



BRB No. 17-0482 BLA

CHARLIE BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABUNDANCE COAL, INCORPORATED	)	
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	DATE ISSUED: 11/16/2018
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	ORDER on
	)	RECONSIDERATION

As no member of the panel has voted to vacate or modify the decision herein, the motion for reconsideration filed by employer is DENIED.<sup>1</sup> 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301(b); 802.407(a); 802.409.

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<sup>1</sup> Employer argues for the first time on reconsideration that the manner in which Department of Labor administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer’s Motion for Reconsideration at 1-2. The Director, Office of Workers’ Compensation Programs (the Director), responds that employer waived this argument by failing to raise it in its opening brief. We agree with the Director. Because employer first raised the Appointments Clause issue only after the

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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Board issued its decision affirming the administrative law judge's award of benefits, employer waived the issue. *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"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). Employer's assertion that its failure to raise the argument should be excused because in its view the Board does not have the authority to decide constitutional issues is without merit. *Gibas v. Director, OWCP*, 748 F.2d 1112, 1119 (6th Cir. 1984) ("Congress intended to invest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts.") (citation omitted).