No. 10-1399

In The Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., and KEMPER INSURANCE CO., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

MICHAEL F. POZZI
P.O. Box 2460
Renton, WA 98056
(425) 793-9000
Fax (425) 793-3090
MPozzi@PozziLaw.com

CHARLES ROBINOWITZ
211 S.W. 5th Ave., Ste. 2323
Portland, OR 97204
(503) 226-1464
Fax (503) 226-6456
chuck@crlawoffice.com

JOSHUA T. GILLELAN II
Counsel of Record
LONGSHORE CLAIMANTS' NATIONAL LAW CENTER
Georgetown Place, Ste. 500
1101 30th Street, N.W.
Washington, DC 20007
(202) 625-8331
Fax (202) 787-1920
JGillelan@comcast.net

Counsel for Petitioner Roberts

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT IN REPLY

Section 6(c) of the Longshore Act Unambiguously Makes the Time the Claimant Is "Newly Awarded Compensation," Not the Time He or She Is First Entitled to Compensation, the Determinant of the "Applicable" Limits on the Weekly Rate.

A. The Several Standards Proposed

The Director and Sea-Land actually suggest three different standards to replace the obvious and natural referent of the statutory standard for determining which year's maximum and minimum compensation rates apply to a claimant under Longshore Act § 6(c) – the fiscal year "during" which the claimant is "newly awarded compensation." They variously urge the time of the *injury*, without any basis in the statute, but to "harmonize" the relevant time for the § 10 average-wage basis of the compensation rate and the relevant time of the § 6(b) rate limits; the time of *onset of disability*, based on reading "compensation during such year" to mean "compensation *for disability beginning* during such year"; and the time the claimant first became *entitled* to compensation, or, as the Director now puts it, the time the claimant was first "awarded" compensation "by force of the Act," based on reading "awarded" to mean "granted by the terms of the Act." The Director even advances the only relevant sliver of legislative history – a single unelaborated sentence in a 1972 committee report – that states yet a fourth standard, the time the claimant "*begin[s] receiving* compensation for the first

time" (Br. for Resp. Dir. ("Dir. Br.") 42, *quoting* S. Rep. No. 92-1125 at 18 (1972)), although he does not support that standard.[1]

The Director acknowledges that the time of injury and the time of onset of disability occur in different fiscal years in a substantial number of cases, and disavows the former standard. Dir. Br. 30 n.9.[2] That disavowal is particularly significant for two reasons. First, the only evidence of even the least formal articulation by the Director of any rule on the subject, prior to the litigation before the Board in *Reposky v.*

---

[1] The difference is illustrated in the common facts of *Boroski v. DynCorp Int'l*, No. 10-10033, 2011 WL 5555686, 2011 U.S. App. LEXIS 22900 (Nov. 16, 2011) (amending October 27, 2011 opinion in irrelevant respects). There no compensation was paid from the time of onset of total disability in FY 2002 until the ALJ's entry of an award in FY 2008, yet the Director contended that the FY 2002 maximum applied. He points out that the time-of-first-receipt standard is "irreconcilable with [Roberts's] interpretation," Dir. Br. 42 (*see also* Sea-Land Br. 46), but does not mention that it is just as irreconcilable with the Director's position. In cases like the present, where some compensation is received in the same fiscal year as that of the onset of disability and of the first entitlement, the committee report's standard would produce the same outcome as any of the Director's standards; in others, like *Boroski*, it would produce the same result as the reading urged by Roberts and found unambiguous by *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (5th Cir. 1997), and by the *Boroski* court.

[2] The difference is elucidated by *Kubin v. Pro-Football, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 117 (1995) (five years between injury and onset of resulting disability), where the Board adopted the time of onset as the determinant, which the Director has supported.

Int'l Transportation Services, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), an informational pamphlet, states the time-of-injury standard. Dir. Br. 9, 46, *citing* U.S. Dep't of Labor, Employment Standards Admin., *Workers' Compensation Under the Longshoremen's Act* (1979); Sea-Land Br. 49 (same). And second, the Director does not acknowledge that the unavailability of a time-of-injury determinant alone violates the "harmony" and "uniformity" he seeks. Nor, in fact, does he acknowledge that there are differences between the time of onset of disability and the time of first entitlement to compensation or the time the claimant first receives any compensation.

Respondents attempt to cloak the time-of-onset reading with a heretofore absent fig leaf of textual plausibility by characterizing the claimant as "'newly awarded compensation' 'by force of the Act.'" Roberts agrees that this fiction, or something like it, underlies the reasoning of the court below. It is, however, both different from the time-of-onset rule and ambiguous. It entails either reference to the time of first *entitlement* or to the time the first payment of compensation without an award was *due*, in the absence of controversion, under § 14(a). The former, contrary to the Board's and the Director's careless references, is not at the time of the *first* disability, but only at the time of first disability *after three days'* disability have accrued. See § 6(a) (Dir. Br. App. 2a). Even in many of the "typical traumatic injury case[s]" to which the Director refers in discounting the difference between a time-of-injury rule and a time-of-onset rule, Dir. Br.

30 n.9, the time of onset of disability and the time the claimant first becomes entitled to any compensation, or is "awarded" it "by force of the Act," will be in different fiscal years. That difference will exist in something more than three of every 365 cases – all those in which immediately disabling injuries occur on the last three days of the fiscal year, and others in which the injury occurred earlier but disability was not immediate, or cumulated to more than three days episodically over a longer period. The time the first *payment is due*, under § 14(a) of the Act – fourteen days after the employer is aware of the injury, assuming the employer does not "controvert" its liability – will be in a different fiscal year in many more cases. If, as respondents' other central concern about the result of the ordinary meaning of § 6(c) – their shared concern for "harmonizing" § 6(c) with the Act's requirement of payments without claim or award in uncontroverted cases – suggests, a claimant is to be regarded as "newly awarded compensation by force of the Act" only when the first such *payment is due*, the applicable § 6(b) rate limits will be different from those at the time of the onset of disability in fourteen of every 365 cases, plus an additional number in which the employer did not become aware of the injury until a later date, as well as all those in which the employer "controverts" the claimant's rights at the outset.

Each of the alternative determinants put forth by respondents would produce the same result in *this* case. Although no award was entered on Roberts's

claim until FY 2007, his injury, the onset of his disability two weeks later, and the time he first became entitled to compensation under the Act three days after that, and also the time the first payment without an award fell due (and even the time the first payment was received), although all different, all occurred in FY 2002. But that does not permit respondents to sweep the differences among their proposed rules under the rug, pretending they are all the same, as they attempt to do in cumulating their arguments in support of one with arguments that could support only another. *See particularly* Dir. Br. 30 n.9 (Court "need not decide" between time of injury and time of onset). The question how § 6(c) should be read cannot be answered at this stage merely by acceptance of the Director's anything-but-time-of-award approach, even though that would be enough to resolve this individual case. Surely the Director must propose an articulable *statutory basis* for adoption of a *particular* standard, not merely a resolution of this case, before this Court; the Court can hardly approve an administrative construction that fails to c*hoose one referent* for the § 6(c) determination, which can be applied across common variations in timing.

It should be understood at the outset that respondents' alternative standards are not the same as one another, and that in presenting them as all the same just because each would produce the same outcome in this case, the Director still appears not to have thought through fully his administrative

construction of the statute. The date an "award" is first filed pursuant to § 19(e), urged by Roberts and held required by the clear terms of § 6(c) by the Fifth and Eleventh Circuits, has none of the ambiguities of the Director's shifting positions. Both the Director and Sea-Land contend that basing the applicable § 6(b) limits on the national average wage in effect at the same time as the claimant's own "average weekly wage" that is the basis of the rate before application of any limits, *i.e.*, the time of injury, in all cases is the only determinant that could make sense and be "harmonized" with the structure of the Act; but they recognize that such a rule is out of reach in any event, inasmuch as there is no textual basis for equating the time the claimant is "newly awarded compensation" with "the time of the *injury*."

B. A Claimant Is Not "Awarded Compensation" Within Any Provision of the Longshore Act When Entitlement Arises, But Only When an Award Is Filed under § 19(e).

Respondents attempt to minimize the critical functions of a compensation order under the Longshore Act. Sea-Land describes a "compensation order . . . making the award" under § 19(e) of the Act merely as "formally recognizing [the claimant's] right to compensation," Sea-Land Br. i; the Director likewise obscures the role of such an order by describing it as "a formal administrative order *specifying benefit levels* under the Act, see 33 U.S.C. 919(e)," Dir. Br. 6 (emphasis added). Section 19(e) describes a compensation

order instead as "the order denying the claim or *making the award*." Such an order does not merely "recognize" or "specify[ ] benefit levels" of the claimant's entitlement; among other functions (*see* Pet. Br. 23), it *establishes* the claimant's right, on pain of twenty-percent augmentation of any late payment, and makes the payments which it directs enforceable promptly in district court, under § 18(a) or § 21(d), until and unless it is supplanted by a later compensation order "modify[ing]" it under § 22. Any payments made before such a § 19(e) order is filed are explicitly and repeatedly denominated payments "without an award." The employer may stop such payments at any time at will; the claimant then has no remedy other than to await the outcome of litigation, and even then, so long as it files a simple notice-of-controversion form under § 14(e), the award will include nothing for the delay beyond the limited pre-award interest allowed, *see Price v. Stevedoring Services of Am.*, 627 F.3d 1145 (9th Cir. 2010), *reh'g en banc granted*, 653 F.3d 928 (2011). Only the security of an "award" under § 19(e) enables a disabled worker and his or her family to know how next week's groceries are going to be paid for.

The Director claims – despite his contrary acknowledgement until the decision of the court below (*see* Pet. Br. 21 n.11) – that "awarded" in § 6(c)'s phrase "is ambiguous," in that it can mean merely "conferred or bestowed upon," and that the "statutory context and role of the maximum compensation level in the statutory scheme" show that a claimant is

"newly awarded compensation" within the meaning of § 6(c) "when he is awarded compensation 'by force of the Act,' *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947) – at the time of a disabling injury." Dir. Br. 15-16, 29-30 & n.9, 41; *cf. id*. 21. Sea-Land makes the same argument, adding a catalog of references by this Court and others to statutes that *grant rights* to various remedies as "award[ing]" those remedies. Sea-Land Br. 18-20 & nn.4, 5. *Porello*, in fact, did not refer to benefits being *awarded* "by force of the Act"; it said that "the employee . . . *receives* benefits quite soon after his injury by force of the Act" – but that description was qualified by the conditional clause in the previous sentence, "unless an employer controverts the right of the employee to receive compensation[.]" The figurative usage to which respondents point, though "perfectly acceptable English," Sea-Land Br. 19, is not even arguably the sense in which the word is used anywhere in the Longshore Act.

Both the Director (Br. at 23-24) and Sea-Land (Br. at 22-23) add a further provision of § 8 to the court of appeals's list of supposed uses of the term "award" that "could not have meant assigned by formal order . . . ," Pet. App. 6; *see* Pet. Br. 29-30. That addition serves only to demonstrate further the implausibility of the assertion that "award" is used to mean merely "entitlement" *anywhere* in the Act. Section 8(d)(1), as respondents point out, provides that "the amount of the award [for scheduled disability] unpaid at the time of death" is payable to specified

survivors. Respondents assert that since some claimants die while receiving compensation for such disabilities *without* an award having been entered, "[i]f petitioner's reading of ['award'] were correct, such an employee's survivors would not be entitled to [the] compensation" to which the worker had a right but had not yet been paid, which would be anomalous. Dir. Br. at 24; *see also* Sea-Land Br. at 22-23. But respondents ignore the companion provision of § 8(d)(3) that "[a]n *award* for disability may be made after the death of the injured employee." The survivors are fully entitled to pursue an *award*, in the sense in which that term is consistently used in the Act, for the disability if none has been made during the worker's life, and receive the part of the amount awarded that had not yet been paid at the time of death. Section 8(d)(3) is impossible to square with the Director's eleventh-hour discovery of an alternative meaning of "award" under which the "force of the Act" has "awarded" the injured worker compensation as soon as he or she is entitled to it. Obviously an "award" for disability in any such sense as respondents posit cannot "be made" after the worker's death; § 8(d)(3) rules out the respondents' reading of "award" in § 8(d).

Respondents' claims that the court of appeals was correct in citing the uses of "award" in a few other provisions of the Act as unmistakably requiring the figurative sense of the term that is equivalent to mere entitlement are no more valid. *See* Pet. Br. 29-31. In particular, the Director describes the disfigurement

provision of § 8(c)(20) as "requiring compensation to be 'awarded' for disfigurement without a formal compensation order," Dir. Br. 13, and as providing that "[u]nless the employer controverts liability, it is legally obligated to pay $7500 to an employee who suffered a 'serious disfigurement . . . , whether or not the employee has received a compensation order,'" *id*. 25. This is simply wrong.

First, § 8(c)(20) provides, not that disfigured claimants *are* "awarded" any amount, but that an amount up to $7,500 "*shall be* awarded" in such cases. *See also* § 8(c)(22), on which respondents and the court below also rely (in multiple-scheduled-injury cases "the award *shall be*" for each scheduled period of compensation, consecutively).

Second, contrary to the Director's second statement, the amount to "be awarded" under § 8(c)(20) is not $7,500, but an amount "*not to exceed*" that figure. The amount must be *fixed by an order*, and the employer is not "legally obligated" to pay any particular amount until it is fixed by such an "award." Indeed, unlike other compensation for which the Act provides, a lump sum for disfigurement is not payable "periodically" in the "installments" encompassed by § 14(a)-(b). Nothing in the Act establishes a time for the payment of a sum under § 8(c)(20), other than § 14(f), requiring payment of compensation "payable under the terms of an award within ten days after it becomes due," *i.e.*, after the § 19(e) compensation order

"making the award" is filed and hence "effective," § 21(a).[3] Section 8(c)(20) does not *make* any award "by force of the Act"; it provides that an amount "*shall be* awarded." It necessarily contemplates administrative action to fix the amount of the liability and direct its payment.

The final sentence of § 10(h)(1), relating to the small class of workers and survivors still receiving compensation in 1972 for pre-1947 injuries or deaths for which they were "*awarded* compensation at less than the maximum rate that was provided in this Act at the time of the injury," likewise does not imply the usage on which respondents rely. The reference to the time of the injury in the context of the maximum in *pre-1972* cases says nothing about the relevance of that time to the applicable maximum under *amended* § 6. On each previous occasion when the § 6(b) limits had been raised, the amending acts specified that the new limits were applicable only to injuries and deaths after their enactment. The 1972 revision of the rate-limits provision contained no such restriction, except such as is implicit in, and hence defined by, the provision for adjustments in some pre-1972 cases, § 10(h). What the reference to the time of injury in pre-1972 cases "makes clear," Dir. Br. 26, is only that Congress knew that the applicability of *previous* maximum and minimum rates had been determined

[3] *See*, *e.g.*, *Twine v. Locke*, 68 F.2d 712 (2d Cir. 1934) (compensation is "due" under an award when the award is "effective" under § 21(a), *i.e.*, filed under § 19(e)).

by the time of injury or death, pursuant to explicit provisions. And again, respondents do not even claim that § 6(c) can be read to impose a time-of-injury standard like those specified in previous rate-limit changes.

More broadly, even if some use of the term "award" or "awarded" in the Act could be thought to reflect the sense posited by respondents in which the *Act itself* "awards" compensation, § 6(c) could not be so read. The Act could only "award" compensation in that sense to disabled workers *generally*, not to any particular claimant in any particular amount. But § 6(c) focuses on the individual claimant – the time the "*employee*[is] newly awarded compensation." The legislative enactment may be loosely said to "award" compensation *generally*; but an individual worker thereafter first becomes *entitled to* it, and then is to be "awarded" it under § 19(e). Section 6(c), with its reference to the individual claimant, can only be read to refer to the last of these events.

C. The "Context" of Other Provisions of the Act Provides No Basis for Imparting a Different Meaning to "Awarded" in § 6(c).

Respondents' first central point is that because the claimant's own § 10 "average weekly wage" is determined as of the "time of the injury," § 6(c) "is thus logically read to apply to an initial benefit calculation the [§ 6(b) limits] that are likewise based on circumstances that existed at the time of the injury." Dir. Br.

31. But even aside from the fact that respondents *do not urge* a time-of-injury determinant, there is no necessary "logical" connection. Regardless of the Director's views on what legislative answer would *best* have been provided to the question what class of cases would be subject to a given year's limits under the new annually-adjusting § 6(b), Congress was free to make its own choice of a determinant, and it made no reference in the provision by which it made that choice to either the time of the injury or the time of first entitlement. Further, the § 6(b) limits for a given year do *not* reflect "circumstances that existed at the time of the injury." Because the "national average weekly wage" that prevails for a fiscal year under § 6(c) is based on data from the first three quarters of the *preceding* year (§ 6(b)(3)), the § 6(b) rate limits will always be based on prevailing wages during a period centered at least seven and a half, and as much as nineteen and a half, months before the time of reference for the § 10 wage-basis. Thus even a time-of-injury determinant would not provide quite the degree of symmetry between the two prongs of the rate determination that respondents claim to be looking for.

The other point of the Director's contention that the "context" of the Act is in conflict with reading the time a claimant is "newly awarded compensation" within the meaning of § 6(c) to refer to the time an award is filed under § 19(e) is his view that "it is logical" to treat payments "*without* an award" within the meaning of § 14 as "awarded" within § 6(c). He

bases this surprising assertion on the supposition that reference to the time an award is filed "would render [§ 6(b)-(c)] impossible to apply in the many Longshore Act cases in which the employer pays compensation [without an award, in accordance with § 14(a)-(b)], with no compensation order ever being issued." Dir. Br. 34. But the "long-settled practice" of the OWCP district directors in leaving injured workers without the security of awards *requiring* continued payments is a problem of the Director's own making, which can readily be solved for purposes of the relatively few maximum- and minimum-rate cases without any rule "that entry of compensation orders is compelled by the Act in every case in which compensation is paid."

The Director and Sea-Land ascribe to Roberts the view that this is indeed so compelled. Dir. Br. 36, *citing* Pet. Br. 29 n.16, 43; Sea-Land Br. 37. But each cited passage of Roberts's brief referred to undisputed *claims*, not "every case in which compensation is paid"; and the Director does not, and cannot, dispute that § 19(c) *directs* prompt entry of awards in such circumstances. The fact that for some decades the OWCP has *ignored* that direction hardly suggests that Congress legislated in § 6(c) with the current practice in mind. But whether or not the Act makes such entry a mandatory, ministerial duty with respect to uncontested claims, it certainly *permits* such

entry,[4] and the Director presents no basis on which the district director might *deny a demand* by a party for entry of an award under such circumstances. *Cf.* Dir. Br. 38-39 (§ 19(c) "cannot reasonably be read to require a district director to issue a formal compensation order even if the parties resolve their difference informally *and no party requests a compensation order*.") (emphasis added). Section 6(c) simply gives the employer an incentive, in cases subject to § 6(b) rate limits, to make such a demand, just as it has in the situation where it fears the time limitation on a third-party tort cause of action will expire before it can obtain an assignment of the claimant's unexercised right to pursue it, under § 33(b) (*see* Pet. Br. 28); the district directors must comply with such legitimate demands.

Even in cases in which a claim has *not* been filed because the claimant agrees that the payments the employer is making are what he or she is entitled to, although § 19(c) does not apply, there is no statutory *obstacle* to entry of awards of the agreed compensation currently payable. If there *is* some defect in such

---

[4] *Compare Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 533 n.1 (1983) (unnecessary to decide in that case whether § 19(c) of the Act "requires the Deputy Commissioner to issue an order with respect to any uncontested compensation claim, as petitioner argues"), *with Czaplicki v. SS Hoegh Silvercloud*, 351 U.S. 525, 528 n.9 (1956) ("'if no hearing is ordered within twenty days' after notice of the claim is given to the employer and other interested parties, the Deputy Commissioner *can* decide the claim' ") (emphasis added).

entry where no claim has been filed, of which the claimant would be entitled to complain by appeal (*but see Czaplicki*, *supra* n.4), we are unaware of any employer so dimwitted as to be unable to induce the claimant, who is receiving payments without an award at its sufferance, to file a claim (*e.g.*, "The enclosed is the last payment without an award we will make, and we will controvert your right to benefits, unless you file a claim by the time the next payment is otherwise due; enclosed for your convenience is a claim form."). We are likewise unaware that any claimant, other than the injured worker in *Czaplicki*, has ever complained about issuance of an order awarding the benefits that all agree are due, and thus rendering the right to their continuation promptly enforceable if the employer should attempt to change its mind prior to entry of a new order under § 22.

The Director's reference *in terrorem* to entry of awards "in every case in which compensation is paid" obviously misstates the burden that would be imposed in order to avoid the supposed problem with § 6(c)'s reference to the time of the award. The point affects *only* cases governed by the rate limits of § 6(b), a very small minority of cases. Although we submit that the Director's current manner of leaving cases in payment-without-award status does violate *all* claimants' rights to the relative security of continuing awards subject to § 22 modification, the present case is not an attempt to cure that aspect of the maladministration of the Act; it concerns only cases to

which § 6(c) pertains, and the OWCP's responsibility to act promptly on *employers'* demands for entry of awards on undisputed claims. The Director never quite brings himself to acknowledge that the Act provides for entry of awards not only to resolve *disputed* claims, but where the claimant's rights are acknowledged as well (and his regulations are entirely silent on the point), but he cannot and does not deny it.

The prompt availability of a § 19(e) award in an undisputed case upon the employer's request solves the problems with application of § 6(c) to such cases on which the Director relies. The Director can adopt the simple expedient of having his district directors enter awards promptly, without the need for any litigation, as directed by § 19(c), in any case in which the employer initially acknowledges its maximum- or minimum-rate liability, *promptly upon its request*, as contemplated by Congress. Presumably they will do so, in response to the Congressional "expect[ation]," *see* Pet. Br. 28, if the employer's reason for wanting an award entered in such a case is to start the time for an assignment of a third-party cause of action from the claimant to the employer under § 33(b) of the Act before the limitations period on such a cause of action expires, rather than to lock in the current year's maximum or minimum rate. There is no reason at all they cannot or should not do the same where the employer's request is motivated by § 6(c).

But neither achieving consistency of meaning among provisions with pointedly differing operative terms nor adherence to an administrative practice

that ignores a statutory direction is a policy goal the administrator is entitled to pursue in any event. Neither of respondents' bases for twisting the terms of § 6(c) out of their ordinary legal signification can justify treating either being entitled to compensation or receiving payments "without an award" as being "awarded compensation." An employee is "awarded compensation" only by "the award" entered under § 19(e).

D. Cognate State Laws Are Instructive Only in Showing that There Is a Wide Variety of Legislative Answers to the Question How the Applicable Rate Limits for Particular Cases Should Be Determined.

Sea-Land argues that "[s]tate laws . . . provide an informative backdrop" for consideration of the meaning of § 6(c) of the Longshore Act, and that "the vast majority of [such] laws apply the average weekly wage for the year in which the injury occurred." Sea-Land Br. 42, 42-44. First, of course, inasmuch as none of those laws is shown to include terms comparable or equivalent to those of § 6(c), they are unlikely to be "informative" concerning that provision. Laws to which Sea-Land makes no reference, however, demonstrate that, far from being even an *unlikely* intent (much less one "absurd" to ascribe to Congress), the determination of the applicable limit by reference to a time other than that of the injury, or the onset of disability – when the compensation is first awarded, or when it is paid in cases of delay, or when

a particular *class* of compensable *permanent* disability or impairment matures or is "determined" – is a feature of several states' workers'-compensation laws. *See*, *e.g.*, *LeBrun v. Woonsocket Spinning Co.*, 106 R.I. 253, 258 A.2d 562, 564-65 (1969) (compensation for permanent disability held governed by benefit provisions in effect at time of permanency); *McLeod's (Dependent's) Case*, 14 Mass. App. 906, 436 N.E.2d 413 (1982), *aff'd*, 389 Mass. 431, 450 N.E.2d 612 (1983) (applying state's statute providing that "[i]n any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury."); *Hofmeister v. Workers' Comp. App. Bd.*, 156 Cal. App. 3d 848, 203 Cal. Rptr. 100 (1984) (state statute providing that current statutory rate rather than earlier rate governs temporary-disability "payment[s] made two years or more from the date of injury," held applicable to payments for *disability within* two years of injury that were not *made* until thereafter); *Gregory v. North Dakota Workmen's Compensation Bureau*, 369 N.W.2d 119, 122 (N.D. 1985) (awards for permanent partial impairment were required to be based on statutory weekly rate in effect at time extent of impairment is determined and award made); *Saari v. North Dakota Workmen's Compensation Bureau*, 598 N.W.2d 174 (N.D. 1999) (same under subsequent amendments to benefit provisions that allowed less than one-twentieth of the compensation payable under those in effect at time of injury and time disability

became permanent); *Appeal of Lorrette*, 154 N.H. 271, 910 A.2d 1155, 1157-58 (2006) (statutory amendment making *average weekly wage* at time of original injury applicable to permanent-impairment award did not change rule that *law* in effect at time *permanent impairment was "assessed,"* rather than that in effect at time of injury, governs such awards).

In view of the diversity of approaches, legislative and judicial, among different jurisdictions' compensation laws on the question what events determine the applicable benefit rates under what circumstances, the Board's and the Director's attempts to twist the statutory terms to accomplish the result they think would be the most administratively convenient, or even "logical," cannot remotely be justified on the ground that Congress *must* have meant to determine the applicable maximum under the automatically-adjusting-limits provision of Longshore Act § 6(b) by reference to when the claimant first *became entitled* to compensation for *some* class of disability. Their distortion of the statutory phrase would be ill-founded even if it were otherwise legitimate.

But in any event – even if the Act were *unique* in making the time compensation is "newly awarded" determinative – the attempt to avoid the natural signification of the statutory phrase is *not* legitimate. The terms of § 6(c) have a plain, common meaning that makes the critical factor the time when compensation is "newly awarded," rather than when the earliest period of *disability for which* it is so awarded began; and Roberts was in no sense "newly awarded"

compensation until FY 2007. It is the FY 2007 maximum that restricts the weekly rate of *all* the compensation he was "newly awarded during" that period.

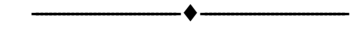
E. The Degree of Respect Due to the Director's Position

This case presents little reason for the Court to consider the variety of factors that determine where on the continuum of judicial deference to an administrative agency's construction of a statute the Director's present positions on the best reading of Longshore Act § 6(c) should fall. First, the court of appeals's opinion did not touch on the point at all. Second, the circumstances of the Director's present position are extremely weak for *any* claim of deference. That position is not the same as that stated in the pamphlet that is all the Director can adduce as evidence of a longstanding agency construction, nor is it even the same as the basis of construction he advanced in the litigation of *Reposky* or the present case, until the court of appeals adopted an entirely distinct analysis and basis for essentially the same determinant, which counsel for the Director now urge despite the fact that it plainly was not the basis on which the Director adopted the position. The Director's present assertion that "awarded" is ambiguous is not even agency "appellate counsel's *post hoc* rationalization" for agency result based on an entirely different theory, but a position the Director *disavowed* throughout that litigation until the decision of the court of appeals; "[d]eference to what appears to be

nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). The Director cites nothing at all, and provides no rationale, in support of his assertion that "[t]he fact that the Director in *Reposky* [as well as below] advocated a different textual route to the same ultimate conclusion is of no import," Dir. Br. 46. Further, "the nature of the legal question" presented is not "interstitial" but addressed directly by the terms of § 6(c); it does not implicate "related expertise of the Agency"; and there is no indication of "careful consideration by the Agency . . . over a long period of time," *Barnhart v. Walton,* 535 U.S. 212, 222 (2002). And finally, because of the division of responsibility between the administrator and the quasi-independent adjudicatory tribunals before whom the Director appears as a litigant since the 1972 revision of the Act's adjudication provisions, the Director is without authority either to adjudicate disputed issues or even to *institute* litigation (or, generally, to invoke the courts of appeals' review jurisdiction when the Board rejects his positions, *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 514 U.S. 122 (1995)), and there is no basis to believe that the position he advances was developed, like those of an *adjudicatory*-administrative body, after consideration of input from affected parties.

To be sure, "the Director's reasonable interpretation of the Act brings at least some added persuasive force" to that interpretation. *Metropolitan Stevedore*

Co. v. Rambo, 521 U.S. 121, 136 (1997). The Director's institutional awareness of the recurring fact patterns of many thousands of cases, litigated and otherwise, qualifies his view of how a broad statutory term or phrase may best be read, in light of the effects of competing constructions that are often not apparent to generalist courts, to judicial "respect," but only proportional to its power to convince. But the ramifications of a ruling one way or another on the referent of "awarded" in § 6(c) are not complex or obscure, and the Director brings no identifiable administrative experience to bear on the question. The only point of statutory or administrative policy he adduces in opposition to the natural meaning of "newly awarded compensation" is the contention that it would encourage employers to litigate otherwise undisputed claims – but it simply is not so, since a dispute or litigation is not a condition required for entry of a § 19(e) award. Even the strongest version of judicial deference to administrative constructions does not come into play unless the Court agrees that the statute in question *is ambiguous*, and § 6(c) is not.



CONCLUSION

The Court should reverse the decisions below and modify the award to run at the FY 2007 maximum rate.

Respectfully submitted,

MICHAEL F. POZZI
P.O. Box 2460
Renton, WA 98056
(425) 793-9000
Fax (425) 793-3090
MPozzi@PozziLaw.com

CHARLES ROBINOWITZ
211 S.W. 5th Ave., Ste. 2323
Portland, OR 97204
(503) 226-1464
Fax (503) 226-6456
chuck@crlawoffice.com

Counsel for Petitioner Roberts

JOSHUA T. GILLELAN II
Counsel of Record
LONGSHORE CLAIMANTS' NATIONAL LAW CENTER
Georgetown Place, Ste. 500
1101 30th Street, N.W.
Washington, DC 20007
(202) 625-8331
Fax (202) 787-1920
JGillelan@comcast.net