



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

December 18, 2012

[redacted] Esq.
[redacted]

- Re:
- Mr. [redacted], Appeal [redacted]
 - Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies (the "Bethlehem Plan" or the "Plan"), PBGC Plan No. 196603
 - Successor to the Lukens Inc. Salaried Employees Retirement Plan As Amended and Restated Effective December 31, 1992 (the "Lukens Plan")

Dear Mr. [redacted]:

We are responding to your appeal of PBGC's November 2, 2010 determination of Mr. [redacted]'s benefit under the Bethlehem Plan. As explained below, we must deny Mr. [redacted]'s appeal. We must also change his PBGC-payable benefit to \$0 because he received an amount greater than his Maximum Guaranteeable Benefit under the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), when the Plan paid a \$400,000 lump-sum distribution to him in 1998.

Background

Mr. [redacted] was born on [redacted]. He was hired by Lukens Steel Co. ("Lukens") on [redacted]. Lukens was merged with and into Bethlehem Steel Corporation ("Bethlehem") effective May 29, 1998.

Mr. [redacted] was laid off on [redacted], 1998. He and others were parties to Severance Agreements with Lukens Steel. These Severance Agreements triggered payment obligations ("severance payments").¹

The severance payments would have created potential tax liabilities. Those tax liabilities could be mitigated if portions of the severance payments were to be moved through a pension plan

¹ Mr. [redacted]'s Severance Agreement was dated October 31, 1990, according to a June 5, 1998 letter from Bethlehem that you included with your appeal. The June 5, 1998 letter is at Enclosure 1 to this decision.

qualified under the Internal Revenue Code. On June 5, 1998, shortly before Mr. [] was laid off, Bethlehem explained the following:

We also propose to pay a portion of the severance payments to you through the qualified Lukens pension plan rather than as a direct payment from Bethlehem. This will not reduce the amount you will receive but it will provide you a potential benefit in the event you would prefer to rollover that payment and thereby defer taxation.²

Consistent with Bethlehem's June 5, 1998 explanation, the Lukens Plan was amended effective June 1, 1998 (the "1998 Amendment") to increase the benefits of Mr. [] and 8 other [].³ The 1998 Amendment provided Mr. [] with a new Cash Balance Benefit in addition to the benefit the Plan already provided (his "prior Plan benefit").

The 1998 Amendment states "[A] Designated Participant's Accrued Benefit shall also include the Participant's Cash Balance Benefit."⁴ The 1998 Amendment also defined a "Special Distribution Date," which was July 1, 1998 for Mr. []. Effective July 1, 1998, he received the following options for receiving his new Cash Balance Benefit:

- a \$2,425.64 per month Straight Life Annuity ("SLA"), what we call his "Cash Balance Annuity,"⁵
- an actuarially-equivalent \$2,298.05 per month Joint and 50% Survivor ("J&50%S") annuity,
- other alternative actuarially-equivalent annuities, or
- a single \$400,000 lump sum.

² The quote is from Enclosure 1 to this letter. A payment from a tax-qualified pension plan is also excluded from what is defined as a "parachute payment" in IRC § 280G(b). Certain parachute payments are subject to an excise tax under IRC § 4999.

³ The 1998 Amendment is part of Enclosure 3 to this letter. The amendment was to the Lukens Plan As Amended and Restated Effective December 31, 1992, at Enclosure 2 to this letter.

⁴ See section B2 of the 1998 Amendment, on page 6 of Enclosure 3 to this letter.

⁵ The \$2,425.64 amount is shown in Exhibit 7 to your appeal.

PBGC miscalculated the Cash Balance Annuity as a \$2,184.32 per month SLA (what we call his "Assumed Cash Balance Annuity"). This miscalculation does not materially affect the Appeals Board's decision because both amounts (\$2,425.64 and \$2,184.32) exceed his Maximum Guaranteed Benefit, as we explain in this decision. We also reconcile the two calculations later in this decision.

Bethlehem separately agreed to reimburse the Plan \$2.455 million, including \$400,000 attributed to Mr. [REDACTED].⁶

Mr. [REDACTED] chose to receive his Cash Balance Benefit under the lump-sum option (\$400,000) after his wife waived her right to the J&50%S annuity. He received the \$400,000 lump-sum distribution on or about July 30, 1998. The prior Plan benefit that still remained unpaid would provide \$2,639.02 per month if paid as an SLA starting at age 65.

The Lukens Plan merged into the Bethlehem Plan on October 1, 1998. Bethlehem filed for bankruptcy protection on October 15, 2001. The Plan terminated on December 18, 2002 without sufficient assets to provide all benefits. PBGC became the Plan's statutory trustee on April 30, 2003.

PBGC's November 2, 2010 Determination

PBGC determined Mr. [REDACTED] is entitled to a PBGC-payable monthly benefit of \$1,207.12, if paid in the form of a Straight Life Annuity with no survivor benefits starting on August 1, 2012. PBGC's guaranteed-benefit calculations may be summarized as follows:

(1) PBGC assumed Mr. [REDACTED] would claim his prior Plan benefit starting at age 65.

(2) PBGC combined both components of his benefit (\$2,184.32 Assumed Cash Balance Annuity starting July 1, 1998 and \$2,639.02 prior Plan benefit starting [REDACTED]) into a total Plan-provided SLA that would pay \$4,823.34 at age 65.

(3) PBGC limited the \$4,823.34 combined Plan benefit to \$3,579.55, the Maximum Guaranteeable Benefit ("MGB") under ERISA for PBGC-payable benefits starting at age 65.⁷

(4) As a result of ERISA's "phase-in" requirement, PBGC guarantees 80% of the increase from the prior Plan benefit to the MGB-limited total Plan benefit; thus, PBGC calculated a total guaranteed amount of \$3,391.44.⁸

⁶ See "Financial Impact under Summary of Lukens Inc. Salaried Employee Retirement Plan Amendments" at the fourth page of Enclosure 3 to this letter.

⁷ The MGB is required by ERISA § 4022(b)(3) and 29 CFR §§ 4022.22-23. For a plan terminating in 2002, the MGB provides \$3,579.55 per month if PBGC payments begin at age 65 under an SLA. See 29 CFR § 4022.23(c) and § 4022 Appendix D.

⁸ \$2,639.02 {4-year-old benefit}
+ (\$3,579.55 {total age-65 annuities limited by MGB} - \$2,639.02) x 80%
PBGC applied 80% phase-in because the 1998 Amendment was both adopted and effective between 4-5 years before Plan termination. Phase-in is required by ERISA § 4022(b)(7) and 29 CFR §§ 4022.24-25. 29 CFR § 4022.24(c) requires applying the MGB limit in 29 CFR § 4022.22 before calculating phase-in.

(5) PBGC subtracted the Assumed Cash Balance Annuity (\$2,184.32) that Mr. [] effectively received as a partial distribution when he chose payment under the lump-sum option.

PBGC concluded the share of the guaranteed benefit that remains to be paid by PBGC was \$1,207.12⁹ per month if paid as an SLA starting August 1, 2012.

Your March 4, 2011 Appeal

In your March 4, 2011 appeal, you objected to the characterization of Mr. []'s \$400,000 payment as a "partial distribution" of his pension. You characterize the \$400,000 as an amount to be paid in addition to the pension (his prior Plan Benefit) that he was entitled to receive before the 1998 Amendment. Thus, you believe PBGC mis-characterized the \$400,000 Cash Balance payment as a "partial distribution" of his pension.

You claimed ERISA's guarantee limit applies only to his "traditional pension," the prior Plan benefit that has not yet been paid. Also, the prior Plan benefit would provide \$2,639.02 per month, an amount that:

(i) is below the age-65 MGB (\$3,579.55), and

(ii) by itself is not affected by phase-in, because it was already provided by the Lukens Plan before the 1998 Amendment.

Thus, you believe PBGC should guarantee the full Plan benefit that has not already been paid.

You also asserted PBGC's phase-in calculation is somehow "double penalizing" Mr. [] for the distribution of his Cash Balance Benefit in a \$400,000 lump sum.

In further support of your appeal, you cited Lami v. PBGC.¹⁰ You stated the Lami Court noted the benefits purchased under plaintiffs' annuity contracts were part of their "regular retirement incomes." In contrast, you claimed Mr. []'s \$400,000 lump-sum distribution was separate and apart from his "traditional Lukens Plan benefit." Thus, you believe none of Mr. []'s pension has been provided.

You also noted the Lami Court discussed PBGC's regulation for reducing monthly benefits that were already being paid. In contrast, you noted Mr. [] has not received any payments from the Plan since receiving his lump sum in 1998, 4 years before the

⁹ \$1,207.12 = \$3,391.44 (total guaranteed amount) - \$2,184.32 (Assumed Cash Balance Annuity).

¹⁰ Lami v. Pension Benefit Guar. Corp., 1989 U.S. Dist. LEXIS 19153, (W.D. Pa. July 18, 1989).

Plan terminated and 14 years ago. Thus, you question whether PBGC might be mistakenly applying to Mr. [] regulations that instead apply to monthly benefits that are actually already in pay.

You asserted it is "anomalous" for Mr. []'s MGB to be affected by a 4-year old lump-sum payment in light of ERISA section 4045, which allows PBGC to "recapture" certain amounts paid to a participant within only a 3-year period before a pension plan's termination.

You stated Mr. [] and his wife relied on an October 28, 2004 letter where PBGC estimated PBGC would pay him a \$2,639.02 pension starting at age 65.

You asked to reserve the right to request a hearing or an opportunity to present witnesses in your appeal. You advised you are open to informal discussions with PBGC to discuss these issues further.

You stated there is information potentially relevant to your Appeal which you did not possess and therefore could not include in your Appeal. You requested the right to supplement the record in Mr. []'s case with such additional information to the extent it became available.

Discussion

When the Plan terminated on December 18, 2002, it did not have sufficient assets to provide all benefits. Thus, PBGC became the Plan's statutory trustee. The terms of the Plan, ERISA, and PBGC's regulations determine the benefits PBGC can pay.

For a benefit to be guaranteeable, a participants must satisfy a plan's conditions for entitlement to the benefit no later than the plan's termination date.¹¹

The benefit PBGC guarantees may be less than the benefit a pension plan would otherwise pay as a result of legal limits under ERISA and PBGC's regulations. A participant may receive more than his guarantee, however, if sufficient plan assets and legal recoveries are available.

As shown in the Appendix to this decision, Mr. []'s guaranteed benefit is larger than the benefit funded by the Plan's assets. Therefore, the analysis in this Discussion relates to his guaranteed benefit, which we will show was already provided before the Plan terminated.

¹¹ See ERISA §§ 4001(a)(8), 4022. See also 29 CFR §§ 4022.3 and 4022.4. The Bethlehem Plan's sponsor filed for bankruptcy before September 16, 2006. Therefore, the Bethlehem Plan is exempt from new ERISA § 4022(g) and 4044(e) requirements for substituting Bethlehem's bankruptcy petition date for the Bethlehem Plan's termination date.

\$400,000 Payment Was a Partial Distribution Of a Pension Benefit

Mr. []'s Plan benefit consists of 2 components: (i) The Cash Balance Benefit that he was paid under the lump-sum option in 1998, and (ii) The remainder (his prior Plan benefit), an annuity that has not been paid.¹² You questioned whether payment of the \$400,000 Cash Balance Benefit was a partial distribution of a pension benefit.

The Cash Balance Benefit is based on an Account Balance that increases over time at defined interest rates, independent of actual investment performance. The Account balance is a hypothetical amount:

The Account Balance shall constitute a recordkeeping entry, and not an individual account, and no Plan contribution shall be allocated to, or for the benefit of, any Designated Participant's Account Balance.¹³

The hypothetical Account Balance is converted to an annuity, what we call the Cash Balance Annuity, using defined interest and mortality assumptions.¹⁴ The Cash Balance Annuity is defined to be a component of the annuity the Plan provides at a participant's Normal Retirement Date.¹⁵ We concluded:

- Plan documents define the Cash Balance Benefit in the form of an annuity, what we call the Cash Balance Annuity (\$2,425.64 per month if paid as an SLA starting July 1, 1998).
- The Plan offered options for receiving the Cash Balance Benefit in alternative forms. With his wife's permission, Mr. [] chose the option of receiving an actuarially-equivalent lump sum (\$400,000) instead of as a Cash Balance Annuity (\$2,425.64 per month).

¹² Mr. []'s benefit is determined under Part 2 of the Lukens Plan (at Enclosure 2 to this letter), as amended by the 1998 Amendment (at Enclosure 3).

¹³ See section 15.1(a)(6) of the 1998 Amendment, on page 15 of Enclosure 3 to this letter.

¹⁴ "'Cash Balance Benefit' means an annuity" - see section 15.1(d), added by section D2 of the 1998 Amendment, on page 16 of Enclosure 3. The rules for updating Account Balances and converting to an annuity are in sections 15.1-2 on pages 14-17 of Enclosure 3.

¹⁵ "[A] Designated Participant's Accrued Benefit shall also include the Participant's Cash Balance Benefit." See section B2 of the 1998 Amendment, on page 6 of Enclosure 3 to this letter. "'Accrued Benefit' means ... the amount of benefit ... payable as a single life annuity beginning at the Participant's Normal Retirement Date." See section 1.1 of the 1992 Plan, on page 35 of Enclosure 2 to this letter.

• We must affirm PBGC's determination that the \$400,000 lump-sum payment was a partial distribution of Mr. []'s pension.

Guarantee Limits Apply To the Total Pension Benefit

The Cash Balance Benefit's features distinguish it from the type of benefit under an "individual account plan," the type of plan exempt from PBGC coverage under ERISA sections 4021(b)(12) and 3(34). In a similar situation, PBGC Opinion Letter 89-6 explains:

The term "individual account plan" refers to a plan in which the level of benefits for each employee may fluctuate up or down depending on the experience of the account. In your Plan, the level of benefits is apparently fixed by a formula and is not dependent on the actual experience of each separate account; the interest rate is not tied to the actual investment performance of the Plan's assets, but is based on specific provisions in the Plan document. Therefore, on the basis of the information you have supplied, it appears that the Plan is covered by the plan termination insurance provisions of Title IV of ERISA.

PBGC's coverage of cash balance plans is broadly acknowledged.¹⁶ Thus, Mr. []'s Cash Balance Benefit is a type of benefit covered under PBGC's guarantee program, and consequently subject to the guarantee limits under ERISA section 4022.

PBGC's guarantee limits apply to the total benefits that a pension plan provides a participant, without distinguishing components that might be created by separate plan provisions. Under ERISA 4022(b)(3), the MGB applies simply to "[t]he amount of monthly benefits described in subsection (a) provided by a plan." Likewise, under ERISA sections 4022(b)(7) and 4022(b)(1)(B), the phase-in limit applies to "any increase in the amount of benefits under a plan."¹⁷

Historically, PBGC has applied the MGB to the total plan-provided retirement annuity, including portions a plan may have already funded before termination.¹⁸ PBGC's interpretation of section 4022 is a plain interpretation of the law. Mr. []'s Cash Balance Benefit is simply part of a Plan-provided pension, the

¹⁶ For example, see the second paragraph under Background under PBGC's Proposed Rule published in Federal Register/ Vol. 76, No. 210/ Monday October 31, 2011.

¹⁷ Footnote 8 in this decision shows how phase-in was calculated in PBGC's November 2, 2010 determination.

¹⁸ For example, see PBGC Op. Ltr. 86-28.

same as if, instead of choosing an actuarially-equivalent lump sum (\$400,000):

- In 1998 he and his wife had chosen the \$2,425.64 annuity on which the lump sum was based, or
- If he had decided to wait and retire at age 65 with an annuity based on a larger Account Balance.

For the reasons articulated above, the Appeals Board affirms PBGC's determination that legal guarantee limits apply to Mr. []'s total Plan benefit, including the Cash Balance Benefit component.

PBGC-Payable Portion of Guaranteeable Benefit Is \$0

For a benefit that has already commenced, PBGC's regulation requires a calculation of the MGB using the participant's age when a plan terminates (age [] on December [] for Mr. []).¹⁹ His Cash Balance Annuity had already effectively started 4 years earlier, on July 1, 1998, when he received his Cash Balance Benefit under the lump-sum alternative (\$400,000). Thus, for the portion of his Accrued Benefit that was already effectively in pay at Plan termination, which is his Cash Balance Annuity, the correct MGB is \$1,682.39.²⁰

You showed Plan actuaries calculated Mr. []'s Cash Balance Annuity would provide \$2,425.64 per month if paid as an SLA starting July 1, 1998. Plan actuaries used a 5.99% interest rate, the correct rate for converting a \$400,000 Initial Account Balance for Mr. [] to his Cash Balance Annuity.²¹ PBGC incorrectly calculated a \$2,184.32 amount for his Cash Balance Annuity by using a 5.00% interest rate.²² Both amounts (\$2,425.64 and \$2,184.32) are

¹⁹ See 29 CFR § 4022.23(c), which requires the MGB to be adjusted for the participant's age as of the later of a plan's termination or the start of PBGC's benefit payments.

²⁰ \$3,579.55 for plans terminating in 2002
x 47% adjustment for age [] at Plan termination, on December 18, 2002
47% = {100% - 7% x 5 years - 4% x 4 6/12 years}, for a total of []
full months before age 65. See 29 CFR § 4022.23(c) and § 4022 Appendix D.

²¹ Mr. []'s \$400,000 Initial Account Balance is identified by his Social Security number in Schedule C to the 1998 Amendment. After the \$400,000 Initial Account Balance is used to define an annuity (\$2,425.64), payment in an Actuarially Equivalent lump sum (also \$400,000) was permitted with spousal consent by section 5.4C, added by section B13 on page 9 of Enclosure 3.

²² The 5.00% rate PBGC used applies only for converting between certain actuarially-equivalent annuity forms - see section 15(b) of the 1998 Amendment, on page 15 of Enclosure 3. The 5.99% rate is correct for converting between an Account Balance (\$400,000) and the normal form of benefit (an SLA or a J&50%S annuity), under section 15(d) of the 1998 Amendment - see page 16 of Enclosure 3. The normal form of benefit is given in section 7.2 on page 71 of Enclosure 2

more than the MGB that applies to his Cash Balance Annuity, which is \$1,682.39.

Thus, the lump sum effectively provided \$2,425.64 per month, which is more than 100% of Mr. [redacted]'s Maximum Guaranteeable Benefit (\$1,682.39). Therefore, the portion of the guaranteeable benefit that remains for PBGC to pay, even before applying the phase-in limit, is \$0.

PBGC's Actuarial Technical Manual explains, with regard to a pension plan where only part of a participant's pension was in pay at plan termination:

For participants not in pay status under at least one component as of [plan termination], the Maximum Guaranteed Benefit (MGB) limitation is first applied to the component plan benefit with the earliest annuity starting date (or all benefits in pay at [plan termination]). The remaining portion (if any) of the MGB is applied to the next component plan benefit that the participant elects to begin collecting, and so on. The percentage of the MGB used in previous components is tracked through [an automated benefit-calculation system]. Essentially, a rolling MGB is applied.²³

Thus, our guaranteed-benefit calculation agrees with existing PBGC rules for a pension with component annuities that have different starting dates.

PBGC's Interpretation Upheld in Lami v. PBGC

In Lami, an administrator was required to reduce plaintiffs' benefits to an estimated PBGC-payable amount after a plan terminated. The Lami Court upheld PBGC's procedures for calculating the PBGC-payable amount. You sought to distinguish the facts here from those in Lami. You theorized that the Cash Balance Benefit was never a part of Mr. [redacted]'s regular retirement income. Under your theory, the Lami Court's reliance on the PBGC's Maximum Guaranteeable Benefit Regulation, that the MGB applies to "all 'benefits payable with respect to a participant under a plan'"²⁴ would become irrelevant.

(Part 2 of the Lukens Plan). Under sections 15(e)-(f) of the 1998 Amendment, the Cash Balance Interest Rate is the 30 Year Treasury securities for the month of December 1997 (5.99%), the last month of the Plan year before the \$400,000 was distributed.

²³ The quote is from PBGC's Actuarial Technical Manual Chapter 9 October 2009 Meeting Minutes section K "Multiple Retirement Dates."

²⁴ The text the Lami Court quoted, at 29 CFR § 2621.3(a), has been moved to 29 CFR § 4022.22. The Court applied 29 CFR § 2621.3(a) to benefits that were part of Lami's "regular retirement income."

To the contrary, we have shown Mr. []'s Cash Balance Benefit is defined as an annuity (what we call his Cash Balance Annuity) that is payable at his Normal Retirement Date.²⁵ Thus, we have rejected your theory that the Cash Balance Benefit was not a part of Mr. []'s pension benefit. Moreover, even if the Cash Balance Benefit were not already defined as an annuity, PBGC would still guarantee his Cash Balance Benefit because it could have been paid as an annuity.²⁶ Consequently, PBGC's Maximum Guaranteeable Benefit Regulation applies to the entire benefit Mr. [] earned, as was also the case in Lami.

Referring to ERISA section 4022(a), the Lami Court explained, "The maximum statutory guarantee applies to 'all nonforfeitable benefits ... under a single employer plan which terminates.'" ²⁷ The Court concluded the MGB applied to the total plan benefit, including the benefit that the Plan had already provided through an insurance contract.

You noted that at plan termination, the plaintiffs in Lami were still receiving a benefit from an insurance company. In contrast, none of Mr. []'s Cash Balance Annuity was being paid or remained to be paid when the Plan terminated. We find this difference between the two circumstances (Lami and []) is immaterial. In both circumstances, at plan termination a pension plan had already provided through lump-sum payment the value of a plan-provided annuity.

Thus, we found no material difference between the facts in Lami and in Mr. []'s appeal.

Other Issues

You claimed certain regulations discussed in Lami, now at 29 CFR section 4022 Subparts D and E, cannot be used to justify PBGC's

²⁵ See footnote 15. Lump-sum payment is only an alternative to receiving a benefit that is defined as an annuity, as shown in footnote 21.

²⁶ At 29 CFR § 4022.7(a), PBGC's regulation states:

"Alternative benefit. If a benefit that is guaranteed under this part is payable in a single installment or substantially so under the terms of the plan, or an option elected under the plan by the participant, the benefit will not be guaranteed or paid as such, but the PBGC will guarantee the alternative benefit, if any, in the plan which provides for the payment of equal periodic installments for the life of the recipient."

²⁷ See Lami v. Pension Benefit Guar. Corp., 1989 U.S. Dist. LEXIS 19153, (W.D. Pa. July 18, 1989). The Court cited ERISA § 4022(b)(3)(B) (the MGB) and quoted ERISA § 4022(a).

adjustments for Mr. []'s \$400,000 payment.²⁸ We agree. Because Mr. [] is not receiving a PBGC benefit (unlike the Lami plaintiffs), neither PBGC nor the Appeals Board is relying on 29 CFR section 4022 Subparts D or E.

You questioned whether PBGC doubly reduced Mr. []'s PBGC benefit because he chose to be paid his Cash Balance Annuity under the lump-sum alternative (\$400,000). Our summary of PBGC's calculation of the PBGC-payable benefit shows no double reduction occurred. Our correction to Mr. []'s PBGC-payable benefit (finding his MGB has already been fully provided) likewise has no double reduction.

You also questioned whether PBGC might be reducing Mr. []'s PBGC-payable benefit for the \$400,000 payment because of the MGB adjustments in 29 CFR 4022.23(c)-(e).²⁹ This is not why PBGC is reducing Mr. []'s PBGC-payable benefit. PBGC reduced Mr. []'s PBGC-payable amount because his \$400,000 lump-sum distribution was made in lieu of paying a \$2,425.64 per month Plan-provided annuity. However, the Appeals Board is correcting PBGC's oversight in omitting the MGB age reduction in 29 CFR 4022.23(c).³⁰

You observed that under ERISA section 4045, PBGC may "clawback" certain payments the Plan made during the 3 years before Plan termination. We have shown Mr. [] received the lump-sum equivalent of an annuity that provides \$2,425.64 per month for life, more than his \$1,682.39 per month MGB on December 18, 2002. While section 4045 does not allow PBGC to recapture any of his \$400,000 payment, neither does it require PBGC to pay any part of a pension benefit that has already been provided. Thus, section 4045 is irrelevant to PBGC's calculation of what guaranteeable benefit, if any, remains for PBGC to pay.

You enclosed an October 28, 2004 PBGC letter that estimated PBGC would pay a \$2,639.02 SLA starting at age 65 (August 1, []). PBGC's October 2004 letter explained: "Please note that this is only an estimate of your benefit under the Plan and may change if [a] review provides different information."³¹

²⁸ The name "Benefit Reduction Regulation" as used in the Lami decision and in your appeal refers to rules that have moved to and are divided between: 29 CFR 4022 Subpart D "Benefit Reductions in Terminating Plans," starting at 29 CFR § 4022.61; and Subpart E, "PBGC Recoupment and Reimbursement of Benefit Overpayments and Underpayments," starting at 29 CFR § 4022.81. The Lami Court cited a prior version of this regulation at 29 CFR 2623.

²⁹ You cite 29 CFR 4022.22. The current citation for the section you reference is 29 CFR 4022.23.

³⁰ In footnote 20, we corrected the \$3,579.55 MGB PBGC used to \$1,682.39.

³¹ PBGC's October 28, 2004 letter is at Exhibit 4 to your appeal.

PBGC did not promise Mr. [] a PBGC payment. To the contrary, PBGC indicated uncertainty about what his PBGC benefit might finally be determined to be.

When producing the October 28, 2004 estimate, PBGC overlooked that the Plan had already paid Mr. [] his Cash Balance Benefit in a \$400,000 lump sum in 1998. The Appeals Board cannot require PBGC to pay again a benefit that has already been paid. For these reasons, we must deny your request for PBGC to pay a benefit based on PBGC's October 2004 benefit estimate.

We decided your appeal based on: (i) long-established law and PBGC procedures, and (ii) documented facts, including benefit calculations you submitted and Plan documents. Therefore, we deny your request for a hearing or an opportunity to present witnesses.

In its March 11, 2011 letter acknowledging receipt of your appeal, the Appeals Board granted your request to supplement your appeal. We advised you could supplement your appeal at any time. Our records do not show that you provided any such additional information.

Decision

Having applied the law, regulations, and Plan provisions to the facts in his case, we must deny Mr. []'s appeal. We are changing his PBGC benefit to \$0 because he already received more than his Maximum Guaranteeable Benefit when he was paid the actuarial value of his Cash Balance Annuity in 1998.

This letter concludes his administrative remedies with respect to PBGC's November 2, 2010 determination. He may, if he wishes, seek U.S. District Court review of PBGC's determination with respect to the issues you have raised. We thank you and Mr. [] for your patience while we carefully reviewed his appeal.

Sincerely,



William D. Ellis
Appeals Board Member

Appendix: Any PBGC-Payable Benefit Is Under PBGC's Guarantee

Enclosures:

- (1) Bethlehem's June 5, 1998 Notice of Termination to Mr. [] (also at Exhibit 5 to your appeal, 3 pages)
- (2) Excerpt from Lukens Plan As Amended and Restated Effective December 31, 1992. (44 pages)

(3) 1998 Amendment to the Lukens Plan and documents authorizing the amendment. (23 pages, Schedule C is redacted.)

(4) Table of the Lukens Plan's actuarial reductions for starting a Deferred Vested Benefit before age 65

cc: Mr.

Appendix: Any PBGC-Payable Benefit Is Under PBGC's Guarantee

The Bethlehem Plan was only 44%-funded and was underfunded by more than \$4.5 billion. The Bethlehem Plan's assets totaled \$3.5 billion at plan termination on December 18, 2002. Afterward, only \$9.3 million more became available for providing benefits from PBGC's legal claims. Consequently, Plan assets and legal recoveries were exhausted in a category of benefits called Priority Category 3 ("PC3").³²

A PC3 benefit must be earned and payable 3 years before a plan's termination, and it must be determined under 5-year old plan provisions. Mr. []'s PC3 benefit is based on:

- (1) accruals through December 18, 1999, 3 years before Plan termination, and
- (2) the Lukens Plan as in effect on December 18, 1997, 5 years before the Plan terminated.³³

Thus, the amount of his PC3 benefit does not include the amount of his Cash Balance Benefit under the 1998 Amendment.³⁴

Mr. []'s gross PC3 benefit (before considering funding and his \$400,000 payment) would have provided only \$749.40³⁵ per month as of December 18, 1999. Because the Plan already effectively provided him a larger amount when the value of his \$2,425.64 Cash Balance Annuity was distributed to him in 1998, he has no unpaid PC3 amount to which any Plan assets may be allocated.³⁶

³² Plan assets and legal recoveries fund benefits under ERISA §§ 4044, 4022(c). Funds are allocated to six different tiers of benefits. Plan assets and legal recoveries together were sufficient to only fund 60.0425% of the total PC3 benefits. PC3 is defined in ERISA § 4044(a)(3).

³³ The Lukens Plan document in effect in 1997 is Enclosure 2 to this letter.

³⁴ The 1998 Amendment was effective June 1, 1998 and signed July 30, 1998. See Enclosure 3.

³⁵ $\$2,175.74 \{ \text{on December 31, 1997} \} + \$210.04 \{ 1998 \} + \$179.43 \{ 1999 \}$
 $\times 0.29214 \{ \text{age } [] \text{ on December 18, 1999 (See Enclosure 4)} \} = \$749.40.$
This accrual data underlines the \$2,639.02 accrued benefit you asked the Appeals Board to use. See page 6 of Exhibit 6 to your appeal. The actuarial reduction is required by Lukens Plan section 6.2(c). See Enclosure 2 page 68.

³⁶ It is likely Mr. [] would have no benefit funded by Plan assets even if the amount of his cashed-out Cash Balance Annuity were less than the amount of his gross PC3 benefit. It is likely his Earliest PBGC Retirement Date ("EPRD") would be age 55 under 29 CFR 4022.10. Because he was only age [] years before Plan termination, an age-55 EPRD would make an asset allocation in PC3 impossible for his benefit. PBGC's EPRD policy explains, "recent changes in plan design will require increasingly difficult case-by-case analysis to distinguish retirement annuities from other plan payments."

Because Mr. [] has no unpaid benefit left to be funded by the available Plan assets and legal recoveries (exhausted in PC3), any PBGC-payable benefit is under PBGC's guarantee.