



BRB Nos. 17-0478 BLA
and 17-0479 BLA
Case Nos. 2012-BLA-05850
and 2015-BLA-05647

LILLIE NEACE)
(o/b/o and Widow of ISHMEAL NEACE))

Claimant-Respondent)

v.)

CUMBERLAND RIVER COAL COMPANY,)
Self-Insured Through ARCH COAL,)
INCORPORATED, c/o UNDERWRITERS)
SAFETY AND CLAIMS)

DATE ISSUED: 12/17/2018

Employer/Carrier-)
Petitioners)

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

ORDER on)
RECONSIDERATION)
EN BANC)

Party-in-Interest)

As a majority of the Board's permanent members has voted not to vacate or modify the Decision and Order herein, the motion for reconsideration en banc filed by employer is DENIED.¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(c); 802.407(a), (d); 802.409.

¹ Employer argues on reconsideration that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II §2, cl. 2. The Director, Office of Workers' Compensation Programs (the Director), responds that employer forfeited this argument by failing to raise it in its opening brief. We agree with the Director. Employer first raised its Appointments Clause argument in a motion to hold this case in abeyance filed six months after the filing of its petition for review and brief, and it later raised the argument again in a motion to remand

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. The Board denied both motions because employer failed to raise the Appointments Clause argument in its petition for review and supporting brief. *Neace v. Cumberland River Coal Co.*, BRB Nos. 17-0478 BLA, 17-0479 BLA (Apr. 19, 2018)(Order)(unpub.); *Neace v. Cumberland River Coal Co.*, BRB Nos. 17-0478 BLA, 17-0479 BLA, slip op. at 3 n.6 (Aug. 15, 2018)(unpub.); see *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (requiring “a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party’s] case”); *Island Creek Coal Co. v. Wilkerson*, F.3d , No. 18-3147, 2018 WL 6301617 at *1-2 (6th Cir. Dec. 3, 2018) (holding that the employer forfeited its Appointments Clause challenge by failing to raise it in its opening brief). For the same reasons, we again hold that employer forfeited its argument. The Board has considered employer’s arguments that “exceptional circumstances” should excuse its forfeiture, and concludes that they lack merit. See *Wilkerson*, 2018 WL 6301617 at *2; Motion for Reconsideration at 6-8.