No. 19-1630

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**JEFFREY G. CARSWELL; BENT HANSEN;
HEINZ H. ERIKSEN,**

Petitioners

v.

**E. PIHL & SONS, TOPSOE-JENSEN & SHROEDER, LTD;
DANISH CONSTRUCTION CORP.;
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,**

Respondents.

**On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

KATE O'SCANNLAIN
Solicitor of Labor
BARRY H. JOYNER
Associate Solicitor
KEVIN LYSKOWSKI
Deputy Associate Solicitor
MARK REINHALTER
Counsel for Longshore
GARY K. STEARMAN
Counsel for Appellate Litigation
MATTHEW W. BOYLE
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2119, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of
Workers' Compensation Programs

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REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and First Circuit Rule 34.0(a), the Director, OWCP, states that oral argument is not necessary in this case. There is clearly substantial evidence in the record to support the administrative law judge's conclusion that the ailments Petitioners allege – and on which they base their claims for compensation under the Defense Base Act – are not related to their employment at Thule Air Base in 1968.

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E. PIHL & SONS, TOPSOE-JENSEN & SHROEDER, LTD,
DANISH CONSTRUCTION CORP., and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents,

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal arises from claims filed by Jeffrey Carswell, Bent Hansen, and Heinz Eriksen (Claimants) for benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act), as extended by the Defense Base Act (DBA), 42 U.S.C.

§ 1651 *et seq.*[1] Administrative Law Judge Adele Higgins Odegard (the ALJ) had jurisdiction to hear the claim under 33 U.S.C. §§ 919(c), (d). Her October 18, 2017, decision and order denying benefits became effective on October 19, 2017, when it was filed in the office of the district director. Certified List (docketed Jun. 21, 2019) at 5; 33 U.S.C. § 921(a).

Claimants filed a notice of appeal with the Benefits Review Board (Board) on November 14, 2017, Certified List at 6, within the thirty-day period provided by 33 U.S.C. § 921(a), thereby invoking the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On December 11, 2018, the Board issued a final decision and order, affirming the ALJ's decision. Certified List at 4.

Claimants were aggrieved by the Board's decision, and filed a petition for review with the United States Court of Appeals for the Second Circuit on January 14, 2019, within the sixty days allowed under 33 U.S.C. § 921(c).

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[1] The DBA applies the provisions of the Longshore Act "to the injury or death of any employee engaged in any employment . . . (4) under a contract entered into with the United States or any executive department . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work . . .." 42 U.S.C. § 1651(a)(4). A "public work" includes "projects or operations under service contracts and projects in connection with the national defense." 42 U.S.C. § 1651(b)(1). Persons covered by the DBA include foreign nationals (like Claimants). 42 U.S.C. § 1652.

The Second Circuit found that it did not have jurisdiction over the appeal, and transferred it to this Court. (Case No. 19-151, Order of June 18, 2018).[2]

STATEMENT OF THE ISSUES

I. Department of Labor regulations implementing the Longshore Act and its extensions, including the DBA, provide that the Director, Office of Workers' Compensation Programs (OWCP), is "an interested party" in formal proceedings before an ALJ, 20 C.F.R. § 702.333(b); that the Secretary or his designee (the Director) is a "Party or Party in Interest," in proceedings before the Board, 20 C.F.R. § 801.2(a)(10); and that the Director is "the proper party on behalf of the Secretary in all review proceedings" of Board decisions in the United States courts of appeals, 20 C.F.R. § 802.410(b); *accord Ingalls Shipbuilding, Inc. v. Director, OWCP*, 519 U.S. 248, 265-70 (1997) (petition for review of a Board order must name the Director, OWCP as a party respondent.). The ALJ and Board both

[2] In the same order, the Second Circuit denied Claimants' motion to certify questions of law to the United States Supreme Court. Claimants then petitioned the Supreme Court for a writ of certiorari, which the Court declined to docket because it was filed out of time. *See* Supreme Court No. 19M73 (available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19m73.html.) Finally, Claimants asked this Court for certification to the Supreme Court under 28 U.S.C. § 1254(2) (motion docketed Aug. 20, 2019), which the Court denied on October 28, 2019.

permitted the Director to participate in proceedings before them. Was the Director a proper party before the ALJ and Board?

II. Is there substantial evidence in the record to support the ALJ's finding that Claimants' ailments were not caused by exposure to plutonium radiation in the course of their employment?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

On January 21, 1968, a U.S. Air Force bomber carrying nuclear weapons crashed on sea ice near Thule, Greenland, which was a territory of Denmark at the time. The crash occurred about eight miles from Thule Air Base, a U.S. Air Force facility (Thule). Exh. D-2(a), DOL-1, G-7.[3] (Thule is located 750 miles north of the Arctic Circle on the northwest coast of Greenland.) As a result of the crash, radioactive plutonium was released. *Id.*; *see also* Exh. D-4, G-15.[4] Almost immediately, the U.S. Air Force

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[3] The ALJ used the following method to identify exhibits: "C" for Claimants' Exhibits relating to Carswell; "H" for Claimants' Exhibits relating to Hansen; "E" for Claimants' Exhibits relating to Eriksen; "G" for Claimants' Exhibits relating to all three Claimants; "D" for Employer's Exhibits; "DOL" for the Director's Exhibits; and "ALJ" for any other submissions admitted into evidence. *See* ALJ Dec. at 3 n.3.

[4] Radiation was released either when the nuclear weapons disintegrated on impact or the conventional explosive elements of those weapons detonated. *See* ALJ Dec. at 118 n.172 (citing Exh. D-2(a)).

began a comprehensive cleanup effort, "Operation Crested Ice," that lasted from January to September 1968, and consisted of three phases. Exh. D-2(a), D-4, DOL-1, G-14, G-15. Air Force leaders were aware of the potential dangers of plutonium exposure, and took steps to monitor and minimize any harmful exposure to cleanup workers. Exh. G-7, D-2(a), G-8, DOL-1.

By January 25, 1968, the U.S. military had set up a "hazard control line" or "zero line," the point at which detection devices registered a radiation level of zero. U.S. military servicemen who passed that point into the "hot zone" were required to wear protective clothing, and were decontaminated when they returned to the zero line. Exh. D-2(a) at 17; D-17; Tr. 710-14. No Danes were permitted to cross the zero line. Tr. 730-44, 1428-41.

Phase I of the cleanup involved the removal of potentially contaminated aircraft debris, and was performed by U.S. airmen walking shoulder-to-shoulder and collecting the debris. The collected debris was returned to the base, where military personnel packed it in 55-gallon drums and larger containers. This phase of the cleanup lasted until late February 1968. Exh. D-3(a), D-21; Exh. G-8 (court) at 840 (operations plan for Feb.

24, 1968), 856-57 (same for Feb. 26, 1968), 1040 (description of debris containers), 1340 (photographs of debris containers).

Phase II of the Operation, which lasted until April 10, 1968, involved the removal of contaminated ice and snow from the hot zone, the movement of those materials back to the base, and the sealing of those materials in metal tanks. Exh. D-21. The work in the hot zone was performed by U.S. service members using road graders, belt loaders, pay loaders, tractors and dozers. Exh. G-8 (court) at 553, 1207 (listing personnel and equipment used); 1705-08, 1721-22 (photographs of graders); 1713-17 (belt loaders); Exh. H-6 (Hansen's statement, reproduced in full with the exception of pictures at ALJ Dec. 22-24); Tr. 85. The snow and ice were loaded into large plywood boxes on the backs of trucks. Exh. D-44 at 7 (photograph of loading operation); Exh. G-8 (court) at 552-56; 1207, 1716.

U.S. military personnel drove the loaded trucks (which stayed in the hot zone) to a material transfer point on the zero line, where the containers with contaminated snow and ice were transferred from the hot-zone trucks to other trucks that returned to the base. Exh. D-17 at 2. These other trucks were U.S. military vehicles, but were driven by Danes. Tr. 85-86. When the trucks reached the base, the snow and ice were loaded into specially-modified 25,000-gallon fuel tanks. Exh. D-44 at 9-12 (photographs). The

tanks were modified by cutting holes in their tops with welding equipment, and attaching newly-constructed wooden chutes to assist in loading. The tanks were loaded in Hangar # 2 at Thule Air Base. When full, the tanks were welded shut and moved outside to the "tank farm." Exh. D-2(a), D-3(a), D-44 at 5 (aerial photograph of tank farm); Exh. G-8 (court) at 1208-09, 1377; DOL-1; Tr. 82-94, 174-85, 768-773, Exh. H-6 (ALJ Dec. 22-24).

During Phase III of the operation, the liquids (melted snow and ice) in the 25,000-gallon tanks were transferred to smaller tanks, and then transported to the United States by ship, the last of which left Thule on September 13, 1968. Exh. D-2(a), D-3(a), DOL-1, G-8 (court) at 1024-1026, 1226-27, 1290, 1373, 1389, 1391; Tr. 82-94, 174-85, 768-773, Exh. H-6.

Claimants, all Danish citizens, worked for the Danish Construction Corporation (DCC), a joint venture of five Danish companies that assisted in the cleanup. As detailed below, Claimants assert that their participation in the cleanup exposed them to plutonium radiation, which caused them injury.

Claimants filed claims against two of the DCC companies that they believed were still going concerns: E. Pihl & Son (E. Pihl), and Topsoe-

Jensen & Shroeder, Ltd (Topsoe). ALJ Dec. at 3-4.[5] E. Pihl was declared bankrupt by a Danish court on August 26, 2013, during the proceedings before the ALJ, *see* ALJ Dec. at 4 (citing ALJ Orders of Sept. 6, 2013 and July 23, 2014), but continued to defend against the claims before the ALJ and Board, and has entered an appearance before this Court. Topsoe refused to accept service of process and has not participated in any proceedings.

A. Jeffrey Carswell

Carswell was hired by DCC as a shipping clerk, and arrived at Thule in July 1966.[6] Tr. 61-65, 147-54. Carswell supervised the attachment of hazardous material labels to the sealed drums and tanks. Tr. 79-82, 154-58. He was also responsible for the logistics of shipping the closed tanks, and thus went to the tank farm daily, but he did not personally handle the tanks. Tr. 154-58, 878-84. He additionally alleges that he added ice from a fjord

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[5] Throughout this litigation, all parties assumed that DCC no longer existed, and there was evidence that it ceased operations in the 1970s.

[6] While working at Thule, Carswell used the name Henri Skriver Olesen and thus some employment and medical documents in the record reflect that name rather than Carswell. ALJ Dec. at 29 n.43, 115; Tr. at 112-14; *see also* Exh. C-2 (name change document). He worked at Thule from July 5, 1966-May 19, 1967; June 14, 1967-April 9, 1968; May 15, 1968-December 28 or 29, 1969; February 2, 1970-October, 1970; October 21, 1970-December 16, 1970; and January 12, 1971-July 7, 1971. Exh. D-40; Tr. 1830-37 (Testimony of Dr. Juel).

near the base to his drinks after the crash. Exh. D-2 at 2, C-9 at 9. Carswell filed a claim on July 26, 2010, alleging that his exposure to the contaminated debris, ice, and snow resulted in stomach cancer, esophageal problems, and hypothyroidism. ALJ Dec. at 132.

B. Heinz Eriksen

Eriksen was a fireman for DCC, starting at Thule in the summer of 1967.[7] He worked inside Hangar #2 every other day from January through September 1968. He extinguished minor fires that started daily when the tanks were being welded shut, and was generally stationed fourteen to fifteen feet away from the tanks during welding. Tr. 216-21. He testified that the hangar floor was wet with melting snow and ice and covered with fog. Tr. 185-98, 216-21, 285-90. Eriksen filed a claim on August 13, 2010, alleging that he suffered from renal cancer and affiliated tumors as a result of his plutonium exposure. ALJ Dec. at 132.

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[7] While working at Thule, Eriksen used the last name Sorensen. ALJ Dec. at 17, 39 n.57, 115; Tr. 214-15. He worked at Thule from November 1967-December 8, 1968; January 29, 1969-May 6 or 8, 1970; June 17, 1970-December 9, 1970; and December 29, 1970-April 6, 1971. Exh. D-39; Tr. 1830-37 (Testimony of Dr. Juel).

C. **Bent Hansen**

Hansen was employed by DCC at Thule as a carpenter in 1967 and 1968.[8] As part of the cleanup effort, he constructed scoops that the U.S. military used to remove contaminated material from the crash site, and chutes used to funnel ice and snow into the 25,000-gallon fuel tanks at Hangar #2. He stated that when he delivered the chutes to Hanger #2, the hangar floor was covered in ice from spillage and truck tires, and there was often a fog in the hangar during the tank-filling process. He stated that there were frequent fires in the hangar because the heat from welding the fuel tanks would ignite the petrochemical residue in them, and that he was present for three or four fires. Hansen stated that he also brought raw timber to the tank farm to be placed under the tanks to stabilize them as the permafrost melted. Exh. H-6 (*see* ALJ Dec. at 22); Tr. 2296-2306.

Like Eriksen, Hansen filed a claim on August 13, 2010, alleging that his exposure to the contaminated materials caused renal cancer and affiliated tumors. ALJ Dec. at 132.

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[8] Hansen worked at Thule from December 14, 1966-December 30, 1967; February 21, 1968-August 21, 1968; and October 2, 1968-December 11, 1968. Exh. D-41.

II. DECISIONS BELOW

A. The ALJ denies the claims.

The ALJ held nine days of hearings, on December 4, 2012; July 15-16, and August 12-14, 2013; and March 7, April 3, and November 14, 2014. She also entered numerous interim orders during the proceedings. In her 164-page, single-spaced, final decision, dated October 18, 2017, the ALJ denied benefits to all three Claimants.

At various points during the proceedings, the ALJ rejected Claimants' objections to the Director's participation in the case. *See* ALJ Dec. at 161 (citing interim orders). For example, in an Order dated July 23, 2014, she rejected the argument while relying on 20 C.F.R § 702.333(b), which provides that the "Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party." In another Order, dated July 2, 2013, she explained that the Director's participation was warranted in light of the bankruptcy of the potentially liable employers and the resulting possibility that the Director would be asked to pay Claimants' compensation under 33 U.S.C. § 918(b) (authorizing the Director to pay an award from the Special Fund "[i]n cases where judgment cannot be satisfied by reason of the employer's insolvency."). The ALJ reiterated this conclusion in her final

decision, finding "that the Director acted prudently to safeguard the potential liability of the Longshore Act's Special Fund." *Id*.

The ALJ also rejected Claimants' demand that the independent medical examiner, Dr. Siegel, conduct urinalyses to detect the presence of the plutonium exposure. June 10, 2013 Order at 7. She left it to the doctor's medical expertise to decide which objective tests were necessary. *Id*.

With regard to the claims at issue, the ALJ found Carswell's and Hansen's disability compensation claims time-barred, ALJ Dec. at 132-33, 135, and only Eriksen's claim for a forced early retirement timely. ALJ Dec. at 134. Notwithstanding that determination, she addressed the claims on their merits and denied them, finding that "the overwhelming weight of the medical evidence establishes that Claimants' medical conditions are not related to their exposure to radiation, if any, at Thule." ALJ Dec. at 151.

As detailed below, the primary evidence presented to the ALJ consisted of expert medical opinions from Employer, Claimants, and the Director. Employer's experts were Dr. Lynn Anspaugh, who testified that Claimants' work at Thule would not have exposed them to a detectable dose of plutonium, *see* Exhs. D-23, 24, 25; and Drs. Fred Mettler, Paul Russo, and Allen Turnbull, who testified that the ailments Claimants allege are not caused by exposure to plutonium. Exhs. D-32, 33 (Mettler), D-34 (Russo);

D-35, 36, 42, 42(a) (Turnbull). Employer also submitted a report and testimony from Dr. Knud Juel, who had previously studied and found no adverse health effects to DCC employees involved in Thule cleanup. ALJ Dec. at 158; *see* Exhs. D-38, 5, 43, 45.[9] Claimants' experts consisted of Drs. Albert Robbins, Graeme Edwards, and Frank Barnaby, who testified that Claimants' medical conditions stemmed from their work at Thule. ALJ Dec. at 158; Exhs. C-3 (Edwards), E-5 (Edwards), and G-3 (Barnaby). Last, the Director submitted the report of Dr. Jerome Siegel, who conducted an independent medical examination (IME) of each Claimant and found that they suffered no acute illnesses or health effects from radiation exposure. JA 155; DOL-2.[10]

The ALJ first addressed whether Claimants were exposed to plutonium radiation. She found it unlikely that Carswell had been. ALJ Dec. 149. She based that conclusion on the opinion of Dr. Anspaugh, an expert in the field of radiation dosimetry (calculating the dose of radiation to

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[9] Dr. Juel testified as a fact witness because, as an employee of a Danish state university, he was prohibited by the Danish government from testifying as an expert witness. Tr. 1755, 1766.

[10] The ALJ found Dr. Siegel's evaluations to be "of little value" and accorded them "minimal weight" because he focused on the wrong issue, namely, "the effect of acute exposure to radiation." ALJ Dec. at 157.

a body part or organ), who opined that plutonium radiation could not penetrate a piece of paper, clothing, or even skin, much less a metal tank, and that Carswell had come into contact with the containers after they had been filled and placed outside in the open air at the tank farm, where they were sealed or being sealed. ALJ Dec. at 149 (citing *inter alia* Tr. 1188).

She also rejected Carswell's contention that he could have ingested plutonium by putting ice from the fjord in his drinks. She noted that he was likely to have harvested the ice at Thule air base, not at the contaminated crash site, which was eight miles away, and past the zero line. *Id*.

As for Hansen and Eriksen, she ruled that it was "possible" they were exposed to "very low" levels of radiation. ALJ Dec. at 148, 151. She observed that they had worked in Hangar #2, an indoor confined space, while containers were being filled with contaminated ice and debris, during which plutonium particles could have been re-suspended and inhaled. ALJ Dec. at 148. Nonetheless, any exposure was minimal, she ruled, again referring to Dr. Anspaugh's opinion, who stated that Claimants would not have received a detectable dose of plutonium, and that any dose received "would not have exceeded a small fraction of the radiation dose received

from one year's exposure to background radiation."[11] Exh. D-23; ALJ Dec. at 150-51.

Despite concluding that Claimants had not received a detectable dose of plutonium radiation, the ALJ ultimately found it unnecessary to rely on this determination. ALJ Dec. at 158. She found that, even if Claimants had been exposed to plutonium radiation, the medical evidence established that plutonium radiation does not cause the kind of ailments Claimants suffered. ALJ Dec. 152-59.

She reached this conclusion based primarily on the opinion of Dr. Mettler, "a recognized expert" "regarding the effect of plutonium radiation on the human body." ALJ Dec. 154. Dr. Mettler stated that plutonium radiation exposure "has been extensively studied," and "it is well known that, in terms of cancer causation," it "manifests primarily in lung, liver, and bone cancer."[12] *Id*. (citing Tr. 1510); *see also* ALJ Dec. at 103 (citing Tr.

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[11] Dr. Anspaugh relied on an investigation conducted by the National Health Service of Denmark of radiation exposures at Thule. It found no measurable amount of plutonium exposure in the Americans who performed the actual cleanup of the crash area on the ice, or in the most at-risk Danes who assisted in the cleanup. ALJ Dec. at 151 (citing Exh. D-23, D-29).

[12] Dr. Mettler relied on numerous sources – including epidemiological reports studying exposed populations at Los Alamos labs and Mayak, Russia; a United Nations report; the World Health Organization monograph on radioactive material; and online references for the U.S. Centers for

1494-1500) (noting Dr. Mettler's opinion that "[r]adiation doesn't cause some kinds of cancers and we know plutonium has never been shown to cause kidney or stomach cancer").[13] The reasons for this, he explained, are attributable to the "physical properties of plutonium particles," and the fact that exposure occurs through inhalation. *Id*. By contrast, ingestion of plutonium presents few health concerns because the stomach lining renews itself within a short period of time. *Id*. The doctor added that these findings held true for significant exposures over long period of time. *Id*. He further opined that Carswell's hypothyroidism was "absolutely not" radiation-related.[14] He stated, *inter alia*, that the dose of radiation required to make a

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Disease Control and Prevention – all of which found a link between plutonium radiation and lung, liver, and bone cancer, but not stomach or kidney cancer. ALJ Dec. at 102-104.

[13] *See also* ALJ Dec. at 54 (citing Exh. ALJ-3, Statement of the Public Health Service regarding plutonium, recognizing that most likely cancers due to plutonium exposure are to lungs, bones, and liver); ALJ Dec. at 153, citing Exh. G-16 at 3, G-19 (both indicating that the risk of cancer due to plutonium radiation is to the lungs, liver and bone).

[14] The ALJ found that, while Carswell established that he had stomach-related medical conditions – including Barrett's esophagus, a pre-cancerous esophagus condition – he did not establish that he was ever diagnosed with stomach cancer, having provided no medical records or credible medical opinion on the issue. ALJ Dec. at 140-41.

thyroid non-functional would result in a much higher dose to the lungs, which would prove fatal. *Id*.

The ALJ further found Dr. Mettler's opinion supported by Drs. Russo and Turnbull. ALJ Dec. 154-55. Dr. Russo opined that it was not possible to determine the etiology of Eriksen's and Hansen's kidney tumors, especially given Eriksen's smoking history, which is a known risk for kidney cancer. Dr. Turnbull, in turn, stated that – even assuming that Carswell had stomach cancer and Barrett's esophagus – these conditions were "extremely unlikely" to be related to plutonium exposure. He explained that acid reflux causes both Barrett's esophagus and stomach cancer (which can also be due to an H. pylori infection). Tr. 1684-88. The doctor further reasoned that plutonium ingestion is unlikely to have any ill effect on the stomach, as items pass through it within a few days, and the cells of the stomach lining are replaced frequently. *Id*. (citing Exh. D-35 at 2-3; Tr. 1684-88, 1694, 1713-14).

The ALJ also found the conclusions of Drs. Mettler, Russo, and Turnbull bolstered by the "truly remarkable" studies conducted by Dr. Juel of the DCC employees at Thule. ALJ Dec. at 157. This research demonstrated "no difference in illness or mortality between DCC workers who were at Thule during Operation Crested Ice and the DCC workers who

were at Thule at other times either before or after the air crash and clean-up."[15] *Id*. at 158.

In rejecting the claims, the ALJ concluded that, "in order for me to conclude that the Claimants' health conditions were due to any plutonium radiation exposure at Thule, I would have to discount the opinions of highly-credentialed physicians and ignore a multitude of medical and epidemiological studies, in favor of the "vague" or "conclusory" opinions of the Claimants' experts. ALJ Dec. at 158 (referring to the opinions of Drs. Robbins, Edwards, and Barnaby).[16] "I would also have to ignore the

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[15] Dr. Juel is an employee of Southern Danish University and its National Institute of Public Health and has a master's degree in statistics and a Ph.D. in epidemiology. ALJ Dec. at 113. At the request of Denmark's National Board of Health, Dr. Juel conducted a study of DCC's workers at Thule. *Id*. He obtained a file of 4,322 index cards that had been maintained by DCC, each of which showed the name, address, date of birth, and dates of entry and exit to the Thule area, of each worker employed there by the DCC between 1963 and 1971. *Id*. at 113. He also used two Danish government registries, one of which shows all hospital admissions throughout the country since 1977, and one that shows each death, and its cause, since 1943. The registries use the personal identification numbers assigned to all individuals in Denmark. Using these registries and the DCC index cards, Dr. Juel compared the health of those DCC employees who were at Thule during the cleanup period to those who had left the area before the crash or who arrived afterwards. ALJ Dec. at 114.

[16] The ALJ found that neither Dr. Robbins nor Dr. Edwards "provided much detail as to how they came to their conclusions regarding the link between the Claimants' conditions and any exposure to plutonium radiation." *Id*. at 152. She also noted that Claimants' experts, in contrast with the Employer's

testimony of Dr. Mettler and others regarding the specific health effects of plutonium radiation, in favor of reports and studies that addressed the health effects of radiation, but did not specify the type of radiation involved." ALJ Dec. at 158.

B. The Board affirms the denial of the claims.

The Board affirmed the ALJ's finding that Claimant's ailments were not attributable to plutonium radiation exposure. Board decision and order dated December 11, 2018 (Bd. Dec.). It rejected Claimants' argument that the ALJ erred in giving greater weight to Employer's experts, noting that it is within a fact-finder's discretion to weigh, credit, and draw inferences from the evidence. Bd. Dec. at 8. It further found that the ALJ "exhaustively set forth the evidence and . . . permissibly identified the evidence she deemed probative," *id*., and concluded that her findings were rational and supported by substantial evidence, *id*. at 9. Having affirmed the ALJ's determination that Claimants' illnesses were not caused by their exposure to plutonium

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experts, did not have "any specialized expertise in the effects of radiation on the human body, or specialized expertise in determining the etiology of cancer." *Id*.; *see* DX-35 at 3 (Dr. Turnbull's note that Dr. Edwards "is a General Practitioner with a special interest in Dermatology, Obstetrics, Gynecology, and Fertility problems"); *id*. at 5-6 (describing Dr. Robbins as an osteopath specializing in allergies and environmental medicine).

radiation at Thule, the Board did not address the ALJ's findings regarding the timeliness of their compensation claims.[17]

The Board also found that the ALJ did not abuse her discretion in refusing to compel Dr. Siegel to conduct urinalyses and permitting him to determine the requisite tests. Bd. Dec. at 4 n.7. It observed that Claimants, as proponents of their compensation claims, could have obtained and submitted urinalysis evidence. *Id*. Moreover, the Board ruled that the Director was a proper party, both before it and the ALJ. *Id*. at 4-5 n.7.

SUMMARY OF ARGUMENT

Under the relevant regulations and Supreme Court precedent, the Director was a proper party to the proceedings below. As to the merits of the case, the ALJ's finding that Claimants' ailments are not attributable to plutonium radiation exposure is supported by substantial evidence. Their arguments to the contrary are little more than invitations for the Court to reweigh the evidence.

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[17] Although the Board recognized that claims for employment-related *medical* benefits are never time-barred, Bd. Dec. at 4 n.8, its conclusion that Claimants' medical problems were not employment-related made further inquiry into that issue unnecessary as well.

STANDARD OF REVIEW

The Court reviews legal questions *de novo*. With regard to factual findings, it determines whether the Board adhered to the "substantial evidence" standard. *Bath Iron Works v. Brown*, 194 F.3d at 1, 3 (1st Cir. 1999); *Cunningham v. Director, OWCP*, 377 F.3d 98, 103 (1st Cir. 2004). In reviewing for substantial evidence, the Court will affirm if the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and "will accept the findings and inferences drawn by the ALJ, whatever they may be, unless they are 'irrational.'" *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 56 (1st Cir. 2003) (quoting *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982), and *Barker v. U.S. Dept. of Labor*, 138 F.3d 431, 434 (1st Cir. 1998)). Credibility assessments are also "the ALJ's unique prerogative," *Knight*, 336 F.3d at 56, and the Court will not disturb them "so long as the findings are adequately anchored in the record." *Id*. (quoting *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 231 (1st Cir. 2001)).

ARGUMENT

I. <u>The Director is a proper party in this matter.</u>

Claimants renew their arguments that the Director should not have been involved in the ALJ hearing, and lacked standing to respond to their Board appeal. Claimants' Opening Brief (OB) at 8-9. The ALJ and Board rejected those arguments and permitted the Director to participate. *See* ALJ Order of July 24, 2014; ALJ Dec. at 161, 163; Bd. Order of October 11, 2018; Bd. Dec. at 4-5 n.7. The Court should uphold those rulings. *See Ingalls Shipbuilding*, *Inc. v. Director, OWCP*, 519 U.S. 248, 262 (1997) (observing that "the Director has also been authorized by the Secretary of Labor to appear as a litigant before the relevant adjudicative branches of the Department of Labor, the ALJ, and the Benefits Review Board").

Unless modified by the DBA, the provisions of the Longshore Act apply to DBA claims. 42 U.S.C. § 1651(a). One such unmodified provision is 33 U.S.C. § 939(a). There, Congress directed the Secretary of Labor to administer the Longshore Act (and the DBA by extension), and authorized him, *inter alia*, "to make such rules and regulations . . . as may be necessary in the administration of this Act." Pursuant to that authority, the Secretary promulgated 20 C.F.R. § 702.333(b), which permits the Director to appear and participate in ALJ hearings as an interested party: "[t]he Solicitor of

Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party."[18] *Id.*; *see also* 20 C.F.R. § 701.101(a) (making the subpart 702 procedures, as well as other regulations, applicable to DBA claims).

The Director's participation before the ALJ was especially warranted in this case: the Longshore Special Fund was potentially responsible for the payment of any benefits ordered. This is so because the potentially liable employers had dissolved or declared bankruptcy either before or during the proceedings below. *See supra* at 7-8 and n.5. (It is hardly surprising that these companies are no longer operating – the contracted-for work occurred more than 50 years ago.) Under these circumstances – specifically, "where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment" – § 918(b) allows payment of such awards from the Special Fund. 33 U.S.C. § 918(b); *see* 33 U.S.C. § 944(i)(2). And under 33 U.S.C. § 944(a), the Director is the administrator of

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[18] The Secretary designated the Director, OWCP, as administrator of the Longshore Act and its extensions, including the DBA. 33 U.S.C. § 939(a); 20 C.F.R. § 701.201; Secretary's Order No. 10-2009, 74 FR 58834-01, 2009 WL 3782825 (F.R.).

the Special Fund.[19] Thus, as the ALJ found, the Director's participation to defend the Fund against potential liability was warranted.[20] *See* ALJ Dec. at 161, 163.

The Board's rules governing its operation, practice, and procedure, 20 C.F.R. Parts 801 and 802, likewise grant the Secretary of Labor or his

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[19] The Special Fund is funded primarily through assessments against insurance carriers and self-insured employers. 33 U.S.C. § 944(c).

[20] Claimants correctly state that the Director's participation before the ALJ preceded Respondent E. Pihl's declaration of bankruptcy. OB 9. But they ignore the fact that, before that declaration, DCC no longer existed, and Respondent Topsoe refused to accept service and participate in the proceedings. *See* ALJ Dec. at 124. If the Director had waited until E. Phil's bankruptcy to enter the case, she would have missed nine months of proceedings, including six days of hearings, the filing of numerous motions, and the issuance of numerous interim orders. In short, the Director's participation to protect the Special Fund proved warranted – as the Fund ultimately would have been responsible for any compensation ordered by the ALJ – and the Director would not have been able to adequately protect the Fund by entering the case nine months late. Furthermore, it was not clear for many months whether E. Pihl would continue to defend the case. *See* Order Cancelling Telephonic Conference (Sept. 23, 2013) at 4 (requiring Employer's attorneys to submit, by Oct. 27, 2013, written authorization to continue representation); ALJ Order Directing Employer's Counsel to Provide Written Authorization of Representation (Nov. 21, 2013) (reiterating the requirement for authorization, and setting a new deadline of Dec. 4, 2013); Order Memorializing December 6, 2013, Conference (Dec. 11, 2013) (noting that the attorneys had received authorization for continued representation from the trustees).

designee (the Director) full participant rights in appeals before it.[21] The Board is authorized "to hear and determine appeals raising a substantial question of law or fact *taken by any party in interest* from decisions or orders with respect to claims for compensation or benefits arising," *inter alia*, under the DBA. 20 C.F.R. § 801.102(a) (emphasis added); *accord* 33 U.S.C. § 921(b)(3). The term "party or party in interest" includes the Secretary or his designee. 20 C.F.R. § 801.2(a)(10); *see also* 20 C.F.R. § 802.201(a) (permitting appeal by "[a]ny party or party-in-interest adversely affected or aggrieved" by an ALJ decision, including the Director as a "party adversely affected" when representing the Special Fund, or when the order appealed adversely affects the administration of the Longshore Act or its extensions). With regard to the Director's status as a party respondent, the Board's regulations require a petitioner to serve copies of the petition for review on the Solicitor of Labor, 20 C.F.R. § 802.211(c), and permit each party upon whom the petition for review is served to file a response brief. 20 C.F.R. § 802.212(a). Accordingly, the Board has held that the Director has "automatic standing" to respond to an appeal before the Board as a party-in-interest. *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995). The

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[21] *See supra* n.18.

Board's holding below – that the Director was a proper party before both it and the ALJ – is, therefore, correct. Bd. Dec. at 4 n.7.

Claimants' reliance on *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. [Harcum]*, 514 U.S. 122 (1995) – to argue against the Director's participation below – is misplaced. *Harcum* addresses the Director's standing, in her governmental capacity as administrator of the Longshore Act, to appeal final orders of the Board to the United States courts of appeals under 33 U.S.C. § 921(c).[22] 514 U.S. at 125. *Harcum* does not concern the Director's participant rights in agency proceedings generally, or before the Board in particular. *See* 33 U.S.C. § 921(b)(3) (permitting appeals by "any party in interest"). Nor does *Harcum's* holding – that the Director generally lacks standing to seek review of final Board decisions in the courts of appeals, *id*. at 135-36 – even implicate her rights to appear as a party-respondent before the courts, let alone before the agency. *See Ingalls Shipbuilding*, *Inc.*, 519 U.S. at 265-70 (Director has standing to

[22] The Court left open the possibility that the Director had standing to petition the courts of appeals in order to protect the Special Fund. 514 U.S. at 125 n.1 (noting that the Fourth Circuit "found that, as administrator of the § 944 special fund, the Director did have standing to appeal the Board's decision to grant respondent relief under § 908(f). That ruling is not before us, and we express no view upon it.").

appeal in courts of appeals as a respondent under Federal Rule of Appellate Procedure 15(a)).[23] Because the Director was not a petitioner below, or here, but has always been a respondent, *Harcum* is irrelevant. *Id*. at 127 n.2 ("Our opinion today intimates no view on the party-respondent question.").[24]

II. **The ALJ's finding that Claimants' ailments were not caused by exposure to plutonium radiation at Thule is supported by substantial evidence.**

The Longshore Act, as adopted by the DBA, requires that an injury "aris[e] out of and in the course of employment" to be compensable. 33 U.S.C. § 902(2). The ALJ concluded that Claimant's injuries did not so arise, finding that the "overwhelming weight of the medical evidence establishes that Claimants' medical conditions are not related to their exposure to radiation, if any, at Thule." ALJ Dec. at 151. In reaching that

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[23] *Ingalls* puts to rest any possible argument from Claimants that the Director is not authorized to participate before this Court. 519 U.S. at 265-70. To the extent that Claimants argue against the Director's right to participate before this Court, *Ingalls* defeats that argument. *Id*. at 265-70.

[24] Claimants' quotation (OB 10) from *Green v. Bogue*, 158 U.S. 478, 503 (1895) is likewise misplaced. There, the Court was not attempting to draw a distinction between the rights of a party-litigant and those of a party-in-interest, as Claimants contend. Rather, it was merely explaining that res judicata barred the Greens' suit to enforce a trust because, *inter alia*, their rights had been adequately represented in a prior action by their trustees and privies.

conclusion, she relied on the well-reasoned and amply supported opinions and findings of the highly-credentialed Drs. Mettler, Turnbull and Juel. *See supra* at 14-17. The ALJ's finding is supported by substantial evidence, and consequently, the Court must affirm the denial of their compensation claims.

Dr. Mettler testified that exposure to plutonium radiation has never been shown to cause stomach or kidney cancer, and that exposure sufficient to cause kidney cancer would first result in fatal lung cancer. ALJ Dec. at 105 (citing Tr. 1538-44). Dr. Turnbull likewise testified that it was "extremely unlikely" that plutonium radiation exposure caused Carswell's stomach and esophagus problems. ALJ Dec. at 154 (citing Exh. D-32 at 7-8). He and Dr. Mettler both stated that plutonium does not affect the stomach because it quickly passes through the stomach, and the cells lining the stomach are frequently replaced. *Id*. at 154-55 (citing Tr. 1512-13, 1508, 1713-14). Dr. Turnbull further testified that Barrett's esophagus is caused by acid reflux. ALJ Dec. at 154 (citing Tr. at 1684-88). As to Carswell's hypothyroidism, Dr. Mettler stated that it was "absolutely not" related to plutonium exposure. *Id*. (citing Tr. 1508-11). He explained that plutonium-exposed populations have never shown an increase in hypothyroidism, and noted that, as with the kidney, any dose sufficient to stop the thyroid from

working would be fatal based on the dose received by the lungs. *Id*. (citing Tr. 1519-20).

Finally, at the request of the Danish government, Dr. Juel studied whether DCC employees suffered any adverse health effects by participating in the cleanup. He compared those who worked there during the cleanup to those who worked there but left before the crash (or who started after the cleanup). Published in 1994, the report found no excess of cancers or other relevant health conditions, no increase in hospital admissions, and no increased mortality, in the cleanup group.[25] ALJ Dec. 114-116, 158 (citing Tr. 1801-20, Exh. D-38, and Exh. B to Exh. D-38).

In short, the evidence the ALJ credited shows that Claimants' ailments did not arise from their employment at Thule. Workers who took part in the Thule cleanup were no more likely to die or be hospitalized than those who did not, and that exposure to plutonium radiation does not cause the types of diseases suffered by Claimants.[26]

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[25] The studies found an increase in the incidence of skin conditions, mycosis fungoids, and parapsoriasis en placques in the cleanup cohort. ALJ Dec. at 157 (citing Exh. D-30 at 17).

[26] The ALJ did not find relevant Claimants' evidence that radiation exposure generally can cause cancer. Rather, she relied on the Employer's evidence, which addressed the potential effects of plutonium radiation specifically. Claimants argue that the ALJ improperly discounted Exhibit G-21, a

By contrast, the ALJ gave little weight to Claimants' experts, whose evidence she found "vague" and "conclusory." ALJ Dec. 158 (referring to the opinions of Drs. Robbins, Edwards, and Barnaby); 152 (finding that neither Dr. Robbins nor Dr. Edwards "provided much detail as to how they came to their conclusions regarding the link between the Claimants' conditions and any exposure to plutonium radiation"). She also noted that Claimants' experts, in contrast with the Employer's experts, did not have "any specialized expertise in the effects of radiation on the human body, or specialized expertise in determining the etiology of cancer." ALJ Dec. at 152; *see* DX-35 at 3 (Dr. Turnbull's note that Dr. Edwards "is a General Practitioner with a special interest in Dermatology, Obstetrics, Gynecology,

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research literature review entitled "Cancer and Workers Exposed to Ionizing Radiation," because it cites some studies that address exposure to plutonium radiation. Those studies, however, do not bolster Claimants' arguments, because, while they found correlations between plutonium radiation and other ailments, none found a link between plutonium radiation and renal cancer, stomach cancer, or esophageal problems – the ailments suffered by Claimants here. Exh. G-21 at 10, 18 (bone cancer); 11 (mesothelioma); 18 (testicular cancer); 18 (osteosarcoma); 23 (brain cancer); 27 (breast cancer); 35 (rectal cancer); 53 (blood and lymph cancers); 57 (liver cancer); 60, 62-63 (lung cancer); 67 (multiple myeloma); 88 (benign prostatic hyperplasia). The ALJ recognized as much, noting that although Claimants "did submit evidence on the risks of plutonium exposure, such evidence did not discuss the risk of such exposure to kidney cancer, or to stomach-esophageal conditions, or to hypothyroidism." ALJ Dec. at 152-53.

and Fertility problems"); *id*. at 5-6 (describing Dr. Robbins as an osteopath specializing in allergies and environmental medicine).

Put simply, the bulk of Claimants' arguments amount to complaints about which witnesses the ALJ credited. *See* OB 23-27, 28-29. But it is well established that credibility determinations are within an ALJ's purview, and will not be overturned on appeal. *Knight*, 336 F.3d at 56; *Hutchins*, 244 F.3d at 231; *see* ALJ Dec. at 119-21(discussing the legal standards for the treatment of medical opinions). And the ALJ's credibility findings here are entirely reasonable.

The Claimants' remaining attacks on the ALJ's fact-finding should also be rejected. Claimants argue that the ALJ should have granted their claims because neither Employer's experts nor Dr. Siegel, the independent medical examiner, required them to undergo urine tests, which they argue would have conclusively determined the existence of plutonium in their bodies. OB 16-17. If Claimants believed that urine testing would have shown injurious levels of plutonium in their bodies, there was nothing to prevent them from undergoing such testing and submitting the results as evidence. Indeed, as they bore the ultimate burden of persuasion, they cannot be heard to complain that their opponents failed to bear that burden on their behalf. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267,

278 (1994) (party initiating proceeding bears burden of persuasion); Bd. Dec. at 4 n.6. In any event, as the Board found, Bd. Dec. at 3 n.6, the ALJ did not abuse her discretion in relying on Dr. Siegel's medical expertise to decide which tests were most appropriate for conducting his evaluation.[27] *See* 20 C.F.R. § 702.338 ("The order in which evidence and allegations shall be presented and the procedures at the hearings generally . . . shall be in the discretion of the administrative law judge. . . .").

Regardless, urine testing could only have shown, at most, that Claimants were exposed to plutonium, not that such exposure caused their ailments. And because the evidence the ALJ credited establishes that plutonium exposure does not cause their ailments, the outcome here would not have changed even if urinalysis had been conducted and established plutonium exposure. *See, e.g.,* Tr. 1538-39 (Dr. Mettler testifying that "even in the populations of Russia where their urine tests are wildly positive [for plutonium], there's no increase in stomach cancers.").

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[27] If Claimants were dissatisfied with the IME, 33 U.S.C. § 907 provides a remedy, stating that "[a]ny party who is dissatisfied with [an IME] report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary." 33 U.S.C. § 907(e). The Claimants made no such request for a reexamination with urinalyses included.

Claimants also argue that Dr. Mettler erroneously relied on an "atomic bomb model of single instance exposure" rather than a long-term exposure model in assessing cancer risk. OB 18. But as the record reveals, Dr. Mettler discussed multiple modes of exposure (including, notably, occupational) for the conditions alleged by Claimants, Exh. D-32 at 20, 41, 58, 76, and referenced literally scores of studies in doing so. *Id*. at 10-12 (list of references); 35-39 (references for overview of plutonium and health effects); 50-55 (references for kidney cancers); 67-73 (references for stomach cancer); 82-87 (references for esophageal cancer); 95-97 (thyroid non-cancer radiation effects); 98-100 (materials reviewed for report). That he also referenced studies regarding exposure from atomic bombs is not surprising given how complete and comprehensive his report is, and in no way undermines his reasoning.[28] By contrast, neither of Claimants' experts (Drs. Robbins and Barnaby) provided *any* references whatsoever to support their opinions that Claimants' ailments were related to plutonium exposure. ALJ Dec. at 55 (citing Exh. D-32).

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[28] Indeed, Claimants themselves submitted evidence regarding the health effects of nuclear weapons. *See* Exh. G-15, "The Hazard from Plutonium Dispersal by Nuclear-Warhead Accidents."

Claimants also argue that the ALJ erred by permitting Dr. Juel to testify as a fact witness and admitting his epidemiological report into evidence. OB 27-29. As noted above, *supra* at 13 n.9, Dr. Juel testified as a fact witness because his employment by a Danish state university prohibited him from testifying as an expert. The ALJ reasonably accepted his testimony as a fact witness because he "testified as to the actual work that he and his colleagues did in identifying the dataset and capturing data relating to" those who worked at Thule. ALJ Dec. at 157 n.255. Although Claimants argue that this was somehow improper, the ALJ repeatedly addressed their arguments and objections to Juel's testimony at the hearing, Tr. 1752-64, 1765-1768, 1772, 1774-75, 1778, 1779-80, 1782-86, 1790-92, 1794-95, 1797, 1802, 1804-05, 1806-09, 1811, 1812-14, 1816, 1818, 1824, 1825; and consistently restricted Employer's attorney to inquiring only about facts, Tr. 1764, 1767, 1769, 1791-92, 1798, 1815-16, 1822, 1825-28, 1828-29.

The Board, in rejecting Claimants' argument, noted that an "administrative law judge has great discretion concerning the admission of evidence and the issuance of a motion to compel, and any decisions in this regard are reversible only if arbitrary, capricious, or an abuse of discretion." Bd. Dec. at 4 n.6 (citing *Mugerwa v. Aegis Defense Services*, 52 BRBS 11

(2018); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997)); *see* 20 C.F.R. § 702.338. It correctly found no abuse of discretion in permitting Dr. Juel to testify as a fact witness because Claimants' counsel had the opportunity to, and did, cross-examine him. *Id*.

In any event, while the ALJ found Dr. Juel's study "remarkable" in its scope, it was not the lynchpin of her decision. Indeed, by the time she addressed it in her decision, she had already found credible, and relied on, the testimony of Drs. Mettler, Russo, and Turnbull, ALJ Dec. at 154-55, who determined that plutonium exposure does not cause Claimants' ailments. She merely found that Dr. Juel's studies "bolstered" that conclusion. ALJ Dec. at 157.

Finally, Claimants argue that the ALJ erred in refusing to admit evidence regarding the 1988 death of Karl Banz, who also worked at Thule during the Crested Ice cleanup. OB 29 (citing Exh. G-24). The ALJ correctly rejected the information as speculative on two grounds: (1) Banz was not a party to the litigation, so it was irrelevant whether he was exposed to plutonium radiation or contracted any medical conditions from that exposure; and (2) any testimony about his exposure would have been hearsay from his sister. ALJ Order, dated January 30, 2015 at 7. The issue

in the case was whether the diseases that Carswell, Hansen, and Eriksen complained of were due to occupational exposure to plutonium, and information about Banz's death sheds no light on that issue.[29]

Because the ALJ reasonably found that the "overwhelming weight of the medical evidence establishes that Claimants' medical conditions are not related to their exposure to radiation, if any, at Thule," ALJ Dec. at 151, her decision denying benefits should be affirmed.[30]

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[29] Banz performed different duties than Claimants, Exh. G-24 at 1, and regardless, his autopsy report does not establish that plutonium exposure at Thule caused his thyroid problems. *Id*. at 2 (para. 7). It finds "[c]onnective tissue transformation of the thyroid gland," and states that one possible diagnosis "is after-effects from radiation." But the report also clearly states that the pathologist was unable to "reach a certain diagnosis based on the information available." Exh. G-24 at 6. Moreover, the report indicates that a plutonium analysis was done on both knee caps, tissue from the liver and lymph glands, and bone marrow, and that "the presence of plutonium was not demonstrated with any certainty in any of the specimens received." *Id*. Also notable is the fact that Banz died, not of thyroid disease (or of stomach or kidney cancer), but of heart and lung disease. *Id*. In short, the report would not be probative even if admitted.

[30] Claimants devote much of their brief to arguing against the ALJ's determination that their claims were, for the most part, untimely, and therefore barred. OB 11-15; *see supra* at 12 (describing ALJ's timeliness findings). But the Board declined to reach the issue, and the Court need not consider it either. As shown above, the ALJ's denial on the claims' substantive merits is clearly correct, making any discussion of timeliness largely academic. Should the Court find some error in the ALJ's merits analysis, the case could be remanded for the Board to pass on the timeliness issue.

CONCLUSION

The Court should affirm the decisions of the ALJ and Board denying benefits to Claimants.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

BARRY H. JOYNER
Associate Solicitor

KEVIN LYSKOWSKI
Deputy Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

/s/ Matthew W. Boyle
MATTHEW W. BOYLE
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.,
Rm. N-2119
Washington, D.C. 20210
(202) 693-5660
Attorneys for the Director, Office of
Workers' Compensation

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 8,327 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing Brief for the Federal Respondent through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE