No. 24-784

IN THE

Supreme Court of the United States

ARCH RESOURCES, INC., FKA ARCH COAL, *et al.*,

Petitioners,

v.

DOUGLAS PENNINGTON, ACTING DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* MILLIMAN, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Milliman, Inc. was founded in 1947 and today is among the world's largest providers of actuarial and risk management consulting services, with more than 5,100 employees around the world and annual revenue of $1.64 billion in 2024. The firm is owned by principals who are actively engaged in consulting and whose analyses and opinions are completely independent and objective. Milliman does not act as an agent, broker, reinsurance intermediary, third-party administrator, or adjuster. Milliman generally does not accept any form of contingency compensation. Employees are not permitted to own stock in any insurance or reinsurance company, nor in any client to which that employee directly provides services.

Milliman's services cover a vast array of financial, health and insurance-related topics, including a particular expertise in black lung[2] legislation, regulations, claims, risk quantification, historical background, and insurance. Milliman's Black Lung Practice (the Practice) was started 50 years ago. For the past several years, the Practice has been co-led by Christine Fleming, J.D., AIC,

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1. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person other than *amicus curiae*, their members, or their counsel, make a monetary contribution that was intended to fund the preparation or submission of this brief. All parties received timely notice of Amicus's intent to file this brief.

2. At all times throughout this brief unless otherwise indicated, the term "black lung" will refer to federal black lung as opposed to state black lung claims.

ACAS, MAAA an attorney and credentialed actuary, and Travis Grulkowski, FCAS, MAAA, an expert in black lung actuarial reserving, and includes a team of black lung professionals with backgrounds in actuarial science, claims handling, accounting, and insurance law. Milliman has published numerous articles, papers, and webinars on various topics involving black lung matters, including a comprehensive first-of-its-kind industry study estimating federal black lung liabilities. Milliman has developed proprietary tools and actuarial reserving (risk quantification) methods that are specific to black lung claims. Members of the Black Lung Practice are frequently sought after to speak at industry meetings and have been published in industry periodicals. Milliman's black lung clients have included insurance companies, reinsurance companies, state funds, and coal and energy corporations.

For decades, Milliman has helped coal companies file for self-insured status. Milliman has also assisted insurance companies who provide commercial insurance coverage to coal company policyholders. As a provider of claims software, risk management tools, reserving and ratemaking analyses, consulting advice and other related services to our black lung clients, Milliman sees firsthand the serious financial consequences of ambiguous, unforeseen, or capricious changes in long-standing laws and critical processes upon which operators and insurers rely. In Milliman's opinion, the industry needs clarity and confirmation of these principles and their applicability to self-insured coal companies to ensure that vital financial precepts of reliability and certainty are protected. For this reason, Milliman supports the Court granting Petitioner's Writ of Certiorari.

SUMMARY OF ARGUMENT

Before 2016, the Black Lung Benefits Act, 30 U.S.C. §§ 901-944 (BLBA), and related regulations contained certain provisions—which applied only to insurance carriers—and other very different provisions—which applied only to self-insured coal companies. With its issuance of Bulletin 16-01, the Department of Labor attempted to retroactively apply the requirements of an insurance carrier to a self-insured party (i.e., it used the date of occurrence to trigger responsibility for paying federal black lung claims). This retroactive application of a requirement that did not exist for self-insured companies has led to confusion and financial uncertainty, imposing obligations that were not foreseeable and causing instability in the black lung insurance and funding system.

ARGUMENT

I. Relevant Background about Black Lung Claims and Legislation

Black lung claims arise out of a specific condition called "coal workers' pneumoconiosis" (CWP) resulting from exposure to coal dust. Not surprisingly, coal miners are especially susceptible to this potentially serious respiratory illness. Black lung claims are a type of workers' compensation claim and are governed by federal laws and regulations dating back to 1969 with the creation of the federal Black Lung Program and the enactment of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173), later amended by the Black Lung Benefits Act, 30 U.S.C. §§ 901-944 (BLBA).

Generally, for workers' compensation claims (including black lung), the employer is responsible for the resulting benefit payments when an injury or illness arises out of and in the scope of a worker's employment. For example, if an employed roofer sustains a tibia fracture while fixing a roof, the employer on the date that the fracture occurred would be responsible for paying benefits (assuming other required compensability criteria are met). When the injury date is known, identifying the responsible employer is a trivial task.

But CWP is different from workers' compensation injuries such as a broken leg. It is not possible to identify a specific date and time that CWP occurred because the exposure to the coal dust extends over several years or even decades. If a coal miner worked for several different coal operators, it would be difficult to identify one responsible employer. In addition, the time between exposure to coal dust and the manifestation of CWP can be very long. Even if a miner worked for only one coal company, by the time the miner was diagnosed with CWP and filed a black lung claim, his employer may be out of business. The inability to identify a specific employer quickly could lead to protracted litigation, thereby delaying benefit payments to the injured miner.

To address this issue (and several others), the BLBA authorizes the Department of Labor (DOL) to select the coal operator responsible for benefit payments. 20 C.F.R. § 725.407. This DOL designation is commonly referred to as the "responsible operator" or "RO." The BLBA provides comprehensive and specific criteria for identifying the RO, and two such criteria are especially relevant to the matter before the Court:

a) The last coal company for which the miner worked will be the RO[3] (assuming all other criteria are met). In other words, *the injury* (i.e., CWP) is effectively deemed to have *occurred* on the date of the miner's last employment. *See* 20 C.F.R. § 725.494 (defining "potentially liable operators"); 20 C.F.R. § 725.495(a)(1) ("The operator responsible for the payment of benefits in a claim adjudicated under this part (the 'responsible operator') shall be the potentially liable operator as determined in accordance with § 725.494 that most recently employed the miner.") These regulations, which created presumptions and assigned responsibility, simplified the process so that injured workers could get their benefits paid quickly, without protracted litigation related to responsibility of or allocation among employers as to liability.

b) The criterion described in (a) above is subject to the following constraint: the DOL cannot identify a coal company as the RO if that company is unable to pay the benefits. *See* 20 C.F.R. § 725.408(a)(2)(v). If the coal company would otherwise be identified as the RO (i.e., meets all but one criteria) but is unable to pay (i.e., fails to meet that last criterion), the benefits are to be paid out of the Black Lung Disability Trust Fund (the Trust Fund). The Trust Fund was created

3. As long as the miner worked for that last employer for at least 12 months.

by Congress under Part C of the BLBA to pay black lung benefits for workers when a miner's employer does not meet all of the RO criteria.[4] 26 U.S.C. § 9501. The Trust Fund is funded by a tax on active and solvent coal operators based upon the amount of annual coal they produce.

There are two ways a coal company can provide for the payment of black lung benefits to its employees who develop black lung disease:

- Commercial insurer. The coal operator can purchase a workers' compensation insurance policy from a qualified insurer, in which case the coal operator pays a premium to the insurer and the insurer pays the covered benefits. A coal operator with insurance coverage is considered able to pay the benefits and meets the last criterion for RO. 20 C.F.R. § 725.494(e)(1).

- Self-insured. In the alternative, the coal operator can apply and get approved for self-insured status, in which case the coal company is essentially uninsured by a third party and therefore responsible for paying covered benefits directly to the claimant. 20 C.F.R. § 725.494(e)(2). If the coal company goes bankrupt, it would be considered unable to pay and the claimant's benefits would be paid out of the Trust Fund.

4. Assuming that the state's workers' compensation system is not determined by the DOL to meet certain standards.

II. The Underlying Case Demonstrates the Need for Clarity and Certainty in the Administration of Black Lung Claims

David Howard had been working for Apogee Coal Company (Apogee) when he retired from coal mining in 1997. Mr. Howard filed a black lung claim in 2014 and was awarded benefits.

When Mr. Howard retired in 1997, Apogee was a subsidiary of Arch Resources, Inc. (Arch), a coal mining operator. At the time, Arch was self-insured for black lung claims, including claims related to the operations of Apogee. Apogee was listed on Arch's self-insured application, which was reviewed and approved by the DOL.

In 2005, Arch sold Apogee—including all its federal black lung liabilities—to Magnum Coal Company (Magnum). Then, in 2008, Magnum sold Apogee, again including all its federal black lung liabilities, to Patriot Coal Company (Patriot). Patriot was self-insured for black lung claims, including claims related to the operations of Apogee. Apogee was listed on Patriot's self-insured application, which was reviewed and approved by the DOL.

When Arch transferred Apogee's black lung liabilities to Magnum, Magnum assumed financial responsibility for those liabilities. When Magnum transferred Apogee's black lung liabilities to Patriot, Patriot assumed financial responsibility for those liabilities.

Because Arch was a self-insured operator, it was able to transfer its liabilities via the sale to Magnum and then again to Patriot. If Arch had covered its liabilities through

a commercial insurance plan, it would not have been able to transfer these liabilities (as discussed further below). Self-insured black lung liabilities can be transferred in a corporate transaction; commercial insurance carriers have continuing obligations.[5] Arch was not an insurance carrier and did not issue insurance policies to Apogee.

Patriot (including Apogee) went bankrupt in 2015. In 2015, the usual process (as established by law and by the decades of prior practices of the DOL, discussed below) would have been to transfer Mr. Howard's claim into the Trust Fund. There would be no RO because the last employer was self-insured, was unable to pay due to bankruptcy, and therefore did not meet the RO criteria. 20 C.F.R. § 725.408(a)(2)(v).

III. The Law Treats Self-Insured Entities and Those Insured By Commercial Insurance Differently, Resulting in Vastly Different Treatment of Operators.

In Mr. Howard's case, the DOL identified Apogee as the RO by essentially characterizing Arch as Apogee's insurer. Specifically, Bulletin 16-01 instructed that Apogee be named as the RO because the Howard claim occurred during "Arch Coal's self-insurance." U.S. Department of Labor, BLBA Bulletin No. 16-01 (November 12, 2015), https://www.dol.gov/sites/dolgov/files/owcp/dcmwc/blba/indexes/BL16.01OCR.pdf.

The date that the claim occurred is the applicable date for identifying the appropriate black lung *commercial*

5. Unless of course the commercial insurer transfers the liabilities (e.g., in a commutation or related transaction).

insurance company under Part B of the BLBA—if a coal company had purchased commercial insurance for its black lung claims. But here, Apogee did not purchase commercial insurance and Arch had already transferred these liabilities to another entity. For black lung claims, the distinction between purchasing a commercial insurance policy and being qualified for self-insured status is essential to a determination of an RO and the general administration of the BLBA.[6]

A. Self-Insured Companies Need Clarity Regarding the Scope of Their Obligations Under the BLBA.

As stated above, a self-insured coal company can transfer all its black lung liabilities to another company through a sale or acquisition. These corporate transactions occur often. When a self-insured parent company sells its subsidiary (and the associated black lung liabilities) to another company, it must inform the DOL of that transaction. The parent company then removes that subsidiary's mines from the self-insured application. If the purchaser of the subsidiary is also self-insured, the purchaser in turn adds the newly acquired subsidiary's mines to its self-insured application for DOL acknowledgement and approval.

A self-insured company, by definition, is uninsured in the sense that it has not purchased commercial insurance

6. This discussion pertains to black lung insurance and self-insured requirements only; other workers' compensation claims are subject to programs, self-insured regulations, and insurance requirements that could be very different from those mandated by the federal government specifically for black lung claims.

from a qualified third-party insurer: there is no insurance policy, no payment of premiums, no policy terms and conditions, no endorsements. It pays benefits from its own funds. And a self-insured company is also not an insurance company; it does not and legally cannot issue insurance policies or be a *de facto* insurer for any other company.

To qualify as self-insured, coal companies undergo a rigorous self-insured application process subject to DOL scrutiny and approval. Coal operators that are granted self-insured status are required to refile every year (or at the DOL's discretion) to ensure that the company continues to meet self-insured requirements. *See* 20 C.F.R. §§ 726.114(a) & (b). Self-insured coal companies are required to post security to help ensure that the company can make benefit payments to black lung claimants in the ensuing year and that amount is reassessed annually (or at the DOL's discretion). 20 C.F.R. § 726.114(c).

Mr. Howard's black lung claim both occurred and was reported at a time when the DOL required the self-insured coal company to have sufficient additional assets to cover the annual estimated black lung benefits expected to be paid during that year.[7] 20 C.F.R. § 726.101(b)(3). The DOL sought information about known claims. The amount of security required by the DOL was based upon paid claim data and the net worth of the company. Upon renewal, the applicant would provide a new set of attachments documenting new claims that had been reported in the prior year (or since last authorization if not annual). At the time of Mr. Howard's claim, there was no explicit or

7. Plus the annual cost of the bond purchased if the security is in the form of a bond.

implicit rule, law, regulation, or DOL memo or bulletin requiring or even suggesting that coal companies' self-insured applications include estimates of unreported claims or that security be based upon unreported claims.

Recently, there have been changes to these regulations to address conditions for self-insured status going forward (e.g., regulations were changed on November 15, 2024, requiring the submission of an actuarial analysis; on January 13, 2025, the DOL issued new requirements for assumptions to be used in those actuarial analyses). As of the date of Mr. Howard's last employment in 1997 (i.e., the date the claim occurred) and later in 2014 when Mr. Howard's claim was reported, these laws and rules had not yet existed.

B. Commercial Insurers Also Need Clarity Regarding the Scope of Their Obligations Under the BLBA.

In contrast to self-insured companies, coal companies that purchase commercial insurance do not have to apply every year for approval with the DOL, nor do they have to ensure adequate company assets to cover the annual estimated black lung benefit payments to be paid during the ensuing year. Rather, coal companies that purchase commercial insurance rely upon the insurer to maintain a reasonable provision for payment of future black lung benefit payments.

Not surprisingly, insurers are subject to rigorous state and federal insurance laws and regulations. One notable requirement (for black lung) is that a commercial insurance policy must contain an endorsement that

the policy will respond to claims that occur during the policy period. 20 C.F.R. § 726.203. For this reason, commercial insurance policies are commonly referred to as "occurrence" policies, meaning that they pay for events that occurred during the policy period even if those events have not yet been reported—even if the loss event is not even known yet.

Thus, for black lung claims, a commercial insurance policy still provides coverage to an insured even if that insured goes bankrupt. That is why a bankrupt coal company that had purchased insurance is still "able to pay" and can be an RO—the insurer has a contractual and legal obligation to pay all claims covered under the policy if they occurred during the policy period (i.e., the last date of coal mining employment).

But this creates an additional obligation for insurers. Because commercial insurers have been required to issue occurrence-based policies for black lung claims, they need to set aside money for the best estimate of the reported claim values, commonly referred to as "case reserves," as well as providing a buffer for unanticipated developments on reported claims (i.e., the case reserves might get higher in the future). What is more, insurers must include in their calculations some provision for claims that have occurred but have not yet been reported. These last two provisions are commonly referred to as the "IBNR reserve," which is calculated by qualified actuaries. Since the occurrence for CWP is deemed to be the date of last employment, even if the onset of CWP occurs decades later, the actuary is required to estimate IBNR reserves that make a reasonable provision for all future filed claims by employees who left the policyholder's employment during the policy period.

CONCLUSION

When Mr. Howard's CWP "occurred" in 1997, as well as when it was reported in 2014, the laws and regulations were clear and were consistently adhered to by the DOL and across the industry. While fully appreciating the financial burdens imposed on the Trust Fund, the retroactive application of a *de facto* "insurer" status to Arch—imposing responsibility for a claim it had legally transferred in a corporate transaction—is without a sound legal or practical basis. That is not how the system was designed to work.

The DOL and Congress have treated self-insureds and commercial insurers very differently in certain key respects as outlined in Parts B and C of the BLBA, and with good reason. The DOL acknowledged the transfer of Apogee's black lung liabilities away from Arch when it approved Arch's self-insured application, which included withdrawing Apogee from the list of Arch mines. The DOL then acknowledged the transfer of Apogee's black lung liabilities to Patriot when it approved Patriot's self-insured application including the Apogee mines.

Regardless of what Congress and the DOL decide for funding black lung liabilities going forward, the **retroactive** application implied by Bulletin 16-01 and the effective recharacterization of a self-insured parent company as an "insurer" has led to confusion and financial uncertainty for self-insured coal companies, imposing obligations that were not foreseeable and causing instability in the black lung insurance and funding system.

Milliman supports the Court's granting certiorari and bringing clarity and certainty to this issue moving forward.

Respectfully submitted,

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