June 29, 2015

VIA ELECTRONIC MAIL

U.S. Department of Labor
Division of Coal Miners Workers' Compensation Programs
Office of Workers' Compensation Programs
Room C-3520
200 Constitution Avenue N.W.
Washington, DC 20210

Re: Comments on Proposed Revisions to 20 C.F.R. Part 725 - Claims For Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act as Amended

This document presents the comments of The National Mining Association ("NMA"), American Insurance Association ("AIA"), Old Republic Insurance Company ("Old Republic") and the American Mining Insurance Company ("American Mining") to the proposed revisions to 20 C.F.R. Part 725 published for notice and comment at 80 Fed. Reg. 23743-23754 (April 29, 2015).

These commenters are significant stakeholders in the federal black lung program.

The National Mining Association's members are producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to mining. These regulations will directly impact companies included in NMA's membership.

The American Insurance Association is a leading national trade association representing approximately 325 major property and casualty insurance companies. AIA members collectively underwrite nearly $19 billion in workers' compensation premiums nationwide, comprising more than 35% of the market. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide.

The Old Republic Insurance Company, a subsidiary of the Old Republic International Corp., is a commercial insurance carrier licensed in most coal mining states to insure the workers' compensation liability of mine operators under the Black Lung Benefits Act ("BLBA" or "Act"). For many years, Old Republic was the principal servicing carrier for coal mine-related workers' compensation for the National Workers' Compensation Reinsurance Pool and various state residual market pools in coal mining states allowing private workers' compensation insurance. Old Republic has administered over 35,000 federal black lung claims since 1974, as a direct insurer, residual market servicing carrier and third party administrator.

The American Mining Insurance Company, a W.R. Berkley Company, is a commercial insurance carrier licensed to offer workers' compensation insurance coverage to employers in forty-eight states. Since 1989, American Mining has offered voluntary market insurance coverage including federal black lung coverage in all coal mining states.

I. GENERAL COMMENTS ON THE PROPOSED RULES

The proposed regulations are both disappointing and disturbing. There is no showing that they are necessary, much less a good idea. No empirical evidence is offered to support these changes and the most significant of them are based solely upon one-of-a-kind anecdotes that have not reoccurred and that do not accurately or fairly characterize the handling of claims under the federal black lung program.

In the absence of data showing a genuine need to further prejudice employers and carriers who are attempting to exercise their right to defend non-meritorious and questionable claims, the Department has offered only unrepresentative and unpersuasive anecdotes to justify major regulatory changes to protect claimants from non-existent threats, and a lawyer's brief-like preamble that alleges unproved and mostly non-existent problems. This unnecessary effort adds to an increasingly hostile and burdensome regulatory environment of late in which the Department has broadened the reach and effect of the BLBA into a larger social program, well beyond its original capacity and intent and at a significant expense to the private and self-insurance sectors that originally contracted to fairly address these claims.

Most troubling is that the proposed modification provisions, evidentiary provisions and enforcement provisions are not authorized by law and not within the Department's interpretative authority. The proposals in these areas violate the language and the intent of the BLBA, the Longshore Act and the Administrative Procedure Act in important ways and in some instances, ignore or accord no respect to compromises and agreements made by the Department, Congress and stakeholders decades ago. The Department is not free to abandon longstanding agreements and practices for the reasons offered in support of these proposals.

The proposed regulations are unauthorized, unnecessary and punitive. They will increase claims litigation, delay payments to claimants and disrupt the orderly litigation of benefits claims. The Department should abandon this ill-conceived proposal.

While these commenters oppose these proposed regulations, we are willing to work with the Department on a pro-active approach to address the more pressing problems facing the program including prevention, medical cost containment, and more efficient claims processing.

II. SPECIFIC COMMENT ON PROPOSED RULES

A. Modification Proposals.

Proposed 20 C.F.R. § 725.310 revises the rules governing requests for modification by employers and carriers to prohibit access to this remedy unless the employer previously has paid interim benefits to the claimant, all attorneys' fees due, all interest and penalties that might be due and has reimbursed the Trust Fund for benefits and medical expenses paid by the Fund.

This proposal is plainly unauthorized by the statute and unsupported by any controlling authority or good reason. It essentially eliminates the remedy for employers.

The Supreme Court has frequently recognized the magnanimous scope of the modification remedy and the degree to which it welcomes the efforts of any party to a claim to seek a more accurate and appropriate outcome. The authorities are very clear and include *O'Keefe v. Aerojet Gen. Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971), *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, 461-64 (1968), among others.

In no case has the Supreme Court or a majority opinion in any federal court held that the modification remedy may be burdened or withdrawn by the Department's unilateral decision in order to punish a party or achieve an objective that is unrelated to the clear congressional purpose of favoring accuracy in decisions over finality.

Yet here, for the first time, the Department proposes to depart from statutory text, which makes no suggestion that it is or may be proper to withhold modification as a tactic for achieving something other than accuracy in claims decisions as Congress intended. There is no language in the text or legislative materials that supports the Department's proposal to employ modification as an adjunct enforcement mechanism if the employer seeks the remedy before paying back benefits or reimbursing the Black Lung Disability Trust Fund for all benefits paid, including medical benefits and lawyers' shifted fees, plus interest and penalties. This is unprecedented and not permitted within the text of 33 U.S.C. § 922(a).

Both the BLBA and applicable provisions of the LHWCA contain an abundance of enforcement mechanics available to the Department, claimants, and attorneys which include 30 U.S.C. § 932(d) (interest on unpaid benefits to the Fund and claimants), 30 U.S.C. § 934(b)(i)-(4) (enforcement of tax liens and final awards owed to the Trust Fund), 30 U.S.C. §§ 932(i) and 933(d) (enforcement in the case where an employer has failed to properly secure the payment of benefits), 33 U.S.C. § 914(i) (allowing the Department to require deposits with the Treasury in certain circumstances), 33 U.S.C. § 921(d) (allowing a beneficiary or a district director to seek enforcement of an award in court), 30 U.S.C. § 927(b) (allowing the district director to petition an Article III court, in the case where a party has refused to comply with certain administrative orders).

This comprehensive scheme suggests no legal authority for the Department to fashion its own remedy to seek the punishment of an employer who does not comply with certain pay orders prior to seeking modification. The Department's proposal also is unsupported by jurisprudential precedent. Principles of statutory construction support pre-emption of the Department's freestyle effort to enhance the fully adequate remedies available, by denying a modification remedy.

The proposal also directly violates the specific language and intent of the Black Lung Benefits Revenue Act of 1977. 26 U.S.C. § 9501(d). This section authorizes the Black Lung Disability Trust Fund to pay benefits to claimants if an employer or carrier: "(i) has not commenced the payment of such benefits within 30 days of an initial determination or eligibility by the Secretary of Labor or (ii) has not made a payment within 30 days after a payment is due." 26 U.S.C. § 9501(d)(i)(A)(i), (ii).

This section is not limited to any particular reason why an employer does not pay benefits under an award and was designed to address all reasons for non-payment. It does not excuse an employer from the enforcement provisions cited or from paying interest, but it does by its broad language permit an employer to rely on the Trust Fund to cover the claimants' needs while modification is being sought.

An assumption that these provisions were designed solely to protect claimants from non-payment is not supported and is in error. This may be its primary purpose but when the provision was drafted, it also served the important purpose of protecting employers from erroneous agency determinations and from the excessively long periods of time taken by the Department to process claims to final decision. Everyone involved in workers' compensation knows that prompt payment of claims is essential. Thus the statute reflects a compromise of the parties involved to reduce the large backlogs of claims, alleviate DOL's inability to promptly process many claims, protect employers' rights and claimants' needs while fair and accurate adjudications proceeded through a system that did not otherwise deliver fairness to all parties. By ignoring 26 U.S.C. § 9501(d) and the understandings it reflects, the Department proposes to do an injustice to employers and deprive them of essential rights. The ultimate proof of the conclusion rests on the fact that the Trust Fund has taken on this role for over forty years with no serious harm being done to the BLBA program. Certainly the administrators who agreed to this structure at the beginning knew they were honoring these agreements. The current administrators have made no case for abandoning the past practices and there is none. Longshore Act analogies are inapposite because that program does not enjoy the benefit of a Trust Fund that is funded by a severance tax paid by the covered industry who are also obligated to pay benefits to claimants, and claims processing under the LHWCA is far more efficient.

For the past 40 years, this interpretation has guided the use of Trust Fund payments while an employer pursues modification. This interpretation makes sense and the Department has provided no valid reason to abandon it, especially since interest and possibly penalties or "additional compensation" accrue while the employer or carrier pursues modification. By the same token, the proposal places no burden on a "scofflaw" claimant who owes money to the Fund.

The Department has not conducted an empirical review of cases, the financial burden on the Trust Fund, if there is any, or the economic burden on any claimant from current practices. It has relied exclusively for both legal authority and practical justification on a concurring opinion in one-off case that has been followed by no court either before or since to support this extreme action. *Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 444 (7th Cir. 2011) (Hamilton J. concurring).

In *Crowe*, it was demonstrated that Mr. Crowe was not entitled to black lung benefits. He worked in mines for only four years and was proven to be free from black lung disease by persuasive, mostly uncontradicted evidence. On a second trip to the U.S. Court of Appeals for the Seventh Circuit, the denial was reversed not because of any injustice to Mr. Crowe, but because the petition for modification was filed by a non-existent entity, Zeigler Coal Company, which had been liquidated in bankruptcy. Since no proper party filed for modification, the denial to Mr. Crowe was reversed and a prior interim award was reinstated. The modification proceeding was a legal nullity.

Judge Hamilton concurred in the result, but went off on a largely unbriefed tangent to express his opinion that the non-existent *Zeigler* was a "scofflaw" which should not have been permitted to pursue modification because it had not paid Mr. Crowe the benefits due in the original but erroneous award. 646 F.3d. at 444-50.

From this mostly personal opinion of a concurring judge, the Department draws three dubious conclusions. First, it concludes that non-payment of benefits during modification should preclude access to the remedy even though the statute does not accommodate this dramatic withdrawal of rights. Second, the Department implicitly concludes the interpretation of 26 U.S.C. § 9501(d), adhered to by the Department for over 40 years was wrong. And third, the Department concludes that claimants with non-meritorious claims are being deprived of benefits because the Department is not authorized to pay interim benefits under 26 U.S.C. § 9501(d) in claims like Mr. Crowe's that were in a denial status. None of these conclusions is reasonable or supported.

This setting leads inevitably to the conclusion that the Department for some unstated reason embraces an unexplained intent of denying an effective modification remedy to employers and carriers.

There can be no dispute that the proposed regulation deprives employers of the remedy. First, because the claims process and the modification process take so long to play out, and because almost all claimants are aged or long out of the mining industry or aged survivors, the payment of everything in a case that merits modification means that there is effectively no financial incentive to pursue the remedy. By the time an accurate result is achieved, the claim is mostly or entirely paid out so the pursuit of modification would be a waste of time. If anything, the Department gives a low priority to processing an employer's petition for modification adding yet additional years and possibly larger improper payments to the employer's liability. The Department never has made an effort to expedite employers' petitions for modification.

By requiring the reimbursement of disputed medical costs paid by the Trust Fund or disputed attorney fees, the employers' incentive is further diminished or entirely destroyed because they are prohibited from seeking modification until the separate litigation of disputed fees or disputed medical reimbursement claims is concluded. In these cases, there is no possibility of achieving prompt access to a modification remedy. In the medical benefit context, this is a particularly unjust and unauthorized burden because the Department's medical benefit payments are often excessive and improper, based on a secret list generally unavailable to the public that allows the Trust Fund to pay medical costs for conditions and services not even remotely related to the treatment of a miner's black lung disease. Medical benefit reimbursement claims frequently are disputed and employer disputes often are successful.

The preamble to the proposed rule makes much of the hardship to claimants that may occur but this is not documented at all. Mr. Crowe's case does not suffice. In this regard, Judge Hamilton was incorrect in noting that Mr. Crowe did not or could not have sought enforcement under any of the prescribed statutes mentioned. Crowe, by filing an enforcement suit under Section 21(d) of the LHWCA, in fact, did so. Judge Hamilton may have been unaware of that litigation. Moreover, if Crowe had not been denied on the merits, the Trust Fund would have paid his benefits pending the conclusion of modification, but he was found ineligible for benefits at any time, so it is hard to see the injustice to Crowe or the "scofflaw" nature of the non-existent Zeigler Coal Co.

It also is noteworthy that an employer or carrier has no effective way to recover an overpayment to the claimant. There is no grant of jurisdiction to any court to accommodate such a suit, and the Department is inconsistent in its cooperation with employers attempting to recover. The Department typically has refused to issue an order of overpayment and has made no visible effort to respond to an employer's request for such order. The prospect of a just and timely adjudication of an employer's request for modification under the proposed rule is non-existent.

It is hard to see any rationale for this provision other than the Department's newly discovered need, supported by isolated and aberrant anecdotes and no obvious policy imperative, much less any statutory authorization, to effectively eliminate the modification remedy for the employer and carrier community.

In the preamble to the proposal, the Department pays lip service to the broad scope of this generous remedy, but goes on to hold forth that the intent of the provision is too important and the Department is free to eviscerate the statutory remedy where employers are concerned.

B. Disclosure of Medical Information.

If adopted, proposed Amendments to 20 C.F.R. § 725.413 and 725.414 will require all parties to exchange all medical information collected in connection with a claim within 30 days from its receipt. The section does not define what is included within the scope of "medical information" but it does propose to authorize significant and possibly severe sanctions in the event of a violation of this requirement.

In support of this proposal, the Department cites one anecdotal case involving misconduct by the employer's counsel that ultimately led to the attorney's suspension from practice by state bar authorities. For legal authority, the Department relies upon Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a), and the provisions of the Longshore Act stating that formal and technical rules of evidence should not apply in claims adjudications, 33 U.S.C. § 923(a).

These proposed provisions are far beyond the Department's authority. They are not supported by the authorities cited, and neglect to mention the controlling provisions in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, *incorporated by reference into* 33 U.S.C. § 919(d*), and further incorporated by reference into* 30 U.S.C. § 932(a).

The sanctions proposed similarly are illegal, and arrogate the discipline of attorneys to ALJs and district directors who have no proper judicial training in the application of sanctions, and who have no authority to do so outside those powers enumerated in the APA. The sanctions proposal authorizes no appeal or timely judicial review of adverse action thus denying due process of law to a sanctioned entity. A sanctions ruling cannot be adjudicated along with the claim because the impact of imposing illegal sanctions on the merits of the case cannot realistically be reversed.

The provisions unnecessarily disrupt parties' efforts to develop and muster evidence and to present their cases and defenses in the most fruitful way and therefore place attorneys in the position of violating their ethical obligations to their clients.

First, this complex and formalistic rule cannot be compatible with 33 U.S.C. § 923(a) which counsels against formal, technical rules. The Department's statement to the contrary is unreasoned.

Next, the one anecdote cited does not support the Department's overreaction and the explanation of why parties need to exchange litigation evidence prematurely. The preamble states that in the Department's "experience," claimants are being deprived of important health information. This statement is documented only by the one unique case cited which itself proves nothing about the impact on the miner's health. In fact, the claimant was aware of his diagnosis from the evidence developed in his state workers' compensation claim. The regulatory initiative taken on here by the Department is illegal because it is supported solely by false premises and the Department's unproved and undocumented allegation that the earlier exchange of information will be of any benefit to any claimant.

In addition, the proposal is not supported by empirical evidence or logic, and it also is beyond the scope of the Department's regulatory authority for this reason. Section 205(a) of the Social Security Act has no application in claims for benefits under Part C of Title IV of the FCMHSA. It is a social security provision applicable in Part B claims and is designed to facilitate a non-adversarial system for adjudications that are exempt from the APA. No reliance on this provision is authorized for Part C claims.

Section 7(d) of the APA and related provisions are expressly prescribed for the adjudication of Part C black lung claims and contain provisions expressly designed for adversary claim proceedings. This is the holding of the Supreme Court in *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), and the Department may not override it. No case ever has held that Social Security Act procedures properly are applied in Part C black lung claims for a host of very good reasons, including the fact that SSA claims are not adversarial proceedings and that the APA does not apply to them.

While Part C may incorporate a few Part B payment of benefit provisions affecting the amount and method of payment as set forth in 30 U.S.C. § 932(d),(e),(g), none of those provisions expresses even an arguable intent to import SSA procedures into Part C claims as well. By proposing to do so, the Department acts without legal authority and in violation of standard rules of statutory construction.

Further, neither the APA nor any other source of authority imposes arbitrary limits on the sharing of evidence or any obligation on any party to exchange evidence that the party does not think is pertinent to the litigation of the claim. The APA defines the obligation of the parties to submit evidence and the regulations reasonably allow the submission of evidence within 20 days of the hearing or in accordance with flexible limits set by a district director or ALJ. The additional obligation proposed is unprecedented in any kind of litigation where any kind of evidence is exchanged. The Department has no authority to require it.

There is no reason to believe that the exchange of evidence earlier than the 20 days now allowed before hearing is going to have any effect on a claimant's health. The Department has provided no evidence to the contrary and its reaction to the conduct of one attorney, that has not been repeated as far as anyone knows, is not proper justification for regulatory action. The proposal also appears to assume that physicians will act unethically by not communicating a health emergency to a claimant. This does not happen and the assumption of this misconduct assumes doctors will intentionally violate the oath they have taken.

In our opinion, it is a violation of the rulemaking provisions of the APA, 5 U.S.C. §553, for an agency to concoct reasons for rulemaking that are not documented in the rulemaking record. There is no proof, and likely none could be obtained, to show that employers' litigation evidence will have a material effect on a claimant's health. In the absence of any evidence on this phenomenon, and the case cited provides no such evidence, this rule is a purely arbitrary mandate because it is supported by nothing more than unjustified speculation. Requiring claimants to follow the proposed 30 day rule does not have even a false rationale.

Finally, the proposed amendments requiring open ended sanctions available to ALJs and district directors in the case of a violation of the 30-day rule, are uniformly illegal and not authorized by law.

Before addressing the legal impediments, it is noteworthy that the sanction provisions are in some cases extreme and unwarranted punishment for what may be only an oversight by counsel. They purport to punish an attorney for judgments that may be in the best interest of a client where both employers and claimants are concerned, thus unnecessarily depriving a client of the right to the services of an attorney and they will create ethical dilemmas in some circumstances. Wholly apart from the Department's lack of statutory authority to impose sanctions of any kind, the sanctions themselves are onerous and hostile and beyond an ALJ's or district director's capability to fairly apply. District directors have no legal training and there is no authority in the statute for them to sanction counsel. This proposal, if adopted, will clutter up affected claims with unnecessary and contentious litigation that most likely will be far more harmful to claimants than any act that would cause the imposition of sanctions. Attorneys will not accept illegal sanctions and all such punishments are likely to be litigated to the detriment of all parties.

The proposed rules allow ALJs and district directors to sanction and otherwise punish lawyers appearing before them for conduct that is mostly irrelevant to any legitimate purpose.

ALJs and district directors are employees of the Executive Branch of the United States and function under Article II of the Constitution of the United States. They are engaged to provide adjudicative services in accordance with statutory authorizations assigning powers and duties to these personnel and defining those powers and duties. ALJs and district directors do not possess the inherent or implied powers of judicial officers of the United States authorized under Article III of the Constitution of the United States and may not exercise any such powers unless directed to do so by statute. *See, Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) (articulating the scope of judicial powers under Article III). In accordance with separation of powers doctrine, therefore, ALJs may adjudicate matters assigned to them by statute, but in no event are they constitutionally authorized to exercise the judicial powers of the United States. Neither ALJs nor district directors have implied or inherent powers.

As Article II employees with no inherent judicial powers, ALJs and district directors are denied the power to mete out individual punishment to lawyers or law firms without express statutory authorization. This is not simply our opinion, it is the law.

The APA in 5 U.S.C. § 558(b), provides:

> (b) A sanction may not be imposed or substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

While this section may not originally have had attorney sanctions in mind, it is not limited in scope so as to exclude or even imply the exclusion of any attorney sanction whether or not it existed at the time Section 558 was enacted. The natural meaning of the Section is that any sanction or related punishment that may be imposed by an ALJ or district director is limited to a sanction or punishment expressly authorized by statute.

The APA itself provides some guidance on the scope of authorized attorney sanctions. Section 555(b) allows any person called to appear before an agency the right to be represented by an attorney or other authorized person. Presumably, the agency could decide who is an attorney or what qualifications a non-attorney must have, and there is no implication here that the agency may disqualify an attorney who is otherwise qualified by having obtained the right to practice law by a State's attorney licensing authority. 5 U.S.C. § 555(b).

The powers of ALJs are set forth in 5 U.S.C. § 556(b), (c), and (d). In addition to specifying sanctions on account of ex parte contacts, section 556(c)(5) authorizes the ALJ to "regulate the course of the hearing" and in subsection (c)(9) to "take such other action authorized by agency rule consistent with this subchapter." This in no way implies a power to sanction counsel.

There are no comparable sanction provisions in the BLBA. The Longshore Act has several provisions governing the conduct of counsel and those are applicable in LHWCA claims and largely inapplicable in BLBA claims. *See,* 33 U.S.C. § 928.

Section 27 of the LHWCA, 33 U.S.C. § 927(b), provides that disobedience to an order or misconduct at the hearing by "any person" may be referred to an appropriate U.S. district court for contempt proceedings. To the extent the proposed Part 18 reassigns these judicial powers to an ALJ or district director, it is preempted, unauthorized and a violation of separation of powers doctrine. Section 27 applies to both BLBA and LHWCA claims. It may seem cumbersome to seek district court assistance but inconvenience cannot authorize DOL's ALJs to encroach upon Article III powers.

Any person also may refer attorney misconduct to State licensing authorities, as was done in the anecdotal case cited, with jurisdiction over the attorney. An ALJ may do so as well but has neither the authority nor the competence also to punish the attorney for violations of bar or ethics rules. No such power is authorized by law.

Section 31 of the LHWCA proscribes certain conduct and authorizes specified sanctions. None of these apply in black lung claims. 30 U.S.C. § 932(a). In the 1984 amendments to the LHWCA, Congress excluded black lung from the coverage of these attorney sanctions and it must be implied that none of the Section 31 sanctions may be made applicable in black lung cases and that similar sanctions fairly falling within the context of 33 U.S.C. § 931 also may not be adopted. In any event, even an attorney who is on the Secretary's list of banned LHWCA attorney representatives may represent a party without charge. 33 U.S.C. § 931(c). Of course, any person who has been disbarred by a proper licensing authority may not receive an attorney's fee under Section 28(a) of the LHWCA. In accordance with 5 U.S.C. § 558, the portions of the proposal that exceed the expressly applicable sanctions contained in the LHWCA are expressly prohibited and may not be adopted.

C. Supplemental Reports.

The proposed amendment to 20 C.F.R. § 725.414 allowing additional supplemental reports that are not counted against a litigation quota prescribed by the rules is objectionable only to the extent that as a general matter, the Department's extensive and arbitrary limits on evidence are not authorized by the Administrative Procedure Act.

In litigation contesting the original rules limiting evidence, the Department defended the rules in the D.C. Circuit in *NMA v. Secretary of Labor*, 292 F.3d 849 (D.C. Cir. 2002), claiming that the limits on evidence were not legally problematic and did not violate the APA because a good cause exception was available and would be fairly administered. The Department, however, never adhered to its concession to the Court in *NMA*, and rarely if ever, has agreed that any reason was good enough to support a good cause exception. The Department's lack of candor to the Court and general refusal to extend the limits even where necessary to guarantee a fair adjudication, is as originally alleged, illegal.

D. Liability Issues.

The Department's proposal to change its terminology when referring to the provisions of 33 U.S.C. § 914(f) apparently seeks to further punish employers in their efforts to defend non-meritorious and questionable claims. The change is cynical and irrelevant. Section 14(f) of the Longshore Act, like many other subsections of Section 14 of the LHWCA, was not designed for or appropriate in the adjudication of black lung claims. It is a Longshore provision which imposes a penalty on employers who do not make prompt benefit payments in accordance with the Longshore Act scheme. The title of the provision refers to "additional compensation" as the cost of non-compliance with valid awards of benefits. Titles are not part of the statute. Adding the penalty amount to the claimant's compensation does not change the penal character of the award.

The Department is concerned, for no well-articulated reason, that the regulatory title now is used with reference to payments "in addition to compensation" and may be misconstrued so by changing the reference to "additional compensation," it will be properly construed. It is more likely that the change will cause the provision to be misconstrued. The preamble advocates for a label that is an unauthorized amendment to the Act. Penalties need to be paid somewhere and adding it to compensation is a logical way to designate the payee. This does not alter the nature of the payment or its penal intent.

The suggestion seems counter-intuitive because the provision clearly penalizes an employer for late payments of compensation that are due. There are several reasons why this change is illegal and unnecessary. First, the compensation payable under a black lung award is specified by statute in 30 U.S.C. § 932(d), which establishes benefit payment rates in accordance with 30 U.S.C. § 922(c). These provisions make no reference to Section 14(f) of the Longshore Act and fully account for the calculation of benefits due under the BLBA. Section 932(d) of the BLBA further provides that interest begins to accrue on an award 30 days after an award is made if it is not paid. The ten-day rule of Section 14(f) is inconsistent with the BLBA timeframe and is such a short period in a BLBA context to be utterly arbitrary.

The Department's attempt to penalize employers for longstanding payment practices on the basis of remote authorities not well suited to the black lung context and not a part of the statutory payment provisions of the BLBA also is inconsistent with the standard rules of statutory construction which counsel that where the most direct statutory framework is comprehensive, resort to more remote authorities is not favored. Neither is there any legislative history to support the Department's foray outside the BLBA to apply inapposite provisions of the LHWCA, including section 14(f) which makes no sense within the BLBA system.

The fact that Section 14 of the Longshore Act is not an excluded section under 33 U.S.C. § 932(a) does not mean that every part of the multi-section provision applies. The Department does not apply most of the subsections of Section 14 in black lung claims, with good reason. They are not applicable because they are designed for a general workers' compensation program like the Longshore Act and not a program like black lung which operates and is administered very differently.

The payments of additional compensation attributed to Section 14(f) are payable where an employer fails to pay an employee benefits that are due under an award. In the vast majority of Longshore Act claims, the injured worker is unable to continue in a job that he or she was doing before the injury, usually a traumatic injury that immediately takes the worker out of the workforce and leaves the worker and the family without a livelihood. A penalty for unwarranted non-payment seems appropriate.

This setting almost never plays out in a black lung claim. Mostly, cases are filed by or on behalf of a coal worker who is long out of the workforce because of retirement, an unrelated injury, or disease or death. In recent years, cases are not filed by current workers except in the case of a mine closure. And while the case is developing, the Black Lung Trust Fund is required to pick up payments at the earliest time pending a final award or denial. Section 9501(d) of Title 26 plainly authorizes the Trust Fund to pay benefits pending a final adjudication of an employer's liability. There is no comparable fallback for LHWCA claims. Perhaps the Department prefers that an employer or carrier play the role of insurer of an erroneous interim award, but this is not the choice Congress made and the Department has no authority to force an employer to undertake the risk of error where Congress has relieved employers of this burden. As noted earlier, part of the rationale of 26 U.S.C. § 9501(d) was to protect employers from the risk of unwarranted liabilities in the environment of a controversial and much criticized program.

The proposed change purports to make a difference but it does not and it is unauthorized as a matter of law. When a party is punished for particular conduct, the punishment is a penalty imposed on the employer, not an extra measure of statutory benefits for the claimant. The law the Department is trying to make in this connection is based solely on the false premise that labels matter more than substance and that it has the authority to impose penalties that were not intended by Congress and do not fit in the BLBA regime.

The Department's proposed change is arbitrary and capricious and supported by nothing but an apparent attempt to override the statutory benefits provided by Congress in the BLBA for black lung awards.

E. Medical Cost Containment.

As a final point, it is noted that in contemplation of new rulemaking in 2013, the Department promised stakeholders that black lung medical cost guidelines would be proposed in this body of regulatory amendments. Such guidelines would have saved the Trust Fund significant unnecessary expenditures since there are no valid community-based cost guidelines used in the Black Lung Program at this time. Persons familiar with the guidelines being used have indicated that they are based upon the costs of medical goods and services in Philadelphia, Pennsylvania, where costs are likely to far exceed cost containment guides applicable in Appalachia or rural areas in the Midwest where most miners live and obtain treatment.

New medical cost guidelines would have been applauded by all stakeholders and may have significantly reduced cost pressures on the Trust Fund. If the Department is intent on providing equity and fulfilling its fiduciary responsibilities, it must address this aspect of the program.

III. CONCLUSION

In conclusion, we find this proposal unfair and unauthorized and it must abandoned. Its design, to penalize employers for exercising statutory rights without good reason for doing so, is ill-advised and ill-thought out. As a legal matter, the proposed rules must be withdrawn.

Respectfully submitted,

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Respectfully submitted,

Bruce Watzman
Senior Vice President for Regulatory Affairs
The National Mining Association

Bruce Wood
Vice President and Associate General Counsel
American Insurance Association

Martin E. Bertocchi
Assistant Vice President/Secretary/General Counsel
Old Republic Insurance Company

William Schrimpf, Sr.
General Counsel, Chief Claims Officer, Senior Vice President
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III. CONCLUSION

In conclusion, we find this proposal unfair and unauthorized and it must be abandoned. Its design, to penalize employers for exercising statutory rights without good reason for doing so, is ill-advised and ill-thought out. As a legal matter, the proposed rules must be withdrawn.

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