [Appointments Clause] issue to the agency is fatal."); *Jones Brothers, Inc. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018) (finding

Appointments Clause challenge forfeited when litigant failed to press issue before agency, but excusing the forfeiture in light of the unique circumstances of the case).

The Eighth and Federal Circuits reached the same result before *Lucia*. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 798 (8th Cir. 2013) (holding party waived Appointments Clause challenge by failing to raise the issue before the agency); *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (finding litigant forfeited Appointments Clause argument by failing to raise it before agency). Similarly, this Court, and the Sixth and D.C. Circuits have found Appointments Clause challenges forfeited when the petitioners failed to raise them in their opening brief before the court. *Kabani & Co.*, *supra*; *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2013).

The Federal Circuit has explained that a timeliness requirement for Appointments Clause challenges serves the same basic purposes as those underlying administrative exhaustion: "First, it gives [the] agency an opportunity to correct its own mistakes . . . before it is haled into

federal court, and [thus] discourages disregard of [the agency's] procedures." *In re DBC*, 545 F.3d at 1378 (internal quotations omitted). Second, "it promotes judicial efficiency, as [c]laims generally can be resolved much more quickly and economically in proceedings before [the] agency than in litigation in federal court." *Id.* at 1379 (quoting *Woodford v. Ngo*, 548 U.S. 81, 89 (2006)).

Both of those reasons apply here. If Claimant had timely raised the Appointments Clause challenge during the administrative proceedings, the Secretary of Labor, or the Board, could well have provided an appropriate remedy. In fact, both the Department of Labor and the Board have taken appropriate remedial actions: the Secretary of Labor ratified the prior appointments of all then-incumbent agency ALJs "to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution." *Secretary of Labor's Decision Ratifying the Appointments of Incumbent U.S. Department of Labor Administrative Law Judges* (Dec. 20, 2017).[11]

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

And the Board has held that where an ALJ was not properly appointed, the "parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge," and accordingly remanded the case for that to occur. *Miller v. Pine Branch Coal Sales, Inc.*, __ Black Lung Rep. (MB) __, BRB No. 18-323 BLA (Oct. 22, 2018) (*en banc*)[12]; *Billiter v. J&S Collieries*, BRB No. 18-0256 (Aug. 9, 2018) (remanding for Appointments Clause remedy); *Crum v. Amber Coal*, BRB No. 17-0387 (Feb. 26, 2018) (same). But because Claimant never timely raised the issue, neither the Secretary nor the Board was given an opportunity to consider and resolve the Appointments Clause issue during the normal course of administrative proceedings.

Even if Appointments Clause challenges could be "timely" raised to the Board in motions for reconsideration as a general matter, *but see supra* at 25-26, Claimant forfeited the argument here because he did not raise it at any point during the litigation of his underlying claim for LHWCA benefits. Having offered no challenge to ALJ Berlin's authority to award him benefits, Claimant should not be permitted to challenge

[12] Available at: https://www.dol.gov/brb/decisions/blklung/published/18-0323.pdf.

ALJ Berlin's authority to adjudicate his application for attorney's fees. Attorney-fee proceedings are ancillary to the merits of a LHWCA claim. An attorney-fee application must be filed with the ALJ "before whom the [legal] services were performed," 20 C.F.R. § 702.132(a), presuming that ALJ remains available. There is no dispute that all of the legal services in question were performed before ALJ Berlin. But the remedy Claimant seeks would take the authority to evaluate his fee petition away from ALJ Berlin and assign it to another ALJ who did not directly observe his counsel's advocacy.

Any fee approved must be "reasonably commensurate with the necessary work done, and shall take into account the quality of the representation, [and] the complexity of issues involved." 20 C.F.R. § 702.132(a). Those determinations are matters about which the ALJ who adjudicated the case—here, ALJ Berlin—has the most knowledge. Transferring the attorney-fee proceeding to another ALJ, as Claimant requests, would not only defeat the purpose of section 702.132(a)'s express mandate that fees be determined by the ALJ before whom the legal services were performed, but would also transgress the common-sense principle underlying that mandate: that the relevant factors

listed in section 702.132(a) are "uniquely within the knowledge" of the adjudicator before whom the attorney appeared. *Healy Tibbitts Builders, Inc. v. Cabral*, 201 F.3d 1090, 1096 (9th Cir. 2000)(citing 20 C.F.R. § 702.132(a)). Thus, Claimant forfeited his Appointments Clause issue by not raising it at all during the litigation of his claim on the merits in addition to failing to timely raise it in the collateral litigation over attorney's fees.

Finally, considering Appointments Clause arguments raised for the first time on appeal "would encourage what Justice Scalia has referred to as sandbagging, *i.e.*, 'suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if the outcome is unfavorable—claiming that the course followed was reversible error.'" *In re DBC*, 545 F.3d at 1379 (quoting *Freytag*, 501 U.S. at 895 (Scalia, J., concurring in part and concurring in the judgment)); *see also Exec. Ben. Ins. Agency v. Arkison* (*In re: Bellingham Ins. Agency, Inc.*), 702 F.3d 553, 570 (9th Cir. 2012) (quoting *Stern v. Marshall*, 564 U.S. 462, 481-82 (2011) ("the consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be particularly severe")));

First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969) ("[O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level."); *cf. Jones Bros.*, 898 F.3d at 677 (observing that "it's not as if Jones Brothers sandbagged the Commission or strategically slept on its rights").

In sum, Claimant failed to raise any Appointments Clause objection to the ALJ or Board during the litigation of his LHWCA claim. Even in the collateral litigation over the fee award, he did not mention the issue to the ALJ initially or in his motion for reconsideration to the ALJ, in his appeal to the Board, or even his first motion for reconsideration to the Board. There is no reason that he could not have timely raised this constitutional challenge during the administrative proceedings. This is quintessential forfeiture.

C. There are no grounds to excuse Claimant's failure to timely raise the Appointments Clause issue before the Benefits Review Board.

Claimant argues that his Appointments Clause challenge should be considered timely under *Lucia*, because Lucia's challenge was found timely despite not having been raised before the SEC ALJ. But this ignores the fact that, while Lucia did not raise the issue before the ALJ, he *did* timely raise it before the administrative agency—when it was on appeal to the Commission. 138 S. Ct. at 2050. Here, by contrast, Claimant failed to raise the issue before the ALJ and did not raise it to the Board until his second motion for reconsideration on the attorney's fee issue. The failure to timely raise the argument while the case was before the administrative agency distinguishes this case from *Lucia*, and renders Claimant's Appointments Clause challenge untimely.

Freytag does not change that outcome. Although the Supreme Court chose to exercise its discretion to consider an Appointments Clause issue that had not been raised before the Tax Court, it emphasized that *Freytag* was a "rare case," and did not purport categorically to excuse petitioners from abiding by ordinary principles of appellate review in Appointments Clause cases. *Freytag*, 501 U.S. at

879 (noting that Appointments Clause challenges are "nonjurisdictional"); *id.* at 893-94 (Scalia, J., concurring) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review.").[13]

Since it decided *Freytag*, the Supreme Court has emphasized that litigants are entitled to a remedy for an Appointments Clause violation when they have raised a "timely challenge." *Lucia*, 138 S.Ct. at 2055. *Lucia's* "timely challenge" prerequisite must be seen as cabining the discretion referred to in *Freytag* and highlighting the exceptionality of the Court's review there.[14] Moreover, the courts of appeals—including

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[13] Claimant quotes at length from *Freytag* but omits the Court's conclusion that *Freytag* is the "rare case." OB at 18-20. Claimant also disregards *Lucia's* emphasis on a timely challenge and how that constrains *Freytag*.

[14] Even if *Lucia's* repeated references to timeliness could be considered dicta, "this court considers itself bound by Supreme Court *dicta* almost as firmly as by the Court's outright holdings, particularly when the *dicta* is recent and not enfeebled by later statements." *Newdow v. U.S. Congress*, 328 F.3d 466, 480 n.17 (9th Cir. 2003), *rev'd on other grounds sub nom. Elk Grove Unified School Dist. v. Newdow*, 524 U.S. 1 (2004) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996)); *see also U.S. v. Baird,* 85 F.3d 450, 453 (9th Cir. 1996) (Court treats Supreme Court *dicta* with due deference); *Kabani & Co.,* 733 F. App'x 918, 2018 WL 3828524, at *1 (citing *Lucia* in holding that "petitioners forfeited their Appointments Clause claim by failing to raise it in their briefs or before the agency").

this Court—have often refused to consider post-*Freytag* Appointments Clause challenges that were never presented to an agency. *See supra* at 25-26.

Claimant's argument that his forfeiture should be excused because there was a change in law while the case was pending on appeal must also be rejected. The Appointments Clause was adopted in 1789. *Freytag* was decided in 1991, 501 U.S. 868, and the Tenth Circuit's decision in *Bandimere*, which reached the same conclusion as the Supreme Court later reached in *Lucia*, was decided in 2016, before either the ALJ's 2016 attorney-fee decision or the Board's later decisions here. Put simply, nothing prevented Claimant from timely raising a similar challenge to the ALJ's authority before *Lucia* was decided. *Island Creek Coal*, 910 F.3d at 257 (explaining that "[n]o precedent prevented the company from bringing the constitutional claim before [*Lucia*]" and that "*Lucia* itself noted that existing case law 'says everything necessary to decide this case.'").[15]

[15] By the time the Board issued its April 26, 2017 decision in Claimant's attorney-fee proceeding, there had been at least eleven reported court opinions that discussed Appointments Clause challenges to SEC ALJs. *Bandimere v. SEC*, 844 F.3d 1168, 1170 (10th Cir. Dec. 27, 2016); *Bennett v. SEC*, 844 F.3d 174, 177-78 (4th Cir. Dec. 16, 2016); *Lucia v.*

Claimant's reliance on *Ackerman v. Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988), is also misplaced, as *Ackerman* makes clear that an issue raised for the first time on appeal—even a purely legal issue—is ordinarily waived. *Id.* at 1517; *see also In re Howell*, 731 F.2d 624, 627 (9th Cir. 1984) ("In most circumstances, a federal appellate court will not consider an issue not passed upon below."); *United States v. Patrin*, 575 F.2d 708, 713 (9th Cir. 1978) (refusing to consider on appeal a challenge that "could have been raised and explored" below). The Court in *Ackerman* exercised its discretion to hear the previously unraised issue only because "[t]he issue has been thoroughly briefed and argued here, *and Ackerman has not objected to our consideration of*

SEC, 832 F.3d 277, 283 (D.C. Cir. Aug. 9, 2016), *affirmed by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. June 26, 2017); *Hill v. SEC*, 825 F.3d 1236, 1240 (11th Cir. June 17, 2016); *Tilton v. SEC*, 824 F.3d 276, 279-80 (2d Cir. June 1, 2016); *Bennett v. SEC*, 151 F. Supp. 3d 632, 633 (D. Md. Dec. 17, 2015); *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1312 (N.D. Ga. Nov. 17, 2015); *Duka v. SEC*, 124 F. Supp. 3d 287, 289 (S.D.N.Y. Aug. 12, 2015); *Gray Fin. Grp. v. SEC*, 166 F. Supp. 3d 1335, 1350 (N.D. Ga. Aug. 4, 2015); *Tilton v. SEC*, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015); *Hill v. SEC*, 114 F. Supp. 3d 1297, 1316 (N.D. Ga. June 8, 2015). In some of these cases, the courts did not reach the merits of the Appointments Clause claim because the litigants had not completed their administrative proceedings, and the courts lacked jurisdiction until those proceedings were completed. *See, e.g.*, *Hill*, 825 F.3d at 1252.

it." 860 F.2d at 1517 (emphasis added). That is obviously not the case here, as both the Director and Claimant's former employer objected to the Board hearing the Appointments Clause issue, and the Director continues to object in this Court.

Finally, Claimant argues that his failure to timely raise the Appointments Clause issue should be excused under *Jones Brothers.* OB 21-22. But that decision offers no such support because this case lacks the special distinguishing features that led the Sixth Circuit to excuse the forfeiture in that case. *Jones Brothers* involved a challenge to civil penalties imposed for safety violations under the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 801 *et seq.*). The petitioner did not raise the Appointments Clause issue to the ALJ. It did, however, identify that issue in its petition for discretionary review to the administrative appellate body, the Federal Mine Safety and Health Review Commission (FMSHRC), though it failed to press any argument for it. *Jones Bros.*, 898 F.3d at 672-73.

The Sixth Circuit ruled that Jones Brothers had forfeited its Appointments Clause claim by failing to argue it before FMSHRC. *Id.* at 677. But the court held that this forfeiture was excusable for two

reasons. First, it was not clear whether the Commission could have entertained an Appointments Clause challenge, given the statutory limits on the Commission's review authority. *Jones Bros.*, 898 F.3d at 673-77, 678 ("We understand why *that* question may have confused Jones Brothers"). Second, Jones Brothers' timely identification of the Appointments Clause issue for the Commission's consideration was reasonable in light of the uncertainty surrounding the Commission's authority to address the issue. *Id.* at 677-78 (merely identifying the issue was a "reasonable" course for a "petitioner who wishes to alert the Commission of a constitutional issue but is unsure (quite understandably) just what the Commission can do about it."). Given these circumstances, the court exercised its discretion to excuse the petitioner's forfeiture, but explained that this was an exceptional outcome: "[W]e generally expect parties like Jones Brothers to raise their as-applied or constitutional-avoidance challenges before the Commission and courts to hold them responsible for failing to do so." *Id.* at 677.

No similar exceptional circumstances exist here. Unlike Jones Brothers, Claimant did not timely identify the Appointments Clause

issue to the Board. He did not raise it at all during the merits litigation, and even in the collateral attorney's fee dispute he did not mention it until his second motion for reconsideration with the Board. Moreover, Claimant does not argue that the Board lacked the authority to address his Appointments Clause challenge. On the contrary, Claimant attempted to raise the issue, belatedly, before the Board. Nor could he have reasonably believed that the Board would refuse to entertain such a challenge. The Board has repeatedly provided remedies for Appointments Clause violations, *see supra* at 28, and has broadly interpreted its authority to decide substantive questions of law, including certain other constitutional issues. *See Shaw v. Bath Iron Works*, 22 BRBS 73 (1989) (addressing the constitutionality of the 1984 amendments to the Longshore Act); *Herrington v. Savannah Machine & Shipyard*, 17 BRBS 194 (1985) (addressing constitutional validity of statutes and regulations within its jurisdiction); *Smith v. Aerojet General Shipyards,* 16 BRBS 49 (1983) (addressing due process issue). *Jones Brothers* is simply inapposite.

If the Court were to excuse Claimant's forfeiture, there would be real world consequences. To the best of our knowledge, there are nearly

six hundred LHWCA and BLBA cases currently pending before the Board. But in over five hundred of these cases, no Appointments Clause claim has been raised. Should the Court excuse Claimant's forfeiture here—where he failed to timely raise the claim to the agency—it would be inviting every losing party at the Board to seek a re-do of years' worth of administrative proceedings by raising an Appointments Clause challenge in the courts of appeals.[16] For the LHWCA, which is designed to provide timely and certain relief to disabled workers, *see Nealon*, 996 F.2d at 970, that is precisely the kind of disruption that forfeiture seeks to avoid, *see L.A. Tucker*, 344 U.S. at 37 (cautioning against overturning administrative decisions where objections are untimely under agency practice). In sum, Claimant's Appointments Clause claim should be denied because he forfeited it below.

[16] In addition to this case, there are two appeals under the Longshore Act currently pending before this Court involving similar Appointments Clause challenges. *Dominguez v. Bethlehem Steel Corp., et al*, No. 18-70184; and *Bussanich v. Ports America, et al.,* No. 18-71189.

II.

CLAIMANT'S MOTION FOR RECONSIDERATION OF THE ALJ'S ATTORNEY-FEE DECISION WAS UNTIMELY

A. The LHWCA-Specific Board Regulation Takes Precedence Over the General OALJ Regulation Regarding the Deadline for Filing a Motion for Reconsideration of an ALJ's Decision

Congress created the Benefits Review Board within the Department of Labor (DOL) to hear administrative appeals arising under two statutes: the LHWCA and the BLBA. 33 U.S.C. § 921(b)(3) (incorporated into the BLBA by 30 U.S.C. § 932(a)). The Department promulgated rules of practice and procedure governing administrative appeals to the Board under those statutes. 20 C.F.R. Parts 801 and 802.

In contrast to the more specialized Board, DOL established its Office of Administrative Law Judges to provide the evidentiary hearings called for by many of the statutes that DOL administers, including, but not limited to, the LHWCA and the Black Lung Benefits Act (BLBA).[17]

[17] OALJ's website states that it "hears cases arising in over 80 other labor-related statutes, Executive Orders, and regulations, including such diverse subjects as: whistleblower complaints involving corporate fraud and violations of transportation, environmental and food safety statutes; alien labor certifications; actions involving the working conditions of migrant farm laborers; grants administration relating to preparation of workers and job seekers to attain needed skills and training; prohibition of workplace discrimination by government

When DOL promulgated general rules of practice and procedure for OALJ, DOL carefully tailored the scope of those rules to ensure that they would yield when inconsistent with any program-specific statutes, regulations, or executive orders. 29 C.F.R. § 18.10(a).

This case turns on whether the Board or the OALJ regulations governing the timeliness of a motion for reconsideration applies. In cases arising under the LHWCA, the Board regulation specifies that a timely motion for reconsideration of an ALJ's decision must be filed no later than ten days after the "filing" of the ALJ's decision. 20 C.F.R. § 802.206(b)(1). A timely motion for reconsideration of an ALJ's decision suspends the time to appeal. 20 C.F.R. § 802.206(a).

In contrast, the OALJ only has a general reconsideration rule, which states that a timely motion for reconsideration of an ALJ's decision must be filed not later than ten days after "service" of the decision on the moving party. 29 C.F.R. § 18.93. Further, the OALJ regulations provide in 29 C.F.R. § 18.32(c) that a party is entitled to

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contractors; minimum wage disputes; child labor violations; mine safety variances; OSHA formal rulemaking proceedings; federal contract disputes; civil fraud in federal programs; certain recordkeeping required by ERISA; and standards of conduct in union elections." https://www.oalj.dol.gov.

three extra days to take any action required or permitted in response to any paper served on it by mail pursuant to 29 C.F.R. § 18.30(a)(2)(ii)(C).

Thus, although the OALJ and the Board regulations on motions for reconsideration both set a ten-day deadline, the OALJ deadline runs from service—and provides extra time in the case of service by mail—whereas the Board's regulation runs from filing. Filing of an ALJ's decision under LHWCA section 19(e) (33 U.S.C. § 919(e)) and the LHWCA-specific regulation, 20 C.F.R. § 702.349(a), is not accomplished until service on the parties is effected. *Nealon v. California Stevedore & Ballast Co.*, 996 F.3d 966, 968 (9th Cir. 1993). But that principle does not change the fact that section 802.206(b)(1)'s ten-day deadline runs from filing, especially where, as here, Claimant concedes that ALJ Berlin's attorney-fee decision was filed and served on the same day. OB at 7; *see* ER at 10.[18]

[18] *Nealon* did not address whether "service" was effectuated upon mailing by the district director or if it also required receipt by the parties. In applying *Nealon*, however, the Board has held that service required only mailing by the district director, not receipt by the parties. *Beach v. Noble Drilling Corp.*, 29 BRBS 22, 25 (1995). There is no need for the Court to resolve that question in this case. Claimant admits that the ALJ's fee decision was served on September 23, 2016, the same day it was filed by the district director, OB 7, ER at 10, and does not even mention what date he received the decision. Rather, he argues only that

Given the inconsistency of the OALJ regulations with LHWCA section 19(e) and the Board regulation at 20 C.F.R. § 802.206(b)(1), the general OALJ regulations must yield to the LHWCA-specific provisions—as the OALJ regulations themselves recognize in 29 C.F.R. § 18.10(a).

Claimant's arguments that the OALJ regulations should take precedence lack merit:

First, Claimant asserts that the guiding principle of interpreting the LHWCA broadly in light of its "humanitarian purposes" requires that "the law should be construed in such a way to liberally preserve appeal rights." OB at 22-23. Indeed, such considerations animated this Court's decision in *Nealon*. *See* 996 F.2d at 970, 972 n.10.[19] But Claimant here advocates applying OALJ regulations *instead of* the LHWCA and the LHWCA-specific regulations. Regardless, any concern about appeal or reconsideration time periods being shortened when ALJ

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he had thirteen days—not ten—from September 23, 2016, to file a motion for reconsideration.

[19] This case is distinguishable from *Nealon*, in which there was no evidence that claimant or his attorney had been served with the ALJ's decision. Claimant here concedes that ALJ Berlin's attorney-fee decision was filed and served on the same date.

decisions are served by mail can be easily eliminated through electronic service. As of June 10, 2015—well over a year before the events in question in this case—any party or party representative to a LHWCA claim was empowered to opt for electronic service instead of mail service. 20 C.F.R. § 702.349(b). A parallel option for electronic filing of papers with OALJ is provided by 29 C.F.R. § 18.30(b)(3)(i)(A) (allowing a party to file a document with an ALJ via fax or electronic delivery with the ALJ's permission)—an option that Claimant's counsel exercised when he obtained the ALJ's permission to, and did, file his October 6, 2016 motion for reconsideration via fax. *See* OB at 7. In any event, the trend toward electronic service will likely render the timeliness issue in this case obsolete in future cases.[20]

Claimant's second argument is similarly premised on the LHWCA's "humanistic purposes" (*see* OB at 31)—and similarly lacking in merit. According to Claimant, the fact that even the experienced attorneys representing both Claimant and Employer in this case read the regulations as providing thirteen days for filing the motion for

[20] The Board has also established a system for electronic filing and service. *See* "Notice Regarding Availability of Electronic Filing and Electronic Service," available at https://www.dol.gov/brb/welcome.html.

reconsideration "evidence[s] that this is a trap for the unwary and the wary alike." OB at 31. A prudent attorney, however, would have recognized that reading of the regulations was not the only possible reading. Indeed, the Board's May 23, 2016 decision in *Shah*, which preceded the events in question in this case by four months—and in which the same attorney represented claimant as in this case—expressly rejected an attempt to extend the time to file a motion for reconsideration based on the OALJ regulations. *Shah*, 2016 WL 8377238 *2, 3. Further, the Board reached that conclusion in *Shah* based on the Fifth Circuit's holding to the same effect in *Galle*. *Shah*, at *3; *Galle*, 246 F.3d at 450. Thus, any prudent attorney—and especially Claimant's attorney in this case—should have understood the risk involved in relying on the three-day grace period provided by the general OALJ regulations, and therefore should have erred on the side of caution and filed Claimant's motion for reconsideration within ten days.

Claimant's argument that if the OALJ had "intended to echo the Board's language and start the 10 days at the time the decision was 'filed' . . . as opposed to . . . 'served,' it certainly could have done so," OB

at 32—actually proves the Director's point. The fact that section 18.93's ten-day deadline for filing a motion for reconsideration runs from service—and provides three extra days when service is by mail—conflicts with the ten-day deadline of section 802.206(b)(1), which runs from filing.[21] This argument necessarily concedes the conflict between the OALJ and Board regulations. Given that conflict, as already mentioned above, 29 C.F.R. § 18.10(a) compels the conclusion that the Board's LHWCA-specific regulation takes precedence over OALJ's general rule.

B. Claimant's Reliance on the Fifth Circuit's Decision in *Galle* is Misplaced

In its 2001 decision in *Galle*, the Fifth Circuit initially rejected the contention that OALJ regulations supersede the Board regulations with respect to the timeliness of a motion for reconsideration of an ALJ's decision in a LHWCA case. 246 F.3d at 450. The Fifth Circuit

[21] Claimant's argument that section 18.30(a) encompasses not only papers filed with OALJ, but also papers filed by ALJs (OB 31), need not be resolved. Even if Claimant is correct, that would only enable Claimant to argue that the cross-reference to 18.30(a) in section 18.32(c)'s three-day grace period applies to section 18.93's ten-days-from-service limit for reconsideration motions. That argument, however, fails to address the conflict between section 18.93's use of the term "service" and section 802.206(b)(1)'s use of the term "filed."

nevertheless held that the motion for reconsideration in question was timely filed because FRCP 6(a) applied, and excluded intermediate weekends from the ten-day computation. *Id.*

Even if *Galle's* reasoning is persuasive, that decision no longer supports Claimant's argument. As Claimant acknowledges, the 2009 amendments to the Federal Rules of Civil Procedure amended Rule 6(a) to include intermediate weekends and holidays in the computation of time periods measured in days. *See* OB at 28. Claimant nevertheless argues that the pre-2009 version of FRCP 6(a) "*remains* the appropriate calculation" because that was the version of FRCP 6(a) in effect at the time section 802.206's "passage"—which Claimant identifies as a 1987 amendment to section 802.206. OB at 33 (emphasis in original), and fn.9.

The 1987 amendments to section 802.206, however, did not amend subsection (b)(1)'s pre-existing ten-day provision. Rather, the 1987 amendment added subsection (c) (specifying that the Board will consider a motion for reconsideration of an ALJ's decision timely based on the date of the postmark in the event that the date of delivery to the ALJ would render the motion untimely), and subsection (f) (requiring

any party having knowledge of the filing of a motion for reconsideration with the ALJ to so notify the Board). *See* 52 Fed. Reg. 27292 (July 20, 1987). The Board's pre-existing ten-day regulation was promulgated (as 20 C.F.R. § 802.205A) in 1978. *See* 43 Fed. Reg. 42144 (Sept. 19, 1978). At that time, FRCP 6(a) excluded intermediate weekends and holidays in computing time, but only for periods of seven days or less; the exclusion was extended to periods less than eleven days in 1985. *See Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141, 144 n.8 (1999), *aff'd*, 246 F.3d 440 (5th Cir. 2001). Thus, even under Claimant's reasoning, FRCP 6(a) should not apply to computing the Board's ten-day regulation because when that regulation was promulgated in 1978, FRCP 6(a) applied to periods of seven days or less.

Further, the Board has its own computation regulation which expressly addresses the counting of weekends and holidays: 20 C.F.R. § 802.221(a). The regulation states that the last day of any time period in the Board's regulations "shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday." Thus, the Board's program-specific rule (applicable under the LHWCA and the

BLBA), which differs from FRCP 6(a) with respect to counting of intermediate weekends and holidays, takes precedence in any event. Moreover, the Board's computation regulation, as applied to this case, is consistent with the current version of FRCP 6(a) insofar as both include intermediate weekends and holidays in computing a time period of less than eleven days. Claimant's motion for reconsideration to the ALJ was untimely.

III.

CLAIMANT FORFEITED HIS ARGUMENT THAT THE ALJ FAILED TO REALIZE THAT HE HAD DISCRETION TO ENTERTAIN THE UNTIMELY MOTION FOR RECONSIDERATION

In cases under the LHWCA, this Court will not consider issues that were not raised and preserved before the Board. *E.g., Kalama Services, Inc.*, 354 F.3d at 1094. Claimant failed to argue to the Board that the ALJ did not realize he had the discretion to entertain an untimely motion for reconsideration. Consequently, Claimant may not raise this issue for the first time in this Court. That principle applies with particular force here because the determination of attorney's fees "should not result in a second major litigation." *Fox v. Vice*, 563 U.S. 826, 838 (2011). The attorney-fee litigation in this case has already

added three years (and counting) to the five years it took to conclude the merits phase of the litigation.

In any event, Claimant's assertion that ALJ Berlin did not realize that he had it within his discretion to entertain an untimely motion for reconsideration is incorrect. In previous decisions, ALJ Berlin has demonstrated a full understanding of that principle. *In the Matter of H.H. v. Marine Terminals Corp.*, 2008 WL 10662913 *5 ("The decision whether to allow reconsideration is within the [ALJ]'s discretion"), *6 (considering whether claimant's untimely filing of motion for reconsideration should be excused); *see also In the Matter of Henry Hanson v. Marine Terminals Corp.*, 2011 WL 12559593 *5, 6 (on second remand, considering whether claimant's untimely filing of motion for reconsideration should be excused).

Similarly, Claimant's assertion that ALJ Berlin was not aware of the OALJ regulations is tantamount to accusing ALJ Berlin of not having read Claimant's motion for reconsideration, which, as Claimant acknowledges (OB at 40), cited the OALJ regulations. Moreover, as discussed in Argument II, above, the OALJ regulations do not support Claimant's position. Likewise, Claimant's assertion that the ALJ was

unaware of the Fifth Circuit's decision in *Galle* (OB at 40-41) overlooks the fact that *Galle's* reasoning offers no support to Claimant because FRCP 6(a) was subsequently amended.

Finally, Claimant's insinuation that the filing of ALJ Berlin's decision denying reconsideration was delayed "exactly long enough that the parties both lost their appellate rights" is not well-taken. *See* OB at 41. Nothing prevented Claimant from filing a protective appeal of ALJ Berlin's attorney-fee decision with the Board while Claimant's motion for reconsideration was pending before the ALJ. Claimant did precisely that when he filed a petition for review with this Court while his second motion for reconsideration was pending before the Board

CONCLUSION

The Director urges the Court to deny the petition for review and affirm the Board's decision holding that Claimant's motion for reconsideration of the ALJ's attorney-fee decision was untimely, and therefore did not toll the time for appealing to the Board.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Appointments Clause issue is also raised in

Bussanich v. Ports America, et al., Case No. 18-71189; and

Dominguez v. Bethlehem Steel Corporation, Case No. 19-70184.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 10,189 words as determined by Microsoft Office Word, the processing system used to prepare the brief, and therefore complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Ninth Cir. Rule 32-1.

/s/Edward Waldman
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CERTIFICATE OF SERVICE

This will certify that I electronically filed the foregoing Response Brief with the Court's Clerk on February 1, 2019, by using the Court's CM/ECF electronic filing system, which will send notice to counsel of record.

/s/ Edward Waldman
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

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30 U.S.C. § 919(e)
LHWCA section 19(e)

(e) Filing and mailing of order rejecting claim or making award
The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

20 C.F.R. § 702.349(a)
Office of Workers' Compensation Programs

(a) An administrative law judge must, within 20 days after the official termination of the hearing, deliver by mail, or otherwise, to the district director that administered the claim, the transcript of the hearing, other documents or pleadings filed with him with respect to the claim, and his signed compensation order. Upon receipt thereof, the district director, being the official custodian of all records with respect to claims he administers, must formally date and file the transcript, pleadings, and compensation order in his office. Such filing must be accomplished by the close of business on the next succeeding working day, and the district director must, on the same day as the filing was accomplished, serve a copy of the compensation order on the parties and on the representatives of the parties, if any. Service on the parties and their representatives must be made by certified mail unless a party has previously waived service by this method under paragraph (b) of this section.

20 C.F.R. § 802.206
Benefits Review Board

(a) A timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner shall suspend the running of the time for filing a notice of appeal.
(b)(1) In a case involving a claim filed under the Longshore and Harbor Workers' Compensation Act or its extensions (see § 802.101(b)(1)–(5)), a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 10 days from the date the decision or order was filed in the Office of the Deputy Commissioner.
(2) In a case involving a claim filed under [the Black Lung Benefits Act], a timely motion for reconsideration for purposes of paragraph (a) of this section is one which is filed not later than 30 days from the date the decision or order was served on all parties by the administrative law judge and considered filed in the Office of the Deputy Commissioner (see §§ 725.478 and 725.479(b), (c) of this title).
(c) If the motion for reconsideration is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence such as, but not limited to, certified mail receipts, certificates of service and affidavits may also be used to establish the mailing date.
(d) If a motion for reconsideration is granted, the full time for filing an appeal commences on the date the subsequent decision or order on reconsideration is filed as provided in § 802.205.
(e) If a motion for reconsideration is denied, the full time for filing an appeal commences on the date the order denying reconsideration is filed as provided in § 802.205.
(f) If a timely motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice

as premature. Following decision by the administrative law judge or deputy commissioner pursuant to either paragraph (d) or (e) of this section, a new notice of appeal shall be filed with the Clerk of the Board by any party who wishes to appeal. During the pendency of an appeal to the Board, any party having knowledge that a motion for reconsideration of a decision or order of an administrative law judge or deputy commissioner has been filed shall notify the Board of such filing.

20 C.F.R. § 802.221(a)
Benefits Review Board

(a) In computing any period of time prescribed or allowed by these rules, by direction of the Board, or by any applicable statute which does not provide otherwise, the day from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

29 C.F.R. § 18.10(a)
Office of Administrative Law Judges

(a) In general. These rules govern the procedure in proceedings before the United States Department of Labor, Office of Administrative Law Judges. They should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding. To the extent that these rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.

29 C.F.R. § 18.30(a)
Office of Administrative Law Judges

(a) Service on parties—
(1) In general. Unless these rules provide otherwise, all papers filed with OALJ or with the judge must be served on every party.
(2) Service: how made—
(i) Serving a party's representative. If a party is represented, service under this section must be made on the representative. The judge also may order service on the party.
(ii) Service in general. A paper is served under this section by:
(A) Handing it to the person;
(B) Leaving it;
(1) At the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
(2) If the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there.
(C) Mailing it to the person's last known address—in which event service is complete upon mailing;

(D) Leaving it with the docket clerk if the person has no known address;
(E) Sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or
(F) Delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.
(3) Certificate of service. A certificate of service is a signed written statement that the paper was served on all parties. The statement must include:
(i) The title of the document;
(ii) The name and address of each person or representative being served;
(iii) The name of the party filing the paper and the party's representative, if any;
(iv) The date of service; and
(v) How the paper was served.

29 C.F.R. § 18.32
Office of Administrative Law Judges

(a) Computing time. The following rules apply in computing any time period specified in these rules, a judge's order, or in any statute, regulation, or executive order that does not specify a method of computing time.
(1) When the period is stated in days or a longer unit of time:
(i) Exclude the day of the event that triggers the period;
(ii) Count every day, including intermediate Saturdays, Sundays, and legal holidays; and
(iii) Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.
(2) “Last day” defined. Unless a different time is set by a statute, regulation, executive order, or judge's order, the “last day” ends at 4:30 p.m. local time where the event is to occur.

(3) "Next day" defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
(4) "Legal holiday" defined. "Legal holiday" means the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and any day on which the district office in which the document is to be filed is closed or otherwise inaccessible.
(b) Extending time. When an act may or must be done within a specified time, the judge may, for good cause, extend the time:
(1) With or without motion or notice if the judge acts, or if a request is made, before the original time or its extension expires; or
(2) On motion made after the time has expired if the party failed to act because of excusable neglect.
(c) Additional time after certain kinds of service. When a party may or must act within a specified time after service and service is made under § 18.30(a)(2)(ii)(C) or (D), 3 days are added after the period would otherwise expire under paragraph (a) of this section.

29 C.F.R. § 18.93
Office of Administrative Law Judges

A motion for reconsideration of a decision and order must be filed no later than 10 days after service of the decision on the moving party.

Federal Rule of Civil Procedure 6(a)(1)

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:
(A) exclude the day of the event that triggers the period;
(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.