



BRB No. 19-0103

GEORGE KIYUNA )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 MATSON TERMINALS, INCORPORATED )  
 )  
 and )  
 )  
 SIGNAL MUTUAL INDEMNITY )  
 ASSOCIATION, LIMITED )  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent )

**PUBLISHED**

DATE ISSUED: 06/25/2019

ORDER

Claimant has filed a Motion for Summary Vacatur of the Decision and Order Denying Additional Benefits and the Order Denying Reconsideration (2016-LHC-00140, 00141, 00142) of Administrative Law Judge Jennifer Gee. Employer filed a motion to strike claimant’s motion. The Director, Office of Workers’ Compensation Programs (the Director), filed a response, opposing the motion for summary vacatur. For the reasons that follow, we deny claimant’s motion for summary vacatur and grant his motion for an extension of time to file a petition for review and brief.

This case involves consolidated claims for injuries arising out of three separate incidents at work. After a hearing held over several days in October 2016, the administrative law judge issued a Decision and Order Denying Additional Benefits dated September 10, 2018.

On September 21, 2018, claimant filed a motion for reconsideration with the administrative law judge, alleging an Appointments Clause violation pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. \_\_\_, 138 S. Ct. 2044 (2018).<sup>1</sup> Claimant sought to have the decision vacated and the case assigned to a different administrative law judge on the basis that Judge Gee's appointment was invalid. Employer and the Director each filed responses, urging the administrative law judge to deny the motion for reconsideration because the Appointments Clause challenge was forfeited as untimely raised.

In her Order Denying Reconsideration, the administrative law judge noted *Lucia* was decided on June 21, 2018, two and a half months before she issued her Decision and Order and three months before claimant raised his Appointments Clause argument. She also found claimant should have been aware of the issue prior to *Lucia* in light of the Secretary of Labor's December 21, 2017 ratification of the appointments of all Department of Labor administrative law judges, including her own, in anticipation of Appointments Clause challenges. As claimant had sufficient time to raise an Appointments Clause challenge prior to the administrative law judge's issuance of her Decision and Order, the administrative law judge found his *Lucia* motion untimely and the issue forfeited. Further, she declined to excuse the forfeiture, finding that claimant's raising of the issue after he received an unfavorable decision "smacks of sandbagging" and "judge-shopping." Order Denying Recon. at 13-14. She therefore denied claimant's motion for reconsideration.

Claimant timely appealed the administrative law judge's Decision and Order and Order Denying Reconsideration to the Board, 33 U.S.C. §921(a), and filed this Motion for Summary Vacatur of the Decision and Order Denying Additional Benefits. He asserts that because the administrative law judge was not properly appointed in accordance with the Appointments Clause and took "significant action" before her appointment was ratified, the Decision and Order should be vacated and the case remanded to a different, properly-appointed administrative law judge for a new hearing and decision. He also contends his challenge is timely because it is being raised before the "agency," i.e., the Board. The Director filed a response, urging the Board to deny claimant's motion as the administrative

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<sup>1</sup> *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). U.S. Const. Art. II, §2, cl. 2. The Supreme Court held that SEC administrative law judges are "inferior Officers" under the Appointments Clause of the U.S. Constitution and therefore must be appointed by the President, courts, or heads of departments. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. \_\_\_, 138 S. Ct. 2044, 2053-2055 (2018). A litigant who "timely" raises an Appointments Clause challenge regarding an improperly appointed judge is entitled to a new hearing before a new, constitutionally appointed administrative law judge. *Id.* at 2055.

law judge properly found the Appointments Clause challenge forfeited and exercised her discretion to find the forfeiture unexcused.<sup>2</sup>

Claimant first asserts that an Appointments Clause challenge is timely when raised to the Board, regardless of whether it was raised to the administrative law judge, and thus the claim must be remanded. “[O]ne who makes a *timely* challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief.” *Lucia*, 138 S. Ct. at 2055 (emphasis added). In this respect, Appointments Clause challenges are “non-jurisdictional” and subject to the doctrines of waiver and forfeiture. *See Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009); *see also Jones Bros., Inc. v. Sec’y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018).

The doctrines of waiver and forfeiture are discretionary: courts should proceed on a case-by-case basis to determine whether circumstances excuse the failure to timely raise an issue. *See, e.g., Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 879 (1991) (“We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners’ challenge to the constitutional authority of the Special Trial Judge.”); *see also Jones Bros.*, 898 F.3d at 677 (circumstances of the case warranted judicial review of forfeited Appointments Clause challenge); *but see Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254 (6th Cir. 2018) (declining to excuse forfeited Appointments Clause challenge); *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008) (declining to excuse waived Appointments Clause challenge). Because the issue can be waived or forfeited, we reject claimant’s contention that his Appointments Clause argument is one of “pure law” that must be addressed regardless of whether it was timely raised below.

Apart from stating that his Appointments Clause argument is timely in light of “general waiver principles,” claimant does not challenge any findings or legal conclusions made by the administrative law judge in denying his motion for reconsideration as untimely. The administrative law judge first emphasized that motions for reconsideration should not be used to raise arguments for the first time that could reasonably have been raised earlier in the litigation. *See Order Denying Recon.* at 8. She noted that *Lucia* was issued more than two months prior to her original Decision and Order but claimant did not raise a challenge in that period. *See id.* at 11. Moreover, post-hearing briefing was not completed until August 31, 2018, also well after the issuance of *Lucia*, but claimant did

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<sup>2</sup> We reject the Director’s contention that claimant raised this issue prematurely. A party is entitled to file a potentially dispositive motion, which must be in a separate document, before filing a Petition for Review and brief. 20 C.F.R. §802.219.

not raise the issue.<sup>3</sup> *See id.* at 2. The administrative law judge rationally found that claimant had sufficient time after the decision in *Lucia* to raise an Appointments Clause challenge but did not do so until after an adverse decision was issued. Order Denying Recon. at 13. Thus, we affirm her finding that the issue first raised in claimant’s motion for reconsideration was forfeited.<sup>4</sup> *See generally Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018); *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018).

The administrative law judge also found, within her discretion, that claimant’s counsel’s admitted lack of awareness of the law is not a sufficient basis for excusing forfeiture. *See In re DBC*, 545 F.3d at 1380 (“We are not persuaded to overlook DBC’s lack of diligence to present an [Appointments Clause] issue of which it was, or should have been, aware.”). With no other explanation to account for claimant’s failure to raise the *Lucia* decision prior to her denial of the claim, the administrative law judge reasonably concluded that claimant’s untimely Appointments Clause arguments constitute “judge-shopping” and “sand-bagging.” *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against entertaining untimely-raised arguments to “prevent[] litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware”). Relatedly, claimant’s contention that *Lucia* represents “new law” that was decided “after both of the administrative decisions herein” is incorrect.

Finally, we reject claimant’s argument that he was not required to timely raise the issue below on the basis that an administrative law judge cannot address “facial challenges” to her own appointment. The administrative law judge correctly found claimant’s challenge to her appointment is an “as-applied” challenge that, as noted above, can be waived or forfeited. *See Jones Bros.*, 898 F.3d 669; Order Denying Recon. at 12. Moreover, claimant does not contest the administrative law judge’s finding that a remedy was available to him had he timely raised the issue: she could have referred the case back

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<sup>3</sup> The formal hearing was held on October 26, 27, and 31, 2016. Dr. London’s post-hearing deposition was admitted into evidence on June 20, 2017. Employer’s post-hearing brief was submitted on July 31, 2017. Claimant’s post-hearing brief was submitted on August 31, 2017, with new evidence attached. The administrative law judge admitted the evidence and gave employer the chance to respond to it. Additional briefing was required in 2018, with the last brief filed on August 31, 2018, more than two months after *Lucia* was issued. *See* Order Denying Recon. at 2.

<sup>4</sup> Because claimant failed to timely raise his Appointments Clause challenge even after *Lucia* was issued, we need not address whether claimant’s failure to raise the issue at an earlier date constitutes forfeiture.

to the Office of Administrative Law Judges for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision based on the record developed at that hearing. *See In re DBC*, 545 F.3d 1373. The administrative law judge gave thoughtful consideration to the procedural posture of this case and the bases on which claimant's forfeiture might be excused. Order Denying Recon. at 12-13. Finding no compelling reason to excuse the forfeiture, she denied claimant's motion for reconsideration. Claimant has not established that she abused her discretion or that her decision is contrary to law. *See Freytag*, 501 U.S. at 879.

Accordingly, we affirm the administrative law judge's Order Denying Reconsideration and we deny claimant's motion for summary vacatur. Claimant's motion for an extension of time to file his petition for review and supporting brief is granted. 20 C.F.R. §802.217. Claimant is directed to file his petition for review and supporting brief on the merits of his appeal within 30 days of his receipt of this order. 20 C.F.R. §802.211.

SO ORDERED.



GREG J. BUZZARD  
Administrative Appeals Judge



RYAN GILLIGAN  
Administrative Appeals Judge



JONATHAN ROLFE  
Administrative Appeals Judge