
Volume 60
Issue 3 *Issue 3: Innovations in the Fight Against
Human Trafficking* & Issue 4: *Select Legal
Scholarship from the New York Law School Law
Review*

Article 9

January 2016

Navistar, Inc. v. Forester

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New York Law School, 2016

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Recommended Citation

ADRIENNE BAFFA, *Navistar, Inc. v. Forester*, 60 N.Y.L. SCH. L. REV. (2015-2016).

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ADRIENNE BAFFA

Navistar, Inc. v. Forester

60 N.Y.L. SCH. L. REV. 691 (2015–2016)

ABOUT THE AUTHOR: Adrienne Baffa is an Articles Editor of the 2015–2016 *New York Law School Law Review*, J.D. candidate, 2016. Ms. Baffa would like to thank the members and editorial staff of the *New York Law School Law Review* for their work with this piece.

“I think I’m getting the black lung, Pop.”¹ This recognizable quote from the movie *Zoolander* makes light of the disease; indeed, to many of us, black lung is a thing of the past.² But there are areas in the United States where coal mining is still an important industry and the men and women who work in coal mines are exposed to coal dust that eventually causes black lung.³ Mine workers must be able to receive health benefits when the debilitating effects of black lung render them unable to work.⁴ Unfortunately, disabled workers are often met with obstacles in receiving their benefits, and they must engage in years of legal battles to collect the full benefits they deserve.⁵

In 1969, Congress passed the Federal Coal Mine Health and Safety Act (CMHSA).⁶ The primary goal of the CMHSA, as declared by Congress, was to ensure the “health and safety of [the coal mining industry’s] most precious resource—the miner.”⁷ The CMHSA defined a “miner” as “any individual working in a coal mine.”⁸ Included within the CMHSA was a subchapter called the Black Lung Benefits Act (BLBA), which discussed benefits for miners who suffer from debilitating pneumoconiosis, also known as black lung.⁹ The Black Lung Benefits Reform Act of 1977, which amended the BLBA, defined the term “miner” more narrowly and explained how a miner can qualify to receive benefits.¹⁰

In order to receive benefits under the BLBA, a miner must prove that he qualifies under a four-factor test laid out by the Department of Labor (DOL).¹¹ The test requires that a miner prove: “(1) he has pneumoconiosis; (2) his pneumoconiosis arose at least in part out of his coal mine employment; (3) he is totally disabled; and (4) the total disability is due to pneumoconiosis.”¹² There is a presumption of eligibility for benefits for miners who were employed for at least fifteen years in an underground

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1. *ZOOLANDER* (Paramount Pictures 2001).
 2. See Katie Valentine, *Black Lung Among Coal Miners At Highest Level in 40 Years*, THINK PROGRESS (Sept. 16, 2014, 3:51 PM), <http://thinkprogress.org/climate/2014/09/16/3568204/black-lung-levels-surge/>.
 3. *Id.*
 4. *Black Lung*, UNITED MINE WORKERS AM., <http://www.umwa.org/?q=content/black-lung> (last visited Apr. 20, 2016) (“Black lung is a legal term describing a preventable, occupational lung disease that is contracted by prolonged breathing of coal mine dust. Described by a variety of names, including miner’s asthma, silicosis, coal workers’ pneumoconiosis, and black lung, they are all dust diseases with the same symptoms.”).
 5. See, e.g., *Navistar, Inc. v. Forester*, 767 F.3d 638 (6th Cir. 2014).
 6. Pub. L. No. 91-173, 83 Stat. 742 (codified as amended in scattered sections of 30 U.S.C.).
 7. *Id.* § 2(a).
 8. *Id.* § 3(g).
 9. *Id.* §§ 401–426. See generally *Pneumoconiosis*, AM. LUNG ASS’N, <http://www.lung.org/lung-disease/pneumoconiosis> (last visited Apr. 20, 2016).
 10. Pub. L. No. 95-239, 92 Stat. 95 (codified as amended in scattered sections of 30 U.S.C.).
 11. Black Lung Benefits Act, Pub. L. No. 91-173, §§ 411(b), 422(h), 83 Stat. 742, 793, 797.
 12. *Navistar, Inc. v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014); see also 20 C.F.R. §§ 718.201–718.204 (2015).

coal mine and are totally disabled by pneumoconiosis.¹³ The employer, who would be responsible for paying the miner's benefits, can rebut this presumption by proving either that the miner does not have pneumoconiosis or that the miner's respiratory impairment was not a result of his employment in a coal mine.¹⁴

The BLBA defines a "miner" as:

any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.¹⁵

The DOL's Office of Workers' Compensation Programs (OWCP) was assigned responsibility for coal miners' health by the Secretary of Labor,¹⁶ and expanded the BLBA's definition of "miner."¹⁷ The expansion offers "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner."¹⁸ The DOL offers employers an opportunity to rebut that presumption by showing that: "(1) [t]he person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site"; or "(2) [t]he individual was not regularly employed in or around a coal mine or coal preparation facility."¹⁹

The decisions that have applied these acts create a test for determining when a worker should be considered a "miner." The two-part test, called the situs-function test, comes from a Sixth Circuit case, *Falcon Coal Co. v. Clemons*.²⁰ The first part of the test, the "situs" portion, requires that an employee work in or around a coal mine to be considered a "miner."²¹ The second part of the test, the "function" portion, requires that an employee be involved in the extraction, transportation, or preparation

13. 30 U.S.C. § 921(c)(4) (2012).

14. *Id.*

15. Pub. L. No. 95-239, § 2(b), 92 Stat. 95.

16. Delegation of Authorities and Assignment of Responsibilities to the Director, Office of Workers' Compensation Programs, 74 Fed. Reg. 58,834 (Nov. 13, 2009).

17. *Compare* 20 C.F.R. § 725.202(a) ("A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility."), *with* Black Lung Benefits Act, Pub. L. No. 91-173, § 402(d), 83 Stat. 742, 793 (1969) ("The term 'miner' means any individual who is or was employed in an underground coal mine.").

18. 20 C.F.R. § 725.202(a).

19. *Id.*

20. 873 F.2d 916 (6th Cir. 1989) (holding that a night watchman was not a "miner" as defined by the Act, because his work was not "integral and necessary" to the operation of the mine and establishing the standard for the situs-function test).

21. *Id.* at 921.

of coal, or the construction of coal mines, in order to be eligible to receive benefits.²² Courts have expanded the “function” portion of the test²³ to include workers performing incidental duties at a coal mine, provided that said duties are an “integral” or “necessary” part of the mining process.²⁴ This category includes workers whose jobs involve keeping the mine fully functional.²⁵

Navistar, Inc. v. Forester, a case decided by the Sixth Circuit in 2014, involved a federal mine inspector who was denied the use of the rebuttable presumption after the court ruled that he did not qualify as a “miner.”²⁶ This case comment contends that the Sixth Circuit erred when it held that Terry Forester was not entitled to the fifteen-year presumption of eligibility because his employment did not meet the requirements of being a “miner” as defined by the BLBA.²⁷ The court erred in three ways. First, the court incorrectly gave more deference to the opinion of the Director of the OWCP than the DOL Benefits Review Board (BRB).²⁸ Second, the court’s holding that Congress intended to exclude federal mine inspectors from eligibility lacked substantiation, as nothing in the statute indicates that they were meant to be excluded.²⁹ Third, the court construed its own holding in *Sammons v. EAS Coal Co.*, which had granted BLBA benefits to a mine inspector, too narrowly.³⁰ This case comment further contends that there are legitimate policy reasons, including but not limited to incentivizing employment as a federal mine inspector, to include federal mine inspectors in the class of “miner” that is statutorily eligible for the fifteen-year presumption.

Terry Forester, the respondent, worked as a private mine inspector for Wisconsin Steel in underground Kentucky coal mines from 1970 to 1975.³¹ Wisconsin Steel later became Navistar, the petitioner in this case.³² Upon leaving Wisconsin Steel’s employ in 1975, Forester began working for the DOL’s Mine Safety and Health Administration (MSHA) as a federal mine inspector in Kentucky.³³ Forester’s position as a federal mine inspector required him to visit underground coal mines every day to ensure they were complying with federal mine safety regulations.³⁴

22. *Id.*

23. *See, e.g., id.*; *Sammons v. EAS Coal Co.*, No. 92-3030, 1992 WL 348976 (6th Cir. Nov. 24, 1992).

24. *Falcon Coal Co.*, 873 F.2d at 922.

25. *Id.*

26. 767 F.3d 638, 640 (6th Cir. 2014).

27. *See id.*

28. *See id.* at 644–45.

29. *See id.* at 646–67.

30. *See id.* at 645–46.

31. *Id.* at 641.

32. *Id.*

33. *Id.*

34. *Id.*

Forester worked as a federal mine inspector until 1991, when he sustained a knee injury.³⁵ The next year, Forester “was declared totally disabled due to breathing problems,” a condition that entitled him to benefits under the Federal Employees’ Compensation Act (FECA).³⁶ Then, in 2008, Forester filed a claim to receive additional benefits under the BLBA.³⁷

Upon review, the OWCP denied Forester’s claim, finding that “the evidence failed to show that [he] was totally disabled due to pneumoconiosis.”³⁸ Forester requested a formal hearing with an Administrative Law Judge (ALJ) to challenge the OWCP’s finding.³⁹ At the hearing on April 6, 2011, “Navistar stipulated that Forester had seventeen years of coal mine employment.”⁴⁰ After the hearing, Navistar submitted a brief stating that its stipulation was contrary to the law.⁴¹ Navistar argued that its stipulation was not binding based on Fourth Circuit precedent that would exclude Forester from qualifying for the fifteen-year presumption.⁴² The ALJ found that Forester’s employment as a federal mine inspector did qualify him as a “miner” by the statutory definition and therefore held that Navistar’s stipulation was to be upheld as it was not contrary to law.⁴³ The ALJ further found that the new evidence Forester submitted regarding his pneumoconiosis was sufficient to prove that he was totally disabled, meaning that he met the requirements for the fifteen-year presumption of eligibility to receive benefits.⁴⁴ Due to its stipulation, Navistar failed to rebut the presumption, and the ALJ granted Forester benefits under the BLBA, backdated to 2008 when he originally filed his claim.⁴⁵

Navistar then appealed the decision of the ALJ to the BRB, arguing that the ALJ “erred in crediting claimant with seventeen years of underground coal mine employment.”⁴⁶ Navistar again argued that Fourth Circuit precedent should preclude Forester’s eligibility for the fifteen-year presumption.⁴⁷ Additionally, Navistar argued that because Forester could apply for benefits through FECA, the years he spent as a

35. *Id.*

36. *Id.*; *see also* Federal Employees’ Compensation Act, 5 U.S.C. §§ 8101–8193 (2012).

37. *Forester*, 767 F.3d at 641.

38. *Id.* at 641–42.

39. *Id.* at 642.

40. *Id.*

41. *Id.*

42. *Id.* *See generally* McGraw v. Office of Workers’ Comp. Program, No. 88-1162, 1990 WL 101412 (4th Cir. July 10, 1990); Kopp v. Office of Workers’ Comp. Program, 877 F.2d 307 (4th Cir. 1989).

43. *Forester v. Navistar Int. Truck & Engine Corp.*, BRB No. 12-0442 BLA, 2013 WL 3479965, at *1 (Ben. Rev. Bd. June 27, 2013).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at *2.

federal mine inspector should be excluded from a determination of eligibility.⁴⁸ The BRB stated that it must affirm the ALJ’s decision “if it is rational, supported by substantial evidence, and in accordance with applicable law.”⁴⁹ The board looked to the ALJ’s reasoning for the decision, using the situs-function test and its application in *Duquesne Light Co. v. Moore*, and determined that federal mine inspectors were included in the BLBA’s definition of “miner,” and therefore were eligible for the fifteen-year presumption.⁵⁰ According to the BRB, the ALJ’s reliance on *Moore* and Sixth Circuit cases rather than Fourth Circuit cases was permissible and Navistar’s stipulation was binding as it was not contrary to law.⁵¹ The BRB affirmed the ALJ’s ruling, awarding BLBA benefits to Forester.⁵²

Navistar appealed the BRB’s decision, bringing the case to the Court of Appeals for the Sixth Circuit.⁵³ The Sixth Circuit began its analysis by discussing how much deference should be given to each party’s argument.⁵⁴ The court decided that the BRB should not be given any special deference as it serves as a review board and does not create rules or policy.⁵⁵ Next, the Sixth Circuit discussed how much deference should be given to the opinion of the Director of the OWCP when it is within the DOL’s power to create policy and rules.⁵⁶ The Director argued that federal mine inspectors should not be considered “miners” under the BLBA definition as they do not satisfy the function test.⁵⁷ The Sixth Circuit noted that there is no federal law addressing whether or not federal mine inspectors were meant to be included in the BLBA’s definition of “miner.”⁵⁸

The court analyzed the Director’s assessment that a federal mine inspector should not be included in the statutory definition of a “miner.”⁵⁹ The Sixth Circuit reasoned that a federal mine inspector does not perform maintenance work and that the inspector’s duties are purely regulatory.⁶⁰ The opinion discussed an unpublished Sixth Circuit decision that ruled a mine inspector does perform a necessary and integral part of a coal mining operation, but distinguished that case because the

48. *Id.* at *1.

49. *Id.* at *2.

50. *Id.*

51. *Id.*

52. *Id.* at *3.

53. *Navistar, Inc. v. Forester*, 767 F.3d 638, 640 (6th Cir. 2014).

54. *Id.* at 644.

55. *Id.*

56. *Id.*

57. *Id.* at 642, 644.

58. *Id.* at 644.

59. *Id.* at 644–47.

60. *Id.* at 645.

inspector was employed by the mining company itself and was not a federal inspector.⁶¹

Finally, the Sixth Circuit turned its analysis to congressional intent and determined that Congress created federal mine inspector positions within the DOL in order to separate inspection from production.⁶² The court held, based on this interpretation of Congress's intent, that the Director was correct in his assertion that Forester could not be considered a "miner" under the BLBA's definition.⁶³ Since Forester's position as a federal mine inspector did not fall under the definition of being a "miner," the court held that he had not met the fifteen-year employment threshold and was therefore not entitled to the fifteen-year presumption for pneumoconiosis, regardless of whether Navistar could rebut or had rebutted it.⁶⁴ The Sixth Circuit vacated Forester's award of BLBA benefits and remanded the case to an ALJ for further review of Forester's eligibility for benefits.⁶⁵

This case comment contends that the Sixth Circuit erred in its decision not to classify Forester as a "miner." First, the Sixth Circuit should not have given more deference to the OWCP Director's opinion, as the BRB is a ruling body authorized to determine what regulations actually mean and how they should be applied. Second, contrary to the Sixth Circuit's findings, Congress intended that federal mine inspectors be included in the definition of "miner." Third, the Sixth Circuit erred in its decision to narrow its holding in *Sammons* by creating an arbitrary division between private mine inspectors and federal mine inspectors. Finally, for the policy reasons addressed below, Forester's years as a federal mine inspector should have been viewed as time spent as a "miner" and qualified him for the fifteen-year presumption regarding BLBA benefits.

The Third and Fourth Circuits have split in determining whether a federal mine inspector qualifies as a "miner" for purposes of receiving BLBA benefits and for eligibility for the fifteen-year presumption.⁶⁶ *Forester* was a case of first impression for the Sixth Circuit.⁶⁷

In *Duquesne Light Company v. Moore*, the Third Circuit affirmed an agency decision from the BRB that included federal mine inspectors in the definition of

61. *Id.* at 645–46 (discussing *Sammons v. EAS Coal Co.*, No. 92-3030, 1992 WL 348976 (6th Cir. Nov. 24, 1992)).

62. *Id.* at 646.

63. *Id.*

64. *Id.* at 647.

65. *Id.*

66. Compare *McGraw v. Office of Workers' Comp. Program*, No. 88-1162, 1990 WL 101412, at *1 (4th Cir. July 10, 1990) ("[E]mployment as a federal mine inspector does not meet the statutory definition of a miner."), with *Forester*, 767 F.3d at 642 (discussing *Duquesne Light Co. v. Moore*, 681 F.2d 805 (3rd Cir. 1982), *aff'g* 4 Black Lung Rep. (Juris) 1-40.2 (Ben. Rev. Bd. 1981)).

67. *Forester*, 767 F.3d at 640; see also Phyllis L. Robinson & Barry Lewis, *The Federal Black Lung Program: A General Survey of the Sixth Circuit*, 1988 DET. C.L. REV. 643 (1988).

“miner.”⁶⁸ The BRB decided, and the court affirmed, that federal mine inspectors are “miners” under the situs test because they perform a large part of their work in underground coal mines.⁶⁹ The court further held that federal mine inspectors satisfy the function test because their inspections are a necessary and integral part of successful mine operation.⁷⁰ In the court’s reasoning, inspectors should be eligible for BLBA benefits because safety inspections by federal mine inspectors are required by statute.⁷¹

Similarly, in *K.C. v. Navistar*, a BRB case from Kentucky, a man who had worked as a federal mine inspector and in other capacities sought BLBA benefits for his employment as a miner.⁷² As the case would have fallen under the jurisdiction of the Sixth Circuit had it advanced to an appellate court, the BRB discussed the situs and function tests laid out by the Sixth Circuit.⁷³ The BRB held that federal mine inspectors had been previously shown to meet the requirements of situs and function, and could therefore apply for BLBA benefits.⁷⁴

In *McGraw v. Office of Workers’ Compensation Program*, by contrast, the Fourth Circuit heard an appeal from an agency case and held that a federal mine inspector does not fall within the BLBA’s definition of “miner” and that such employment could not be included in the time required for the fifteen-year presumption because federal mine inspectors are not involved in the extraction or preparation of coal.⁷⁵ The court, based on this reasoning, held that a federal mining inspector does not perform coal mining work, and therefore time spent in that position could not be used to establish the presumption of pneumoconiosis.⁷⁶ This case cited *Kopp v. Office of Workers’ Compensation Programs*, another Fourth Circuit case, for authority in its decision.⁷⁷

In *Kopp*, plaintiff Kenneth Kopp had worked as a mine laborer and then as a mine superintendent before leaving his position to become a federal mine inspector.⁷⁸ He filed for benefits under the BLBA and was denied; the case eventually reached

68. *Forester*, 767 F.3d at 642 (discussing *Duquesne Light Co.*, 681 F.2d at 805, *aff’g* 4 Black Lung Rep. (Juris) 1-40.2 (Ben. Rev. Bd. 1981)).

69. *Id.*

70. *Id.*

71. *Id.*

72. *K.C. v. Navistar*, BRB No. 07-0136 BLA, 2007 WL 7629805, at *1-7 (Ben. Rev. Bd. Oct. 30, 2007).

73. *See id.* at *4.

74. *Id.*

75. No. 88-1162, 1990 WL 101412, at *1 (4th Cir. July 10, 1990). McGraw had been most recently employed as a federal mine inspector at the time he filed for benefits, but had previously been an underground coal miner. *Id.*

76. *Id.* The court did, however, rule that McGraw was still entitled to benefits under the BLBA due to his previous work as a miner, before his employment as a federal mine inspector. *Id.*

77. *Id.*

78. *Kopp v. Office of Workers’ Comp. Programs*, 877 F.2d 307, 308 (4th Cir. 1989).

the Fourth Circuit on appeal.⁷⁹ The Fourth Circuit held that it did not have jurisdiction over the case and therefore refused to rule on the merits as to whether or not Kopp could be considered a “miner” in his role as a federal mine inspector.⁸⁰

The Sixth Circuit in *Forester* gave deference to the Fourth Circuit cases because the Director of the OWCP followed the Fourth Circuit’s interpretation of “miner.”⁸¹ According to the court, deference to these arguments was appropriate based on the analysis developed in *Skidmore v. Swift & Co.*,⁸² which includes factors such as: “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁸³ The court erred in giving deference to the Fourth Circuit because in *McGraw*, the court based its decision not to include federal mine inspectors in the court’s definition of “miner” on *Kopp*.⁸⁴ However, the court in *Kopp* never reached the substantive issue of whether or not a federal mine inspector qualified as a “miner” as it stopped its analysis upon determining that it did not have jurisdiction to hear the case.⁸⁵ Furthermore, the case from which *Kopp* drew their definition, *Eastern Associated Coal Corp. v. Office of Workers’ Compensation Program*, never established that a federal mine inspector was not a “miner.”⁸⁶ In fact, the *Eastern* court did the exact opposite and specifically declined to rule on whether or not a federal mine inspector qualified as a “miner.”⁸⁷ Therefore, the court in *McGraw* erred in using the *Kopp* opinion as authority. In terms of deference shown to the opinions of the Fourth Circuit and the arguments of the Director, *Forester* places the opinions of both the Third and Fourth Circuits on equal footing—both were BRB decisions that were heard by a Court of Appeals, which then did not rule on the issue.⁸⁸

79. *Id.*

80. *Id.*

81. *Navistar, Inc. v. Forester*, 767 F.3d 638, 642, 645 (6th Cir. 2014).

82. *Id.* at 645 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The *Skidmore* case involved fire and alarm first responders employed by Swift & Co. who sued the company for overtime pay they felt they were owed, arguing that time spent waiting for alarms to go off should be considered working hours, in addition to the time spent responding to the alarms. *Skidmore*, 323 U.S. at 135–36. The case was reversed and remanded but has come to stand for the proposition that an Administrator’s opinion, while not controlling of decisions, can be used by courts for guidance. *Id.* at 140.

83. *Skidmore*, 323 U.S. at 140.

84. *McGraw v. Office of Workers’ Comp. Program*, No. 88-1162, 1990 WL 101412, at *1 (4th Cir. July 10, 1990).

85. *Kopp*, 877 F.2d at 309.

86. 791 F.2d 1129, 1131 n.2 (4th Cir. 1986).

87. *Id.*

88. *Navistar, Inc. v. Forester*, 767 F.3d 638, 642–43 (6th Cir. 2014).

The Third Circuit has established that federal mine inspectors are “miners” as defined by the BLBA.⁸⁹ The court in *Forester* chose to give deference to the Director of the OWCP and the Fourth Circuit based on the belief that the cases were stronger and that the Director’s opinion deserved more deference than that of the BRB.⁹⁰ However, the BRB was created for the exact purpose of hearing these cases and deciding whether or not a worker is entitled to benefits.⁹¹ *Kopp* is the only case used by the Sixth Circuit that was not simply an affirmation of an agency decision. As discussed above, *Kopp* should not have been used as authority here, as both *Kopp* and the case it cites as precedent, *Eastern*, did not touch on the substantive issue of whether or not a federal mine inspector qualifies as a “miner.” Therefore, when *Kopp* is not considered, the authority of both the Third and Fourth Circuits are affirmed agency decisions, and should be given the same weight. Additionally, the BRB decision in *K.C. v. Navistar* indicates a willingness to use the situs-function test to include federal mine inspectors in the definition of “miner.”⁹² The Sixth Circuit should have considered decisions by the BRB within its own jurisdiction, especially those based on the Sixth Circuit’s own decisions. The court erred in basing its reasoning on Fourth Circuit precedent, rather than Third Circuit precedent and BRB cases from its own jurisdiction.

Furthermore, contrary to the Sixth Circuit’s findings, Congress intended that federal mine inspectors be included in the definition of “miner.” As the Sixth Circuit noted in *Forester*, Congress never expressly stated that federal inspectors should not be considered “miners” as defined by the BLBA.⁹³ In fact, prior cases have considered federal mine inspectors to be eligible for the presumption and Congress has never provided otherwise.⁹⁴ Additionally, Congress’s top priority was the safety of miners,⁹⁵ which should include those who are employed specifically to ensure that the rest of the miners have safe working conditions.

It is unlikely, therefore, that Congress intended for a worker’s eligibility for BLBA benefits to be based on the source of their paychecks rather than the duties they perform. Navistar argued that Forester was not meant to be included in the BLBA’s definition of “miner” because he was already eligible for FECA benefits.⁹⁶

89. *Id.* at 642 (discussing *Duquesne Light Co. v. Moore*, 681 F.2d 805 (3rd Cir. 1982), *aff’g* 4 Black Lung Rep. (Juris) 1-40.2 (Ben. Rev. Bd. 1981)).

90. *Id.* at 644–47.

91. See *BRB Mission Statement*, U.S. DEP’T LAB., <http://www.dol.gov/brb/mission.htm> (last visited Apr. 14, 2016).

92. *K.C. v. Navistar*, BRB No. 07-0136 BLA, 2007 WL 7629805, at *4 (Ben. Rev. Bd. Oct. 30, 2007).

93. *Forester*, 767 F.3d at 644.

94. See, e.g., *Forester*, 767 F.3d at 642 (discussing *Duquesne Light Co.*, 681 F.2d 805, *aff’g* 4 Black Lung Rep. (Juris) 1-40.2); *K.C.*, 2007 WL 7629805, at *1–7; see also 30 U.S.C. § 801 (2012) (having no amendments in light of decisions).

95. 30 U.S.C. § 801(a).

96. *Forester v. Navistar Int’l Truck & Engine Corp.*, BRB No. 12-0442 BLA, 2013 WL 3479965, at *2 (Ben. Rev. Bd. June 27, 2013).

However, Congress has not prohibited federal mine inspectors from receiving both FECA benefits and BLBA benefits.⁹⁷ This ability to receive double benefits indicates that Congress intended for federal mine inspectors to be considered “miners” under the BLBA.

Finally, the Sixth Circuit erred in its decision to narrow its holding in *Sammons v. EAS Coal Co.* and create an arbitrary division between private mine inspectors and federal mine inspectors. In *Sammons*, a Sixth Circuit opinion, the court ruled that a private mine inspector employed by EAS Coal was a “miner” as defined by the BLBA.⁹⁸ *Sammons*’s work was deemed “vital and essential . . . as it keeps the mine operational, safe, and in repair.”⁹⁹ Based on this reasoning as applied to the situs-function test, the Sixth Circuit held that *Sammons* was a “miner” and was therefore entitled to benefits under the BLBA.¹⁰⁰

In *Forester*, the Sixth Circuit improperly narrowed the *Sammons* decision to include only private mine inspectors. The court ruled that for the years *Forester* was a private mine inspector, he would be considered a “miner” under the BLBA and would qualify for the fifteen-year presumption but that his employment as a federal mine inspector could not be included.¹⁰¹ However, the court failed to recognize any meaningful difference between *Forester*’s position as a private mine inspector and his position as a federal mine inspector.¹⁰² The court’s suggestion that a private inspector is a “miner” but a federal mine inspector performing the same duty is not a “miner” by the BLBA’s standards does not make sense.¹⁰³

Forester spent a total of twenty-one years working underground in coal mines. While working as a federal mine inspector, he was tasked with ensuring the safety of others working in the mines. Inspecting mines to ensure they are safe can certainly be considered an integral and necessary part of mine operation, as it is likely that few people would be willing to work in a mine that has been deemed unsafe.¹⁰⁴ It therefore seems unjust to refuse to consider *Forester* a “miner” by the BLBA’s definition for the years he served as a federal mine inspector. From a policy standpoint, those who spend fifteen years working in an underground coal mine and develop pneumoconiosis should be allowed to use the presumption set out for “miners.” *Forester*’s past work experience should not be barred from inclusion, and he

97. HOWARD L. GRAHAM, FEDERAL EMPLOYEES COMPENSATION ACT PRACTICE GUIDE § 18:35, Westlaw (database updated Mar. 2016).

98. *Sammons v. EAS Coal Co.*, No. 92-3030, 1992 WL 348976, at *2 (6th Cir. Nov. 24, 1992).

99. *Id.*

100. *Id.*

101. *Navistar, Inc. v. Forester*, 767 F.3d 638, 645–46 (6th Cir. 2014).

102. *See id.*

103. *See generally* Alan G. Skutt, Annotation, *Who is “Miner” Under Black Lung Benefits Act*, 30 U.S.C.A. § 901 *et seq.*, 97 A.L.R. Fed. 592 § 12 (1990).

104. *See* 30 C.F.R. § 722.11 (2016).

should be eligible to receive BLBA benefits based on his ability to meet the factors of the rebuttable presumption.

Additionally, federal mine inspectors must ensure that federal regulations are followed.¹⁰⁵ If more inspectors choose to work directly for private companies in order to establish the fifteen-year employee presumption, then mine safety will potentially decline. This decline would occur because fewer people would be interested in federal inspection jobs. Private inspectors would potentially be more loyal to their companies than to the federal government. This conflict could lead to inspectors keeping quiet if not all regulations are strictly followed in order to protect their mining companies and their employment. Also, fewer federal inspectors means less time to inspect mines and report conduct not in line with regulations, as inspectors will not be able to visit each mine as frequently.

The *Forester* court incorrectly showed more deference to the opinions of the Fourth Circuit than to the opinions of the Third Circuit. The court additionally misinterpreted Congress's intent and overly narrowed the standard it set out in *Sammons*. The court's decision could have the unintended result of stopping others from choosing to become federal mine inspectors, in turn endangering the safety of all miners. For these legal and policy reasons, Forester's employment as a federal mine inspector should be deemed time spent employed as a "miner" by the BLBA's definition and qualify him for the fifteen-year presumption and BLBA benefits.

105. *See id.*