



*Black Lung Claims:  
Implications of the Health  
Care Bill of 2010*



## **Black Lung Claims**

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# Moderator



Dave Bradford, Chief Knowledge Officer, Advisen Ltd.

## Today's Panelists



Rich Muchow, Managing Attorney, Muchow, Becker & Pasquarelli



Michael Shiley, AVP Mining Underwriting, Zurich NA



Patricia Painter, Senior Workers' Compensation Specialist, Zurich NA



Maureen Sullivan, AVP, Workers Compensation Claims Division, Zurich NA

# Black Lung Claims: A legal perspective



**Rich Muchow**

Managing Attorney, Muchow, Becker & Pasquarelli

June 8, 2011

# Black Lung Benefits Act – Key aspects of the 15-year presumption



- Applies to both miners' and survivors' claims
- Originally enacted in 1972
- In 1981, limited to claims filed before January 1, 1982
- In 2010, made applicable to claims filed after January 1, 2005 and which were still pending on and after March 23, 2010
- For the presumption to apply in a claim, applicant must prove 15 or more years of coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment

# Black Lung Benefits Act – Terms and impact of the 15-year presumption



- **Terms:** proof of 15 years of coal mine employment and a totally disabling respiratory impairment gives rise to a presumption that the miner is totally disabled due to pneumoconiosis, that death is due to pneumoconiosis, or that the miner was totally disabled due to pneumoconiosis at the time of death.
- **Legal impact:** *in a miner's claim, the burden of proof is now on the employer* to show that the miner does not have pneumoconiosis or is not disabled from it. *In a survivor's claim, the employer now has the burden of proving* that the miner did not have pneumoconiosis or that his death did not arise in whole or in part out of coal mine employment.

# Black Lung Benefits Act – Automatic Entitlement provision



- **Terms:** provides that eligible survivors of a miner who was determined to be eligible to receive benefits at the time of his death, are automatically entitled to survivors' benefits without having to establish that the miner died due to pneumoconiosis
- **Impact:** Prior to the enactment of the health care law in 2010, the automatic entitlement provision only applied to survivors' claims filed prior to January 1, 1982. *Under the health care law the provision now applies to survivors' claims filed after January 1, 2005 and which are pending on and after March 23, 2010*



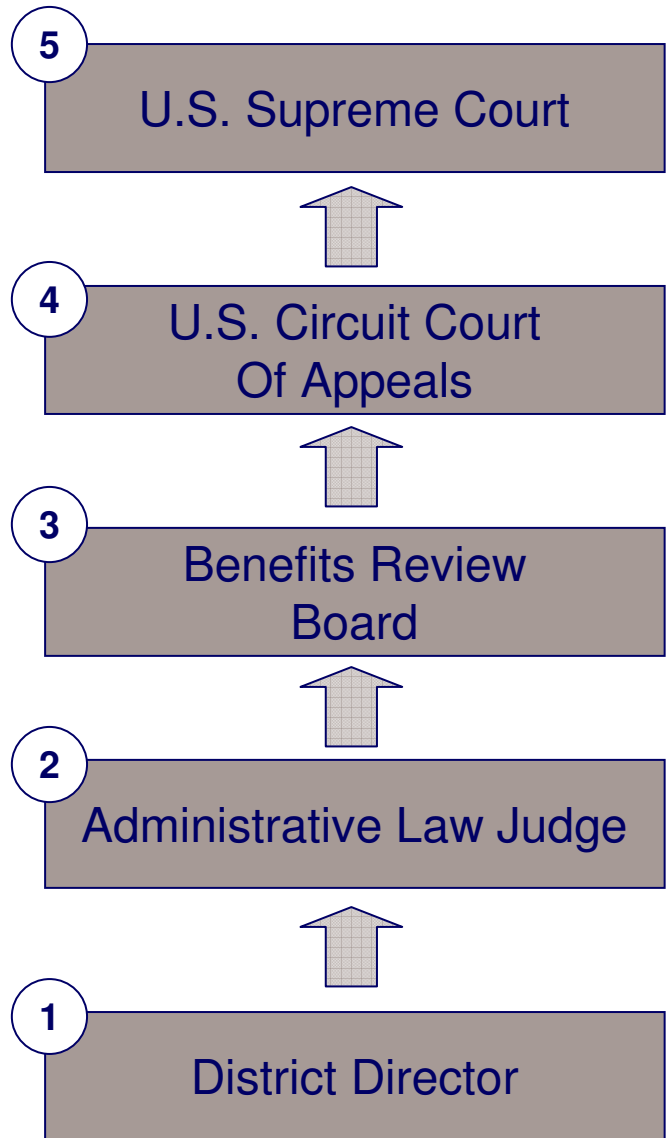
# Black Lung Benefits Act – Constitutionality of the new amendments



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- **15-year presumption:** Keene v. Consolidation Coal Company (7<sup>th</sup> Circuit Court of Appeals, decided May 19, 2011)
- **Automatic Entitlement provision:** Beulah Ann Mathews v. United Pocahontas Coal Company (Benefits Review Board, decided September 22, 2010) & Helen L. Fairman v. Helen Mining Company (Benefits Review Board, decided April 29, 2011)

# Litigation pathway of a black lung claim



- Many black lung claims filed after new amendments signed into law are still in early stages of adjudication



# Black Lung Claims: An underwriting perspective



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# Study by NIOSH – National Institute For Occupational Safety & Health



## CONCLUSIONS:

- After a long period of declining Coal Worker's Pneumoconiosis (CWP) prevalence, recent federal surveillance data indicate that the prevalence is rising
- Coal miners are developing severe CWP at relatively young ages
- There is some indication that the mortality of younger coal miners from CWP is increasing
- The pattern of CWP occurrence across the nation is not uniform; hot spots of disease appear to be concentrated in the central Appalachian region of southern WV, eastern KY, and western VA

# Study by NIOSH – National Institute For Occupational Safety & Health



## CONCLUSIONS (continued)

- Reassurance of CWP is likely multifactorial:
  - Crystalline silica
  - Higher rank coal
  - Coal mine dust exposure (intensity and duration)
  - Dust control in small coal mines
  
- More productive seams of coal are diminishing; industry is transitioning to mining thinner coal seams with more rock intrusions
  - Increased potential for exposure to crystalline silica
  - Increase risk of silicosis

Source: National Institute for Occupational Safety and Health. [1995]. Criteria for a recommended standard: Occupational exposure to coal mine dust. DHHS (NIOSH) Publication No. 95-106. Washington, DC, National Institute for Occupational Safety and Health.

# Black Lung Benefits Act – Impact on Workers' Compensation rates in 2010\*



<u>State</u>	<u>Effective Date</u>	<u>Surface Coal</u>	<u>Underground Coal</u>
Kentucky	7/1/10	+31.0%	+30.9%
Virginia	7/15/10	+26.7%	+26.5%
West Virginia	10/1/10	+23.7%	+24.0%

\*Change to Federal Black Lung rates

Source: National Council on Compensation Insurance, Inc.

# MSHA issues proposed rule on lowering miners' exposure to respirable coal dust



## The proposed rule would:

- Lower the existing concentration limits for respirable coal mine dust from 2 milligrams of dust per cubic meter of air, or 2 mg/m<sup>3</sup>, to 1 mg/m<sup>3</sup> over a 24-month phase-in period;
- Require the use of the continuous personal dust monitor;
- Provide for the use of a single, full-shift sample to determine compliance;
- Address extended work shifts;
- Redefine normal production shifts.
- Require expanded medical surveillance so that miners can take proactive steps to better manage their health.

Source: U.S. Dept. of Labor – press release October 14, 2010

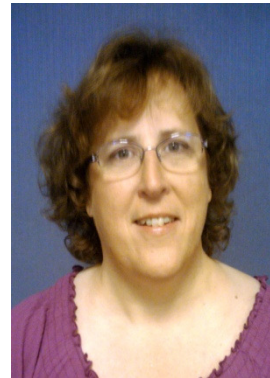
# Black Lung Claims: Management of Claims



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June 8, 2011



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# Benefits available for Black Lung claimants:



- Medical benefits
  - can range from medical exams, prescription drugs, oxygen and hospitalization to lung transplants in the more catastrophic black lung claims
  - only totally disabled former miners can qualify for the medical benefit
- Permanent total disability (includes a COLA, current max: \$625.60 for one miner, miner + one dependent: \$938.30, etc.)
- Widow's benefits (if proven miner had CWP that caused his death)
- Benefits must be initiated within 30 days of a final determination of liability for the benefits
- Federal black lung claims cannot be settled; it's all (lifetime) or nothing

# Course of a Black Lung claim



- A miner has three years from the time he is informed of a medical determination of total disability due to pneumonconiosis to file a claim
- Black lung claim is filed with a US DOL District Office or local social security office
- DOL identifies last coal mine employer (12 mo+) as the Responsible Operator (RO) and notifies carrier, gives claimant list of doctors, claimant can choose from list for initial evaluation
- DOL issues Schedule for Submission of Additional Evidence (SSAE) after initial pulmonary evaluation is completed..
- After evidence period, DOL issues Proposed Decision and Order (PDO).

# What is the Black Lung Disability Trust Fund and how does it work?



- The **Black Lung Disability Trust Fund** finances the cost of black lung claims when:
  - the miner's last coal mine employment was before 1/1/70
  - no responsible coal mine operator has been identified in claims where the miner's last coal employment was after 12/31/69
  - when a proposed Decision and Order is issued indicating we owe benefits and the carrier appeals it, during the pendency of the appeal, the BL Disability Trust Fund pays the miner all black lung benefits; should the carrier lose the appeal, the Trust Fund must be reimbursed all benefit costs and interest
  
- The Trust Fund is supported by a tax paid by coal mine operators on each ton sold

# Can an employee file for both state and federal benefits? Is there any offset?



- Federal black lung benefits are offset by state workers' compensation benefits for the same disease
- If state black lung benefits are less than federal black lung benefits, the federal black lung program covers the difference
- Social Security disability benefits are also reduced by the amount of the black lung benefits received

# Benefits of centralization of Black Lung claims:



- Specialization of adjusters
- Expertise of adjuster
- Selection of independent medical experts, vendors, defense counsel
- Federal black lung claims differ from state claims in benefits, federal oversight, course of litigation, etc.

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