FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

August 1, 2025

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2024-0231
Petitioner,	:	A.C. No. 46-09569-594789
	:	
v.	:	
	:	
CONSOL MINING COMPANY, LLC	:	Mine: Itmann No. 5
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me upon the filing of the Petition for Assessment of Civil Penalty by the Secretary of Labor ("Secretary") against CONSOL Mining Company, LLC ("CONSOL") located in Wyoming, West Virginia, before the Federal Mine Safety and Health Review Commission (hereinafter "FMSHRC" or "the Commission") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 815. On July 17, 2024, Chief Administrative Law Judge Glynn F. Voisin assigned me this docket and attached a copy of my Prehearing Order. Counsel for the parties have complied with my Prehearing Order and filed their initial prehearing reports. This matter is set for a hearing to be held on September 24–25, 2025, in Beckley, West Virginia.

CONSOL filed a Motion to Dismiss on January 6, 2025. Thereafter, on January 10, 2025, the Secretary filed an Unopposed Motion to Extend Time to Respond to Motion Dismiss, which I granted, extending the deadline to file a response to January 31, 2025. On January 29, 2025, the Secretary filed a Second Unopposed Motion to Extend Time to Respond to Motion to Dismiss, which I granted, extending the deadline to file a response to February 21, 2025. On February 6, 2025, the Secretary filed her Opposition to Motion to Dismiss. I chose to wait until after the Supreme Court's recent term ended in late June, given the various constitutional issues raised in CONSOL's motion.

I. PARTIES' CONSTITUTIONAL ARGUMENTS

CONSOL argues that it has a constitutional right to a jury trial in the present case. (Resp't Mot. at 3–7.) Specifically, CONSOL asserts that like the securities penalties addressed in the recent Supreme Court decision *SEC v. Jarkesy*,[1] the civil penalties the Secretary seeks under the Mine Act are intended to punish and deter and not to compensate the injured miner. (Resp't Mot. at 3–4.) Therefore, CONSOL contends that the remedies sought under the Mine Act are "legal in nature" and accordingly trigger the Seventh Amendment right to a jury trial.

[1] *SEC v. Jarkesy*, 603 U.S. 109 (2024).

(Resp't Mot. at 3–4.) CONSOL adds that, similar to *Jarkesy*, the cause of action in this case mirrors the elements of a common law tort claim which confirms that this proceeding implicates the Seventh Amendment. (Resp't Mot. at 4.) In conclusion, CONSOL argues that because it has a constitutional right to a jury trial and the Commission has no statutory authority to impanel a jury, this matter must be dismissed. (Resp't Mot. 6–7.)

CONSOL also argues that the removal restrictions for FMSHRC Administrative Law Judges ("ALJs") violate the "take Care" clause of the Constitution. (Resp't Mot. at 7–9.) Specifically, CONSOL asserts that FMSHRC ALJs are inferior officers who can only be removed by FMSHRC Commissioners if the Merits System Protection Board ("MSPB") finds there is good cause; FMSHRC Commissioners may only be removed by the President for inefficiency, neglect of duty, or malfeasance in office. (Resp't Mot. at 9.) Accordingly, CONSOL contends that the Supreme Court decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[2] dictates that this multi-layered protection against removal violates the Constitution. (Resp't Mot. at 8–9.) CONSOL concludes that dismissal of this case is necessary to avoid further constitutional and jurisdictional violations. (Resp't Mot. at 9.)

In response, the Secretary argues that I lack the authority to hear the constitutional issues CONSOL raises in its motion to dismiss, and thus I should deny the motion. (Sec'y Mot. at 1.) Specifically, the Secretary argues that CONSOL's Seventh Amendment challenge is a facial constitutional challenge and therefore the Commission cannot decide it. (Sec'y Mot. at 2.) In support, the Secretary cites the following language from a Sixth Circuit decision: "[t]his administrative agency [FMSHRC], like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." (Sec'y Mot. at 2 (citing *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018)).)

II. PRINCIPLES OF LAW

FMSHRC's procedural rules do not specifically address motions to dismiss. However, FMSHRC Procedural Rule 1(b) directs FMSHRC Judges to follow the Federal Rules of Civil Procedure for matters not addressed by the Commission's Procedural Rules. 29 C.F.R. § 2700.1(b). Here, CONSOL's arguments focus on the alleged constitutional defects of the Mine Act's failure to provide a jury trial and the removal restrictions for FMSHRC ALJs. Federal Rule of Civil Procedure 12(b)(1) allows dismissal for "lack of subject-matter jurisdiction over the subject matter" of claims asserted in the complaint. Fed. R. Civ. P. 12(b)(1). Thus, under FMSHRC Procedural Rule 1(b) it is appropriate to look to Rule 12(b)(1) for guidance. Under Rule 12(b)(1), a claim is "properly dismissed for lack of subject-matter jurisdiction . . . when the court lacks the statutory or constitutional power to adjudicate" the claim. *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996).

[2] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

III. ANALYSIS

A. Whether the Constitutionality of the Mine Act is Within the Jurisdiction of FMSHRC

The United States Court of Appeals for the Sixth Circuit held in *Jones Brothers, Inc. v. Secretary of Labor* that FMSHRC, "like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law. An administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing." *Jones Bros., Inc. v. Sec'y of Labor*, 898 F.3d 669, 673 (6th Cir. 2018); *see also Carr v. Saul*, 593 U.S. 83, 92 (2021) (holding that "agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise"); *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 544 (D.C. Cir. 1988) (holding that administrative agencies are entitled to pass on constitutional claims); *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) (holding that generally, "the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies"); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (holding that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Matthews v. Diaz*, 426 U.S. 67, 76 (1976) (holding that the constitutionality of the Social Security Act is beyond the Secretary of Health, Education, and Welfare's competence); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (holding that the constitutionality of a statutory requirement of the Social Security Act is beyond the jurisdiction of the Secretary of Health, Education, and Welfare to determine); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) (quoting *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J. concurring in result)) (holding that the "'[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies'"). The Sixth Circuit further held in *Jones Brothers* that while each of the three branches of the federal government has an independent obligation to interpret the Constitution, "only the Judiciary enjoys the power to invalidate statutes inconsistent with the Constitution." *Jones Bros., Inc.*, 898 F.3d at 674.

However, the Supreme Court has held that the general rule disfavoring constitutional adjudication by agencies "is not mandatory . . . and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an independent commission established exclusively to adjudicate Mine Act disputes." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). The Supreme Court also noted that FMSHRC "has addressed constitutional questions in previous enforcement proceedings." *Id.*; *see KenAmerican Res., Inc.*, 42 FMSHRC 1, 7 (2020), *aff'd on other grounds*, 33 F.4th 884 (6th Cir. 2022) (resolving constitutional challenges raised against the enforcement of the Mine Act); *Ala. By–Pro. Corp.*, 4 FMSHRC 2128, 2129–2130 (1982) (concluding that FMSHRC has the authority to decide the operator's constitutional challenge to the validity of the cited standard); *Richardson*, 3 FMSHRC 8, 18–21 (1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982) (holding that "the judicial role of the Commission . . . appropriately permits the Commission to entertain constitutional objections to the underlying statute"); *Rain for Rent*, 40 FMSHRC 1267, 1247–77 (2018) (ALJ), *aff'd on other grounds sub nom. W. Oilfields Supply Co. v. Sec'y of Labor*, 946 F.3d 584 (D.C. Cir. 2020) (FMSHRC ALJ addressing operator's argument that MSHA inspector violated its Fourth Amendment rights).

The Sixth Circuit also noted in *Jones Brothers* that:

> [a]gency actors must continually interpret and apply their statutory duties in light of constitutional boundaries . . . That ongoing duty to conform its behavior with our highest law is inherent in and inseparable from the Executive's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II § 3. And it is re-enforced by the oath each executive officer must stake to "to support this Constitution." U.S. Const. art. VI.

Jones Bros., Inc., 898 F.3d at 674–75. *See also* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 274–75 (1955) (noting that "the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law,' and the ultimate guarantees associated with the Constitution").

The Mine Act broadly directs FMSHRC ALJs to "hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such" ALJ, and to "make a decision which constitutes his final disposition of the proceedings." 30 U.S.C. § 823(d)(1). Additionally, since FMSHRC Judges swear to uphold the Constitution, they must make determinations and decisions in accordance with the Constitution. As FMSHRC aptly stated, it "cannot properly fulfill [its] duty to interpret the law and to apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution." *Richardson*, 3 FMSHRC at 19. I therefore reject the Secretary's assertion that I lack the authority to decide CONSOL's Seventh Amendment challenge.

B. Whether Respondent Is Entitled to a Jury Trial

1. The Supreme Court's decision in *SEC v. Jarkesy*

CONSOL relies on the recent Supreme Court decision *SEC v. Jarkesy* to argue that because the civil penalties sought by the Secretary under the Mine Act are "legal in nature," the Seventh Amendment right to a jury trial is triggered. (Resp't Mot. at 4.) In *Jarkesy*, the Supreme Court determined the issue of "whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud." *SEC v. Jarkesy*, 603 U.S. 109, 120 (2024). The Supreme Court affirmed that the Seventh Amendment right to a jury trial "extends to a particular statutory claim if the claim is 'legal in nature.'" *Jarkesy*, 603 U.S. at 122 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). The Court held that the civil penalties sought by the SEC "are designed to punish and deter, not to compensate" and "are therefore 'a type of remedy at common law that could only be enforced in courts of law.'" *Jarkesy*, 603 U.S. at 125 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)). The Court added that "[t]he close relationship between the causes of action in this case and common law fraud confirms" the conclusion that actions brought by the SEC are "'legal in nature.'" *Jarkesy*, 603 U.S. at 125–26 (quoting *Granfinanciera*, 492 U.S. at 53).

Accordingly, the Court concluded that because the claims at issue in *Jarkesy* implicate the Seventh Amendment, a jury trial is required unless the "public rights" exception applies. *Jarkesy*, 603 U.S. at 127. Under the "public rights" exception, "Congress may assign the matter for decision to an agency without a jury, consistent with the Seventh Amendment." *Id.* The Court ultimately concluded that the public rights exception did not apply in *Jarkesy* but distinguished and affirmed its holding in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.[3] *Jarkesy*, 603 U.S. at 136–40.

2. "Public Rights" Exception in *Atlas Roofing*

The initial litigation in *Atlas Roofing* arose under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651–678, a federal regulatory regime created to promote safe working conditions. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 444–45 (1977). The OSH Act authorizes the Secretary to promulgate safety regulations, and if a party violates the regulations, the Secretary can impose civil penalties. *Atlas Roofing Co.*, 430 U.S. at 444–46. The OSH Act also empowers the Occupational Safety and Health Review Commission ("OSHRC") to adjudicate alleged violations. *Id*.

In *Atlas Roofing*, the Supreme Court rejected two employers' argument that the adjudicatory authority of OSHRC violated the Seventh Amendment. *Atlas Roofing Co.*, 430 U.S. at 461. The Court explained that "Congress found the common-law and other existing remedies for work injuries resulting from unsafe working conditions to be inadequate to protect the Nation's working men and women. It created a new cause of action, and remedies therefor, unknown to the common law," and thus the Seventh Amendment was "no bar to . . . enforcement outside the regular courts of law." *Atlas Roofing Co.*, 430 U.S. at 461. Accordingly, the Court held that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment." *Atlas Roofing Co.*, 430 U.S. at 455.

3. Treatment of *Atlas Roofing* in *Jarkesy*

In *Jarkesy*, the Supreme Court affirmed its holding in *Atlas Roofing*, that "Congress could assign the OSH Act adjudications to an agency because the claims were 'unknown to the common law,'" but held that the case did not control because the pertinent "statutory claim is 'in the nature of' a common law suit." *Jarkesy*, 603 U.S. at 138 (quoting *Atlas Roofing Co.*, 430 U.S. at 453, 461). The Court explained that, unlike the antifraud provisions the SEC enforces, the OSH Act does "not borrow its cause of action from the common law." *Jarkesy*, 603 U.S. at 136. Instead, the OSH Act simply commands that "'[e]ach employer . . . shall comply with occupational safety and health standards promulgated under this chapter.'" *Jarkesy*, 603 U.S. at 137 (quoting 29 U.S.C. § 654(a)(2)). The Court noted that rather than reiterate common law terms of art, the occupational safety and health standards resemble "a detailed building code." *Jarkesy*, 603 U.S. at 137.

---

[3] *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977).

The Court in *Jarkesy* explained that the purpose of the OSH Act "was not to enable the Federal Government to bring or adjudicate claims that traced their ancestry to the common law," but rather to "'develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems.' In both concept and execution, the Act was self-consciously novel." *Jarkesy*, 603 U.S. at 137 (quoting 29 U.S.C. § 651(b)(5)). The Court further emphasized that the "novel claims in *Atlas Roofing* had never been brought in an Article III court. By contrast, law courts have dealt with fraud actions since before the founding, and Congress had authorized the SEC to bring such actions in Article III courts and still authorizes the SEC to do so today." *Jarkesy*, 603 U.S. at 140.

CONSOL argues that while the Supreme Court did not expressly overrule *Atlas Roofing* in *Jarkesy*, the Court indicated that it may already have been overruled by the Court's decision in *Granfinanciera*. (Resp't Mot. at 5.) CONSOL therefore asserts that continued reliance upon *Atlas Roofing* is misplaced and the "public rights" exception cannot stand in the present case. (Resp't Mot. at 6.) However, the Supreme Court explicitly stated in *Jarkesy* that because *Atlas Roofing* did not control, "we need not reach the suggestion made by Jarkesy and Patriot28 that *Tull* and *Granfinanciera* effectively overruled *Atlas Roofing* to the extent that case construed the public rights exception to allow the adjudication of civil penalty suits in administrative tribunals." *Jarkesy*, 603 U.S. at 136. Nevertheless, the Court affirmed that the "public rights" exception applied in *Atlas Roofing* because actions under the OSH Act "bring no common law soil with them." *Jarkesy*, 603 U.S. at 137. Accordingly, I give no credence to CONSOL's argument that *Atlas Roofing* may have been overruled, because the Court specifically held in *Jarkesy* that "*Atlas Roofing* does not conflict with our conclusion." *Jarkesy*, 603 U.S. at 140.

4. Whether the "Public Rights" Exception Applies to FMSHRC

The Mine Act is very similar to the OSH Act. *See generally Petersen*, 2 FMSHRC 3404, 3407 (Nov. 1980) (ALJ) (holding that the Occupational Safety and Health Act "is similar to the Federal Mine Safety and Health Act of 1977"); *Mellot Trucking & Supply, Inc.*, 10 FMSHRC 409, 411 (Mar. 1988) (ALJ) (noting that the civil penalty proceeding before FMSHRC "is similar to the penalty proceeding at issue in the *Atlas* case before the Occupational Safety and Health Review Commission"). The Mine Act establishes a federal regulatory regime, like the OSH Act, "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g); *compare* 29 U.S.C. § 651(b) (stating purpose of OSH Act is "to assure so far as possible every working man or woman in the Nation [has] safe and healthful working conditions"). The Mine Act also directs the Secretary to promulgate "improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," and to impose civil penalties if a party violates the regulations. 30 U.S.C. §§ 811(a), 815(a), 820. Moreover, the Mine Act empowers FMSHRC to adjudicate alleged violations, similar to OSHRC. 30 U.S.C. § 815(d); *compare* 29 U.S.C. § 661(e), (j). In fact, because the Secretary administers both the Mine Act and the OSH Act, she "determines initially whether a workplace falls under the jurisdiction of MSHA, rather than OSHA." *Power Fuels, LLC v. Fed. Mine Safety & Health Review Comm'n*, 777 F.3d 214, 217 (4th Cir. 2015).

In the Mine Act's legislative history, Congress explained that "[t]he hazards involved with the mining of coal and other materials and the need to provide for the health and safety of

the nation's miners have long been a matter of Federal law." S. REP. NO. 95–181, at 3401 (1977). Likewise, Congress found that common-law remedies for work injuries, diseases, and deaths resulting from unsafe working conditions in mines to be inadequate to protect miners—the mining industry's "most precious resource"—and instead "created a new cause of action, and remedies therefore, unknown to the common law." S. REP. NO. 95–181, at 3401–405 (1977); 30 U.S.C. § 801; *see Atlas Roofing Co.*, 430 U.S. at 461. The Mine Act, like the OSH Act, does "not borrow its cause of action from the common law," *see Jarkesy*, 603 U.S. at 136; rather, the Mine Act requires mine operators to comply with "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to" the Mine Act. 30 U.S.C. § 814(a).

Upon consideration of the relevant case law, I reject CONSOL's argument that civil penalty proceedings under the Mine Act mirror the elements of a common law tort claim. Rather, I determine that the Mine Act, like the OSH Act, created "a new cause of action, and remedies therefor, unknown to the common law." *Atlas Roofing Co.*, 430 U.S. at 461. As such, I conclude that actions brought under the Mine Act fall under the "public rights" exception. Accordingly, the "Seventh Amendment is no bar" to FMSHRC, an administrative agency, adjudicating the "public rights" created by the Mine Act. *Atlas Roofing Co.*, 430 U.S. at 461. Hence, the remedy sought by CONSOL—i.e., the dismissal of this proceeding to avoid further constitutional and jurisdictional violations pursuant to *Jarkesy*—is therefore unnecessary.

C. Removal Restrictions for FMSHRC ALJs

CONSOL next relies on the Supreme Court decision *Free Enterprise Fund v. Public Co. Accounting Oversight Board* to argue that the statutory restrictions on the removal of FMSHRC ALJs are sufficiently onerous such that they violate the "take Care" clause of the Constitution. (Resp't Mot. at 9.) CONSOL argues that dismissal of this case is therefore necessary to avoid further constitutional and jurisdictional violations. (Resp't Mot. at 9.)

1. The Supreme Court's decision in *Free Enterprise Fund*

In *Free Enterprise Fund*, the Court considered whether "the President [may] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010). Specifically, the Court addressed whether the removal structure of the Public Company Accounting Oversight Board ("PCAOB" or "Board") is constitutional. *Free Enter. Fund*, 561 U.S. at 484–87.

The PCAOB is composed of five members, who are executive "'Officers of the United States,'" and who are appointed by the SEC. *Free Enter. Fund*, 561 U.S. at 484, 486 (citation omitted). The Sarbanes-Oxley Act of 2002 "places the Board under the SEC's oversight." *Free Enter. Fund*, 561 U.S. at 486. However, the SEC "cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' certain procedures," and SEC "Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" *Free Enter. Fund*, 561 U.S. at 486, 487 (citations omitted).

The Court held that "the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 492. Specifically, the Court determined that the President cannot hold the SEC fully accountable for the PCAOB's conduct since the SEC cannot remove a PCAOB member at will. *Free Enter. Fund*, 561 U.S. at 496. The Court held that under this removal structure—

> [n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

Free Enter. Fund, 561 U.S. at 496. Therefore, "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct." *Id.* The Court concluded that "[b]y granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Free Enter. Fund*, 561 U.S. at 498.

However, the Court also limited its holding to the specific facts of the case. The Court distinguished the PCAOB from other agencies, noting that—

> Congress enacted an unusually high standard that must be met before Board members may be removed. A Board member cannot be removed except for willful violations of the Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing.

Free Enter. Fund, 561 U.S. at 503. The Court also noted that "the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal—including at one level a sharply circumscribed definition of what constitutes 'good cause,' and rigorous procedures that must be followed prior to removal." *Free Enter. Fund*, 561 U.S. at 505.

Thus, the Court explicitly stated that it was not deciding the "status of other Government employees." *Free Enter. Fund*, 561 U.S. at 506. In fact, in a footnote the Court clarified that—

> our holding [] does not address that subset of independent agency employees who serve as administrative law judges . . . Whether administrative law judges are necessarily "Officers of the United States" is disputed . . . And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, [] or possess purely recommendatory powers.

Free Enter. Fund, 561 U.S. at 507 n.10.[4] Hence, the Court specifically left open the question of whether two-levels of removal protections for ALJs is constitutionally permissible. Eight years later in *Lucia v. SEC*, the Supreme Court again declined to address the constitutionality of removal protection for ALJs. *See Lucia v. SEC*, 585 U.S. 237, 244 n.1 (2018).

2. Circuit Courts Split on Constitutionality of ALJs' Removal Restrictions

The federal courts of appeals are divided on the constitutionality of removal provisions applicable to ALJs. The Fifth Circuit struck down the removal restrictions for SEC ALJs, while the Ninth, Tenth, and Sixth Circuit have upheld the constitutionality of the removal restrictions for Department of Labor ("DOL"), Drug Enforcement Agency ("DEA"), Consumer Product Safety Commission ("CPSC"), and Federal Deposit Insurance Corporation ("FDIC") ALJs.

In *Decker Coal Co. v. Pehringer*, a coal operator petitioned for review of a Benefits Review Board ("BRB") order affirming the decision of a DOL ALJ awarding benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901–944, and argued that the removal process for DOL ALJs is unconstitutional. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1126 (9th Cir. 2021). The Ninth Circuit ultimately held that "the President has sufficient control over DOL ALJs to satisfy the Constitution." *Decker Coal Co.*, 8 F.4th at 1133. In reaching its holding, the court distinguished DOL ALJs from the PCAOB members in *Free Enterprise Fund* on four grounds. *Decker Coal Co.*, 8 F.4th at 1133–36. First, the court noted that "[u]nlike the PCAOB members, who exercise policymaking and enforcement functions," DOL ALJs perform a purely adjudicatory function. *Decker Coal Co.*, 8 F.4th at 1133. Second, the court determined that Congress did not trammel on the President's executive power, as "[n]o statute mandates that the DOL employ ALJs in adjudicating BLBA benefit claims." *Id.* Third, the Court noted that the BRB, the body that "hears appeals from the decisions of ALJs in BLBA compensation cases," provides the President with meaningful control over DOL ALJs. *Decker Coal Co.*, 8 F.4th at 1134. The court explained that "all BRB members serve at the pleasure of the Secretary of Labor [a]nd because the Secretary of Labor is subject to at-will removal by the President . . . the President has direct control over BRB members through the Secretary—his 'alter ego.'" *Decker Coal Co.*, 8 F.4th at 1135 (citation omitted). Lastly, the court noted that the "good-cause"

---

[4] Similarly, then-Judge Kavanaugh explained the differences between ALJs and PCAOB members in his dissent when *Free Enterprise Fund* was before the D.C. Circuit—

> First, an agency has the choice whether to use ALJs for hearings, *see* 5 U.S.C. § 556(b); Congress has not imposed ALJs on the Executive Branch. Second, many ALJs are employees, not officers . . . Third, ALJs perform only adjudicatory functions that are subject to review by agency officials, *see* 5 U.S.C. § 557(b), and that arguably would not be considered "central to the functioning of the Executive Branch" for purposes of the Article II removal precedents.

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citation omitted), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010).

standard for ALJ removal "suggests a lesser impingement on presidential authority than was present in *Free Enterprise Fund*." *Decker Coal Co.*, 8 F.4th at 1135; 5 U.S.C. § 7521.

In *Rabadi v. U.S. Drug Enforcement Administration*, the Ninth Circuit also held that the removal protections for DEA ALJs are constitutional based on its reasoning in *Decker Coal*. *Rabadi v. U.S. Drug Enf't Admin.*, 122 F.4th 371, 376 (9th Cir. 2024). In support, the court first noted that "DEA ALJs perform purely adjudicatory functions." *Rabadi*, 122 F.4th at 375. Second, the court determined that "Congress does not mandate that the DEA use ALJs as presiding officers for administrative hearings." *Id.* Third, the court emphasized that "DEA ALJ decisions are reviewed de novo by the DEA Administrator" and the President may remove the DEA Administrator at will. *Id.* Additionally, the court highlighted that "the decisions of DEA ALJs are subject to mandatory review by the DEA Administrator." *Rabadi*, 122 F.4th at 376. Thus, the Ninth Circuit concluded that "the President can control DEA ALJs through the DEA Administrator." *Id.*

In *Leachco, Inc. v. Consumer Product Safety Commission*, the Tenth Circuit held that the removal protections for CPSC ALJs are constitutional. *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 763 (10th Cir. 2024). The Tenth Circuit found the Ninth Circuit's analysis in *Decker Coal* persuasive, as the CPSC ALJ at issue also "performed 'a purely adjudicatory function,' Congress did not statutorily require that the CPSC use ALJs for administrative adjudications, and the 'good cause' standard in the provision restricting—but not precluding—ALJs' removal is a 'lesser impingement' than the standard at issue in *Free Enterprise Fund*." *Leachco, Inc.*, 103 F.4th at 764.

Additionally, in *Calcutt v. Federal Deposit Insurance Corp.*, the Sixth Circuit held that the removal restrictions for FDIC ALJs do not violate constitutional separation of powers. *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293, 320 (6th Cir. 2022), *rev'd on other grounds*, 598 U.S. 623 (2023)). In support, the court noted that "the FDIC ALJs perform adjudicatory functions, and they file a recommended decision that is subject to review by the FDIC Board." *Calcutt*, 37 F.4th at 319. The court also pointed out that "the FDIC must conduct hearings 'in accordance with the provisions of [the APA],' . . . and the APA permits an agency to choose whether to preside over an adjudication itself, allow one or more members to be presiding officers, or use an ALJ." *Id.*

In contrast, the Fifth Circuit in *Jarkesy v. SEC* held that "the statutory removal restrictions for SEC ALJs are unconstitutional." *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024) (addressing only petitioners' argument regarding Seventh Amendment right to jury trial). In support, the Fifth Circuit noted that the Supreme Court "said in *Myers* that 'quasi[-]judicial' executive officers must nonetheless be removable by the President 'on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.'" *Jarkesy*, 34 F.4th at 464 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). The court concluded that "SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed." *Jarkesy*, 34 F.4th at 465.

3. Removal Scheme for FMSHRC ALJs

Section 113(b)(2) of the Mine Act provides that the "[a]ssignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362, and 7521 of Title 5." 30 U.S.C. § 823(b)(2). Section 7521 of Title 5 states that the agency which employs the ALJ may remove the ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521. Thus, FMSHRC Commissioners can only remove FMSHRC ALJs after the MSPB has determined that there is good cause. Section 113(b)(1) of the Mine Act provides, in relevant part, that "[a]ny member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 30 U.S.C. § 823(b)(1). Similarly, members of the MSPB "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

4. Whether FMSHRC ALJs are Officers of the United States

CONSOL argues that FMSHRC ALJs serve sufficiently important executive functions such that they constitute "inferior officers" of the United States. (Resp't Mot. at 8.) Applying the reasoning of *Lucia v. SEC*, the Sixth Circuit in *Jones Brothers* held that FMSHRC ALJs are "inferior officers." *Jones Bros., Inc.*, 898, F.3d at 679. While the Sixth Circuit decision is not binding in this case, I determine that the Sixth Circuit's reasoning is persuasive and accordingly concur. Since FMSHRC ALJs are "inferior officers," the restrictions surrounding their removal must not unconstitutionally impair the President's ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

5. Whether the Removal Restrictions for FMSHRC ALJs are Constitutional

CONSOL argues that the restrictions on the removal of FMSHRC ALJs are sufficiently onerous such that they violate the "take Care clause" of the Constitution under *Free Enterprise Fund*. (Resp't Mot. at 8–9.) However, as previously discussed, *see* discussion *supra* Part III.C.1, the Supreme Court explicitly stated in *Free Enterprise Fund* that "our holding [] does *not* address that subset of independent agency employees who serve as *administrative law judges*." *Free Enter. Fund*, 561 U.S. at 507 n.10 (emphasis added). Contrary to CONSOL's assertion, *Free Enterprise Fund* does not dictate that the removal restrictions for FMSHRC ALJs are unconstitutional.

In fact, more recently in *Lucia v. SEC*, the Supreme Court again declined to address the constitutionality of removal restrictions for ALJs. *See Lucia*, 585 U.S. at 244 n.1 (citation omitted); *see also Jarkesy*, 603 U.S. at 121. The Court noted that it "ordinarily await[s] 'thorough lower court opinions to guide our analysis on the merits,'" but at the time of the decision no circuit court had addressed whether the statutory restrictions on removing SEC ALJs are constitutional. *Id.* As discussed above, *see* discussion *supra* Part III.C.2, a circuit split regarding the constitutionality of removal restrictions for ALJs has arisen since the Court decided *Lucia*.

However, neither the Fourth Circuit, where CONSOL's Itmann No. 5 mine is located, nor the D.C. Circuit[5] have weighed in on whether the statutory removal restrictions for ALJs is constitutional. Additionally, the Supreme Court has repeatedly told the courts of appeals to follow extant Supreme Court precedent unless and until the Court itself changes it or overturns it. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)) (holding that if a precedent of the Supreme Court "'has direct application in a case,'" lower courts "'should follow the case which directly controls," leaving to the Supreme Court "'the prerogative of overruling its own decisions" and noting that "[t]his is true even if the lower court thinks the precedent is in tension with 'some other line of decisions'"); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[w]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent").

To date, the Supreme Court has not held that the statutory removal scheme for ALJs under the Administrative Procedures Act, 5 U.S.C. § 551, et seq. ("APA") is unconstitutional; rather, it has explicitly stated that its holding in *Free Enterprise Fund* "does not address . . . administrative law judges." *Free Enter. Fund*, 561 U.S. at 507 n.10. Thus, in accordance with the longstanding law under the APA and current Supreme Court precedent, I conclude that the removal restrictions for FMSHRC ALJs are constitutional.

6. Remedy

Even if the removal scheme for FMSHRC ALJs is unconstitutional, the remedy CONSOL requests—i.e. dismissal of its case before me—is inappropriate. The Supreme Court's decision in *Collins v. Yellen* established that succeeding in a constitutional separation of powers challenge to a removal provision does not by itself entitle a party to relief. *Collins v. Yellen*, 594 U.S. 220, 257–60 (2021). Specifically, the plaintiffs in *Collins* sought a judicial declaration invalidating prior actions by the Directors of the Federal Housing Finance Agency ("FHFA"), whose removal restrictions the Court determined violated the Constitution. *Collins*, 594 U.S. at 257. However, the Court held that while the Act at issue unconstitutionally limited the President's authority to remove the FHFA Directors, "there was no constitutional defect in the statutorily prescribed method of appointment to that office" and "[a]s a result, there is no reason to regard any of the actions taken by the FHFA . . . as void." *Collins*, 594 U.S. at 257–58.

The Supreme Court in *Collins* explained that to invalidate an agency action a plaintiff must demonstrate an unconstitutional removal provision caused the plaintiff compensable harm—in other words, the plaintiff must demonstrate that the unconstitutional removal provision actually affected the agency's decision or conduct against the plaintiff. *Collins*, 594 U.S. at 259. For example, the Court suggested that the removal provision might harm a plaintiff if the President attempted to remove a FHFA Director "but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Id.* Here, CONSOL simply

[5] In *Fleming v. U.S. Department of Agriculture*, 987 F.3d 1093, 1097–98 (D.C. Cir. 2021), the D.C. Circuit declined to address the petitioners' argument that the USDA ALJs' dual layers of protection against removal is unconstitutional, because the petitioners failed to raise the issue before the ALJ or the Judicial Officer and, therefore, forfeited their argument.

alleges that "[d]ismissal of this case is necessary to avoid further constitutional and jurisdictional violations." (Resp't Mot. at 9.) Accordingly, I determine that CONSOL has failed to demonstrate that the statutory protections against my removal as a FMSHRC ALJ have caused CONSOL compensable harm.

I therefore conclude that under *Collins* no relief is available to CONSOL based on its lack of showing any compensable harm.

IV. ORDER

Accordingly, for the reasons discussed above CONSOL's Motion to Dismiss is hereby **DENIED.**

Alan G. Paez
Administrative Law Judge

Distribution (Via Electronic Mail Only):

Monica W. Hanratty, Esq. & Mathew R. Epstein, Esq.
U.S. Department of Labor, Office of the Regional Solicitor
1835 Market Street, Mailstop SOL/22, Philadelphia, PA 19103-2968
(hanratty.monica.w@dol.gov)
(epstein.matthew.r@dol.gov)

Christopher D. Pence, Esq., Pence Law Firm PLLC
P.O. Box 2548, Charleston, WV 25329-2548
(cpence@pencefirm.com)
(alilly@pencefirm.com)

/MEK