No. ________

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") provides generally for compensation for total disability in periodic payments at a rate of two-thirds of the "average weekly wage of the injured employee at the time of the injury," and for most *partial* disabilities the same fraction of the difference between that weekly wage and the worker's residual "wage-earning capacity." *Id*. §§ 8-10, 33 U.S.C. §§ 908-10. But it has always imposed upper and lower limits on the rate payable as so determined. Section 6(b) of the Act, 33 U.S.C. § 906(b), provides that the compensation rate cannot be more than twice "the applicable national average weekly wage," as determined for each fiscal year; nor can compensation for total disability be less than the lesser of half the "applicable national average weekly wage" so determined and the worker's full pre-injury earnings. The question which fiscal year's limits are the "applicable" ones is addressed by § 6(c):

> Determinations under subsection (b)(3) of this section with respect to a [fiscal year] shall apply to employees or survivors *currently receiving compensation* for permanent total disability or death benefits *during* such period, as well as those *newly awarded compensation during* such period.

QUESTIONS PRESENTED – Continued

33 U.S.C. § 906(c). The identity of the years whose limits are "applicable" under this provision has divided the two courts of appeals with the heaviest Longshore Act dockets.

The questions presented are simple and straightforward:

1. Whether the phrase "those *newly awarded* compensation during such period" in Longshore Act § 6(c), applicable to all classes of disability except permanent total, can be read to mean "those first *entitled to* compensation during such period," regardless of when it is *awarded*.

2. Whether the phrase "employees or survivors *currently receiving* compensation for permanent total disability or death benefits during such period" in § 6(c) can likewise be read to mean those "*entitled to* [such] compensation during such period," without reference to when it is *received*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board (Pet. App. 14) and the Administrative Law Judge (Pet. App. 33, 28) are unreported.[1]

JURISDICTION

The decision of the Benefits Review Board was a "final order of the Board" within the meaning of § 21(c) of the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. § 921(c), because it put an end to all administrative proceedings on Roberts's claim. Because Roberts's injury occurred in Dutch Harbor, Alaska, within the territorial jurisdiction of the Court of Appeals for the Ninth Circuit, that court had jurisdiction of Roberts's timely petition for review under § 21(c). The opinion of the court below was entered on November 10, 2010. The order denying rehearing was entered on February 10, 2011 (Pet. App. 110). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] The administrative decisions are, however, available at www.dol.gov/brb/decisions/lngshore/unpublished/Nov07/07-0382.pdf and www.oalj.dol.gov/Decisions/ALJ/LHC/2005/DR_v_SEA-LAND_SERVICES_2005LHC02193_%28OCT_12_2006%29_193756_CADEC_SD.PDF (May 9, 2011) (all dates appended to web addresses herein are the dates the sites were last visited).

STATUTORY PROVISIONS INVOLVED

The only directly relevant provisions of the Longshore Act are those of § 6(b)-(c), 33 U.S.C. § 906(b)-(c), as amended in 1972 and reenacted without substantive change (other than extension to death-benefits cases) in 1984[2]:

> (b)(1) Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
>
> (2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this Act are less than 50 per centum of

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[2] As amended by Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1251, 1252 (Oct. 27, 1972), and Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 6, 98 Stat. 1639, 1641 (Sept. 28, 1984). This Court had held that the 1972 amendments left no maximum-rate limitation applicable to death cases. *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979). The Court there examined the 1972 version of the same provisions here at issue, but only to determine whether they established maximum-rate limitations for death benefits (which they did not, but as a result of the 1984 amendment now do).

> such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.
>
> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. . . .
>
> (c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

STATEMENT OF THE CASE

1. The Longshore Act requires an employer to compensate a worker disabled by a covered employment injury by periodic payments at a rate based on two-thirds of the worker's average weekly wage at the time of the injury, or, for most partial disabilities, two-thirds of the difference between that wage and the worker's residual earning capacity. *Id.* § 8(a), (b), (c)(21), (e), 33 U.S.C. § 908. The figure calculated under § 8, however, is subject to upper and lower

limits established under § 6(b)-(c), set out above. Section 6(b)(3) directs the Secretary of Labor[3] to determine, by October 1 of each year, the national average weekly wage to apply to "the period beginning with October 1 of that year and ending with September 30 of the next year." Even if two-thirds of the worker's lost earning capacity is greater, compensation cannot be payable at more than twice the "applicable" national average weekly wage; and even if two-thirds of the pre-injury earnings is less, compensation for *total* disability cannot be less than half the "applicable" national average (unless the full pre-injury wages were less than that, in which case such full wages are payable). Section 6(c) of the Act specifies which annual determination of the national average is "applicable":

> Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

2. Dana Roberts slipped and fell in the course of his work as a longshoreman for Respondent Sea-Land

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[3] The Secretary has long delegated authority to make this determination, along with her other powers and duties under the Act, to the Director of the Office of Workers' Compensation Programs (OWCP). *See* Secretary's Order No. 10-2009, 74 Fed. Reg. 58834 (Dep't of Labor Nov. 13, 2009).

Services, at its marine terminal in Dutch Harbor, Alaska, on February 24, 2002. *E.g.*, Pet. App. 65. The injuries to his shoulder and cervical spine required surgery and ultimately left him permanently partially disabled, ending his longshore career (Pet. App. 79-93, 97-107). Sea-Land's insurer under the Act, Respondent Kemper, paid Roberts compensation for temporary total disability for periods in 2002-2005 at a rate that was less than any applicable maximum, and paid for some medical treatment, but as of May 2005 it disputed Roberts's claim, and stopped paying anything (Pet. App. 46, 51-52, 101).

3. Following a hearing, an administrative law judge ("ALJ") issued a decision in October 2006 (Pet. App. 33-109) finding that Sea-Land was liable under the Act for both the shoulder condition and the cervical-spine condition, and awarding Roberts compensation for temporary total disability from March 2002 to July 2005, for permanent total disability from July 12 to October 9, 2005, and for permanent partial disability from October 2005 forward (Pet. App. 97-107). The ALJ determined that Roberts's average weekly wage at the time of the injury was $2,853.08, and that he had a residual weekly earning capacity as of October 2005 of $720 (Pet. App. 93-97, 103-07). Since not only the former figure but the difference between the two figures was greater than three times the national average wage in any year to date,[4] two-thirds of his

[4] The national average weekly wages, and consequent maximum and minimum rates, for each fiscal year from 1973

(Continued on following page)

loss was greater than twice the national average, and the "applicable" maximum rate or rates under Longshore Act § 6(b)-(c) would control the weekly rate payable for each of Roberts's classes of disability. The ALJ, without discussion, ordered Sea-Land to pay compensation for each period of disability at what he referred to as "the maximum rate for *injuries occurring*" during fiscal 2002, $966.08, "plus any increases required under section 6 of the Longshore Act" during the period of permanent total disability (Pet. App. 107).

Roberts moved for reconsideration, arguing that the compensation rate should be $1,114.44, based on the national average weekly wage for FY 2007, when the ALJ's award was filed, in reliance on *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). Roberts acknowledged, however, that the Benefits Review Board's decision in *Reposky v. Int'l Terminal Services*, 40 Ben. Rev. Bd. Serv. (MB) 65, 73-77 (2006), issued between the ALJ's decision and the motion for reconsideration, controlled, and pointed out that even under that decision, the local OWCP "district director" had calculated, and Kemper had paid, less than was due for the part of Roberts's permanent total disability in fiscal 2006; the ALJ accordingly denied reconsideration, but held that under *Reposky*, the appropriate rate for the final nine

(national average $131.80) to 2011 ($628.42), are tabulated on the OWCP's web site, at www.dol.gov/owcp/dlhwc/NAWWinfo.htm (May 9, 2011).

days of permanent total disability, in FY 2006, should be that year's maximum of $1,073.64 (Pet. App. 28-32).

4. Both Sea-Land and Roberts appealed the decision of the ALJ to the Benefits Review Board, which affirmed the order in all respects (Pet. App. 14).[5] With respect to the "applicable" years' maximum rates under § 6(c), the Board, adhering to its decision in *Reposky*, applied the limit for the year in which Roberts suffered his disabling injury to the compensation for all periods of his disability except the nine days of continuing permanent total disability in fiscal 2006. In *Reposky*, the Board had refused to depart from its previous interpretation of § 6(c), despite the decision to the contrary of the Fifth Circuit in *Wilkerson*. The Board reasoned that "the applicable maximum rate is the one in effect when the disability commences" (*Reposky*, 40 BRBS at 76) because the Senate committee report on the 1972 Amendments had characterized the maximum as applying to "those who begin receiving compensation for the first time during the period" (S. REP. NO. 92-1125, at 18 (1972), *quoted in Puccetti v. Ceres Gulf*, 24 Ben. Rev. Bd. Serv. (MB) 25, 31 (1990)). The Board adopted the Director's rationale that "newly awarded compensation during such period" should be read to mean *entitled* to compensation *for disability beginning*

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[5] Sea-Land challenged the ALJ's ruling that Roberts's injury fell within the statutory coverage of the Act (Pet. App. 66-78); it did not seek review of the Board's affirmance (Pet. App. 20-26) of that decision.

during such period, i.e., *first entitled to* compensation during such period, in order to "maintain[ ] consistency in the statute and yield[ ] rational results." *Reposky*, 40 BRBS at 76. With respect to the "currently receiving" clause of § 6(c), applicable to *permanent total* disability, the Board adhered to its ruling in *Reposky* that not only should "receiving" be taken to mean *entitled to*, but "during such period" should be read to mean "at the beginning of such period," so that the compensation rate for such disability, from the time of permanency, remains at the maximum for the year in which the first disability commenced, and increases only after the end of the fiscal year in which the disability becomes permanent total, to the limit for the succeeding year. *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 77; Pet. App. 20.

5. On Roberts's petition for review, the court below affirmed the decision of the Benefits Review Board with respect to the compensation owed Roberts for his period of temporary total disability and for his ongoing permanent partial disability, concluding that "an employee is 'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation" (Pet. App. 9-10). The court acknowledged that the term "award" ordinarily refers to an adjudication and means a formal compensation order in some sections of the Longshore Act, but perceived that in other sections the terms "award" and "awarded" "refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order" (Pet. App. 6-8). Further, because both

the employee's average weekly wage and the residual wage-earning capacity, each used in determining the amount of compensation payable, are to be calculated as of the time of injury, "[t]o apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled would be to depart from the Act's pattern of basing calculations on the time of injury" (Pet. App. 8-9).

The court below disagreed with the conclusion of the Fifth Circuit in *Wilkerson*, 125 F.3d at 906, that the "newly awarded compensation during such period" clause unambiguously makes the time an award is first entered determinative of the applicable year's limits, because it viewed the *Wilkerson* court as having "resolved the issue summarily and without expressing any reasoning" (Pet. App. 9). The court perceived that making the time an award is entered determinative "would have the potential for inequitable results." It rejected Roberts's point that the effect would simply be to encourage employers to expedite instead of delay the proceedings leading to an award; it reasoned that § 14(e) of the Act, 33 U.S.C. § 914(e), "already provides penalties for delay by an employer" (Pet. App. 9 n.1).

The court reversed part of the Board's decision, however, with respect to Roberts's period of permanent total disability, governed by the "currently receiving compensation" clause of § 6(c) (Pet. App. 10-12). Just as it had read "newly awarded compensation during" to mean "first entitled to compensation during," it read "currently *receiving* compensation for

permanent total disability during" to mean "currently *entitled to* [such] compensation during":

> We believe the statute is clear: The "currently receiving" clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually paid it.

Pet. App. 12. Thus the compensation payable for Roberts's initial period of such disability, beginning in July 2005, was subject to that year's maximum (even though he did not *receive* it until fiscal 2007), not the 2002 limit applied by the Board (*id*.).

REASONS FOR GRANTING THE PETITION

1. This case presents a straightforward question of statutory construction. As this Court has made clear in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), concerning the distinction between *entitlement to* compensation under the Act and *award or payment* of such compensation,

> [i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

The Fifth Circuit in *Wilkerson*, 125 F.3d at 906, recognized that § 6(c) "speaks with clarity" to the question which year's maximum applies to an award of compensation and, indeed, expresses an "unequivocal statutory imperative" that the maximum for the year in which the award is made applies. This Court should grant certiorari on the first issue because the decision of the court below is in direct conflict with the decision of the Fifth Circuit in *Wilkerson*. The issue is important because it arises in at least scores of cases, and probably hundreds – Respondent Director, OWCP, can no doubt provide firm numbers – every year.

The divergent readings of § 6(c) govern the rate at which compensation is payable in all cases in which the injured workers were earning more than three times the national average weekly wage (so as to implicate the maximum rates), and in all total-disability cases in which the worker was earning less than three-quarters of the national average (so that the § 6(b)(2) minimum-rate provision governs). Earnings high enough to implicate the maximum rate are not uncommon among senior longshore workers, and some other maritime employees with specialty skills also have such wages; and they are especially prevalent among American workers employed by U.S. government contractors overseas, covered by the Longshore Act's extension by the Defense Base Act, 42 U.S.C. §§ 1651-54, under which some nine thousand

injuries and deaths were reported in fiscal 2010.[6] Earnings low enough to bring the minimum rates into play are especially common among *locally*-hired overseas contractors' employees, and among workers covered by another of the Longshore Act's extensions, the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171-73. And the two courts of appeals that have reached conflicting conclusions are those with the most active dockets under the Act and its extensions.

Consideration of the second question is essential in order to understand the statutory provision in context and as a whole. This question likewise affects not only all permanently totally disabled claimants whose compensation is affected by the maximum rate, but also all such claimants whose compensation is controlled by the minimum rate.

In addition, the decision of the court below conflicts in principle, as to each clause of § 6(c), with this Court's decision in *Estate of Cowart*, *supra*.

Petitioner submits that *Wilkerson* is clearly correct and consistent with *Estate of Cowart*, that the court below did not construe the statutory terms but blatantly "reformed" them so as to accord with the court's view of what Congress would *better* have

[6] *See* U.S. Dep't of Labor, Office of Workers' Compensation Programs, Division of Longshore and Harbor Workers' Compensation, "Longshore Performance Page," www.dol.gov/owcp/dlhwc/LongshoreProgramPerformanceResults.htm (May 9, 2011).

provided, and that each relevant phrase of § 6(c) is just as clear in statutory context as it would be in isolation, calling for summary reversal.

2. The LHWCA "creates a comprehensive federal scheme to compensate" workers who are injured in the course of covered employment. *Cowart*, 505 U.S. at 471. While the Act requires that compensation for such an injury be paid promptly "without an award" unless the employer files a notice "controvert[ing]" liability (§ 14(a), (d)-(e), 33 U.S.C. § 914(a), (d)-(e)), it provides administrative procedures both for prompt issuance of awards in undisputed claims (subject to "modification" if and when a dispute develops thereafter[7]) and for formal-hearing proceedings to resolve disputed claims (Act § 19(b)-(e), 33 U.S.C. § 919(b)-(e)). In either event, § 19(e) provides for formal filing and service of "[t]he *order* rejecting

[7] *See* Longshore Act § 22, 33 U.S.C. § 922; *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968) (re breadth of "mistake" ground); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (same); *Stansfield v. Lykes Bros. S.S. Co.*, 124 F.2d 999, 1005 (5th Cir. 1941) ("neither stipulation nor agreement" underlying original award "will estop [parties], or in any manner prevent [them], from" correction of errors through § 22); *Pistorio v. Einbinder*, 351 F.2d 204, 206 (D.C. Cir. 1965) (same); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 545 (7th Cir. 2002); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291 (1995) ("*Rambo I*") (re breadth of "change in conditions" within the meaning of § 22).

the claim or *making the award* (referred to in this Act as a compensation order)[.]"[8]

The interchangeable terms "award" and "compensation order" thus have specific meaning under the LHWCA, and specific consequences flow from the entry of an "award." For example, an employer that fails to pay compensation "payable under the terms of *an award*" within ten days, absent a stay of the award pending review, is liable for a twenty-percent augmentation of the amount otherwise due under the award. Act § 14(f), 33 U.S.C. § 914(f). If an employer is in "default" of "payment of compensation due *under any award of compensation*" for thirty days, the person entitled to compensation may seek a "supplementary order" from the district director declaring the amount in default, on which a judicial judgment can be entered by a federal district court, under § 18(a), 33 U.S.C. § 918(a); and if the award has become "final," resort to mandatory-injunction proceedings directly in district court is available to

[8] While the Act refers to the initial formal-hearing proceeding as occurring before a "deputy commissioner" (a term for which "district director" has been administratively substituted, *see* 20 C.F.R. §§ 701.301(a)(7), 702.105)), all powers of the deputy commissioners "with respect to hearings" were transferred to administrative law judges in 1972. Longshore Act § 19(d), 33 U.S.C. § 919(d). Thus, in cases in which no hearing is promptly ordered, the last sentence of § 19(c) directs the district director to issue a compensation order; if a dispute requiring a hearing exists, it must be addressed by an ALJ in a compensation order to be filed and served by the district director (*see* 20 C.F.R. § 702.348-.350).

enforce compliance under § 21(d), 33 U.S.C. § 921(d). If the employer becomes insolvent, compensation owed pursuant to an award may be paid by the Secretary of Labor out of the industry-financed "special fund" established by § 44 of the Act, 33 U.S.C. § 944, under § 18(b), 33 U.S.C. § 918(b). A claimant's acceptance of compensation *under an award* operates as an assignment to the employer of all rights against a third person who may be liable for the injury in tort, unless the claimant brings suit against such a third person within six months after such acceptance, under § 33(b), 33 U.S.C. § 933(b). And the Secretary has discretion to "furnish such prosthetic appliances or other apparatus [as is] made necessary by an injury *upon which an award has been made* under th[e] Act," § 39(c)(2), 33 U.S.C. § 939(c)(2).

The payment of compensation "*without* an award," on the other hand, has different consequences under the Act. Payment is due "without an award, except where liability to pay compensation is controverted by the employer" by filing a "notice" stating the grounds. Act § 14(a), (d), 33 U.S.C. 914(a), (d). While a claim must otherwise be filed within a year of injury, "[i]f payment of compensation has been made without an award," the year runs from the date of the last such payment. Act § 13(a), 33 U.S.C. § 913(a). If "compensation payable without an award [because no notice of controversion has been filed] is not paid within 14 days after it is due," the employer is liable for a ten-percent augmentation of the amount otherwise owed. Act § 14(e), 33 U.S.C. § 914(e). But as long

as it files a § 14(d) notice, the employer is free to terminate payments "without an award" at any time, without incurring any compensation liability beyond that eventually determined or acknowledged to have been payable. And acceptance of payments made without an award does not trigger the time after which a cause of action against a third party is assigned to the employer under § 33(b) – and did not do so even before the 1984 amendment to § 33(b) added the current level of specificity on the point in the subsection's last sentence. *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983).[9] Payments under awards and payments made "without an award" have entirely different status under the Act.

The court of appeals's theory that "award" does not have a consistent meaning throughout the Act, and that the time a claimant is "newly awarded compensation" within the meaning of § 6(c) can therefore be taken to refer to the time he or she is first *entitled to* compensation, was the court's own invention. The Board never relied upon any such

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[9] The perception of the court below that the final sentence of § 33(b), explicitly stating that "[f]or the purposes of this subsection, the term 'award' with respect to a compensation order means a formal order[,]" "would be unnecessary" if "award" were not "used in other sections to mean something broader," Pet. App. 8, is fallacious. In fact that sentence was added to § 33(b) in 1984; it had been included in the bill that became the Longshore Act Amendments of 1984, n.2 *supra*, *before* this Court's decision in *Pallas Shipping*; as that decision established, the added sentence *was* "unnecessary."

theory, nor did the Director, OWCP, either in urging the result in *Reposky* or in urging its acceptance in the proceedings below. Both the Board and the Director accepted the settled and consistent meaning of an "award" under the Act and the proposition that a claimant cannot be said to have been "awarded" compensation other than by a § 19(e) "compensation order," "making the award," *ibid*. They reasoned instead that "*during such period*" could be taken to modify, not "newly awarded," but "compensation," or rather an implicit term, "disability," so that "newly awarded compensation during such period" means "entitled to compensation *for disability that began* during such period." The court of appeals did not accept that tortured, syntactically impossible reading, which in any event denies all effect to the term "newly awarded."[10] It based its reading instead on rejection

[10] The Director's contention before the Board in *Reposky* (and before the court of appeals below) that "newly awarded compensation during such period" means "newly awarded compensation *for disability commencing* during such period" is belied not only by the syntax of the phrase, in which "during such period" modifies "newly awarded" rather than "disability" (which does not even appear in the phrase), but further by the fact that the same Congresses that passed and reenacted § 6(c) in 1972 and 1984 used phrases *elsewhere* in the same amendments to the Act that *did* unambiguously provide the determinant the Director and the Board read into the different terms of § 6(c). Longshore Act § 10(h)(1) ("compensation to which an employee or his survivor *is entitled* due to total permanent *disability* or death *which commenced* or occurred prior to enactment"), § 33(g) ("entitled to compensation" at the time of entry into a third-party tort settlement). The use of a phrase with a completely different natural signification in § 6(c)

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of the proposition that the Board and the Director had never questioned: that "awarded" means "awarded" rather than "entitled to."

The court's purported discovery of uses of the term "award" or "awarded" in the Act that "could not have meant 'assigned by formal order,'" Pet. App. 6-8,[11] is illusory. The uses of the terms "shall be awarded" and "the award of compensation" in § 8(c)(20), (22), reflect no necessary or natural inconsistency with the meaning of "the award" provided by § 19(e), and do not even suggest, much less require, that those terms "refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal [compensation] order," Pet. App. 6-7. Likewise, § 10(h)(1), providing for an initial adjustment to post-1972 rates in cases in which "total permanent disability or death . . . commenced or occurred prior to enactment" of the 1972 amendments – and in which the compensation payable had

forecloses reading that provision as if it had used one of those formulations. The Director's contention has never been promulgated in any implementing regulation or even disseminated in any of the Director's less formal pronouncements ("Program Memoranda" and "Industry Notices"). Accordingly, it does not qualify for any deference beyond "respect proportional to its 'power to persuade,'" *e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), and it has none.

[11] The court added "in the course of adjudication," Pet. App. 6, but as § 19(c) makes plain, compensation orders making awards are not intended to be confined to cases in which a dispute requires "adjudication," but are to be entered promptly, as a matter of course, if a claim is initially undisputed, subject to later modification under § 22 under the same procedures.

therefore been subject to the much lower previous limits of employer liability – explicitly makes the time of "commence[ment]" of such disability or "occur[rence]" of the death – *not* the time of an "award" – the critical determinant. The fact that it refers both to "the compensation to which an employee or his survivor is entitled," in its opening clause describing what is subject to the post-1972 "adjust[ment]," and to compensation that has been "awarded" at less than the maximum rate provided at the time of a pre-1972 injury, in a proviso, does not remotely justify the conclusion of the court of appeals that "entitled to" and "awarded" are "used . . . to mean the same thing" in § 10(h)(1), Pet. App. 7.

3. This Court also has specifically rejected the converse of the argument relied on by the court below – that "person entitled to compensation" could be read to encompass only claimants receiving compensation or having an award of compensation at the relevant time. *Cowart*, 505 U.S. at 476.[12] Section 33(g) of the Act, as amended by the same 1972 amendments as the provisions here involved, provides that a "person entitled to compensation" who enters into a settlement with a liable third party without first obtaining the employer's approval forfeits the right to compensation and medical benefits from the employer. The Director and the Board there (just as here) had considered the consequences of applying the statutory terms according to their natural meaning,

[12] The court of appeals did not mention *Cowart*, despite Roberts's central reliance on it.

so as to encompass *unpaid* claimants, anomalous and unduly harsh, and so had read "entitled to compensation" to mean "*receiving* compensation or having been awarded it"; and (again as here) the Ninth Circuit had agreed, but the Fifth Circuit had held that the unambiguous meaning of the phrase employed by Congress controlled and foreclosed the paid-or-awarded reading. This Court there agreed with the latter:

> Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.

Cowart, 505 U.S. at 477. The Court held that the forfeiture provision applied unambiguously to a claimant who did have a right to compensation under the Act when he settled a third-party tort claim, even though the employer was denying such entitlement, and no award had been entered or payments made, at the time. "[T]he stark and troubling possibility" that that rule would have harsh results, "creat[ing] a trap for the unwary" and providing a tool for employers to avoid liability for disabling injuries suffered in their employ, was an insufficient ground for avoidance of its clear terms; as the Court concluded:

> It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has

> done so. If the effects of the law are to be alleviated, that is within the province of the Legislature. It is Congress that has the authority to change the statute, not the courts.

Id. at 483-84.

By a parity of reason, the normal meaning of "those newly awarded compensation" requires more than that the claimant qualifies for the right to compensation, i.e., is *entitled to* it. As the court below began by acknowledging, the verb "award" has a settled legal meaning, requiring a legal document *establishing* an entitlement or liability (Pet. App. 6). Just as "entitled to compensation" cannot be read to mean "awarded or receiving compensation," so neither "newly awarded compensation" nor "currently receiving compensation for permanent total disability or death" can be read as "newly entitled to" or "currently entitled to" compensation. The present issues should be controlled by *Cowart*.

Nor will application of the clear meaning of the statutory terms in this case have harsh effects. Rather, following the statute as written will simply provide a claimant with a higher benefit, at a concomitant cost to the employer, if entry of an award is substantially delayed.

4. With respect to the other critical phrase of § 6(c), applicable to Roberts's compensation for his period of *permanent* total disability, the Ninth Circuit's holding that the "'currently receiving' clause of section 6(c) unambiguously refers to the period during which an employee was entitled to receive

compensation for permanent total disability, regardless of whether his employer actually paid it" (Pet. App. 12), is an even more blatant example of judicial legislation than its reading of "newly awarded." No dictionary could define "receiving" to mean "entitled to receive" as did the court below. The court did not even attempt to cover its amendment of that phrase with a fig leaf of reference to other provisions of the Act that use "receiving" to mean "entitled to," as there are, of course, not even arguably any such provisions. Only by ignoring the plain language of the statute could the court below justify its conclusion that the maximum compensation available for permanent total disability is that "applicable" during the year when the permanent total disability *exists*, even though the claimant is not paid – and therefore does not "receive" in any conceivable sense of the word – compensation for such disability until years later.

5. The concern of the court of appeals for potential inequitable results if the plain meaning of the language of § 6(c) is followed, Pet. App. 9 n.1, is misplaced. Imposing a cost on an employer that delays the payment of compensation by litigation is fully consistent with the Longshore Act's goal of encouraging prompt payments contemporaneous with the disability for which it is payable. The fact that this goal is also reflected in statutory provisions requiring, under defined circumstances, augmentation of compensation that is not promptly paid (§ 14(e), (f), 33 U.S.C. § 914(e), (f)) neither undercuts the consistent result of applying § 6(c) as written, nor renders the result of that plain meaning either

unnecessary or duplicative, as the court reasoned (Pet. App. 9 n.1). An employer can avoid paying the augmented compensation under § 14(e) to which the court of appeals referred simply by filing a notice "controverting" the claim, as Sea-Land did here. Imposing an extra liability on the employer where the claimant's receipt of compensation, and of the security of an award that ensures its continued payment until such time as the award may be modified, is delayed by litigation is fully consistent with the purposes of the Act. The decision of the Fifth Circuit in *Wilkerson* not only reflects the natural meaning of the words of the statute, but also results in an application of the statutory terms that is consistent with the statutory purpose. The Ninth Circuit's decision in this case does neither.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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