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

REPLY BRIEF FOR PETITIONER

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I. The Construction of Longshore Act § 6(c) Advanced by Respondent Director, OWCP, Is Inconsistent with the Plain Terms of the Provision.

A. "Newly awarded compensation during" a fiscal year

Petitioner has demonstrated the error of the assertion that "award[ed]" does not have a consistent meaning throughout the Act, Pet. at 14-19. As the court below began by acknowledging, an "award" has a well-established general legal meaning, and also a meaning fixed by the terms of Longshore Act § 19(e), 33 U.S.C. § 919(e). A claimant has not been "awarded" compensation ("newly" or otherwise) if no order making an award has been filed under that provision, just because he is entitled to the compensation in question, or indeed just because he is paid such compensation, as the Act says, "without an award," § 14(a), (e) – a statutory designation inconsistent with the view that a claimant is "awarded" compensation as soon as he or she is *entitled to* it.

Respondent Director, OWCP repeats the argument of the court below that the specificity of the definition of "the term 'award'" "for purposes of" § 33(b) of the Act, introduced by an amendment to that subsection in 1984, 33 U.S.C. § 933(b), "would not be necessary" if "award" already had that meaning throughout the Act. Br. in Opp. 10. The Director presents no response, however, to Petitioner's point that this Court's decision in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), which intervened

between the introduction and passage of that amendment, showed conclusively that that specificity was *not* necessary because the term already was limited to § 19(e) compensation orders. It should be noted as well – in connection with the Director's claim of "*Skidmore* deference," (Br. in Opp. 17-18) – that the Director's adoption of the court of appeals' view that "awarded" need not be read in § 6(c) of the Act to mean "granted benefits in a compensation order" was in no way a basis for the administrative construction of § 6(c) urged by the Director before the Board in the key decision in *Reposky v. Int'l Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), or before the court of appeals. It is no more than "appellate counsel's *post hoc* rationalization[ ] for agency action" that was based on no such reasoning, to which no judicial deference is due. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). In addition, the Director's purported "construction" of the "currently receiving" clause of § 6(c), advanced before (and accepted by) the Board in *Reposky* and urged to the court of appeals below with partial success, represented a partial departure even from the never-articulated previous administrative *practice* of the OWCP until then. The basis for even *Skidmore* "respect" is at its weakest. But even if that basis were far stronger, the position advanced by the Director is so clearly inconsistent with the terms of the statute that any such "respect" would be insufficient to warrant adoption of the Director's position.

Nowhere in the Act does any form of the word "award" refer to a situation in which the claimant merely has (as subsequently determined) a right to compensation, i.e., suffers from a work-related loss of earning capacity, but has not received an award ordering its payment, in a compensation order filed under § 19(e). It is all the more impossible to regard the claimant whose claim was "controverted," and who was paid nothing "during" the intervening fiscal years between the time of controversion and the time an ALJ's Decision and Order – the § 19(e) "compensation order . . . making the award" – was filed, as having been "newly awarded compensation during" the year of onset.

B. "Illogical and inequitable results" of the statute as written

The Director argues (Br. in Opp. 12) that reading § 6(c) as it is written would "produce an array of impractical and inequitable results," without even attempting to demonstrate that such results are in any way "'demonstrably at odds with the intentions of its drafters' [or] so bizarre that Congress 'could not have intended' it," *Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991). Accordingly, the statute must be applied as written even if it were demonstrated that the effect will be, as in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), harsh and incongruous, or, as in *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), a departure from the pattern otherwise shown by the Act. If the consequences of the

statutory determinant are unacceptable, the Director is uniquely situated to ask Congress to change it. But the courts lack power to grant such relief.

The attempt to demonstrate "illogical and inequitable" results fails anyway. The Director's assertion (Br. in Opp. 12) that the Act is silent as to the maximum applicable where an employer voluntarily pays compensation because the claimant in such a case "would *never* be 'newly awarded compensation' (because they have no formal order of compensation)," begs the question and interposes a fallacious obstacle. An employer must determine an amount of compensation to pay without an award and will, assumedly, do so by reference to the amount of compensation that would be awarded if an award were entered at the time of such payment. Either party, however, may request the entry of a formal award, and the Act explicitly contemplates – indeed, directs in mandatory terms as a ministerial duty – the entry of compensation orders without any litigation, as long as no disagreement is registered or hearing requested within twenty days after notice of claim.[1] It can

[1] Section 19(c) of the Act, 33 U.S.C. § 919(c), provides:

> The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, . . . and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of

(Continued on following page)

hardly be subject to question that the duty to issue such orders falls to the OWCP district directors. Although the 1972 amendments assigned hearing authority to ALJs and transferred "all powers, duties, and responsibility vested by this Act in the deputy commissioners with respect to such hearings," (§ 19(d)), the statutory mandate contained in § 19(c) to issue an order where no hearing is ordered because there is no dispute requiring an evidentiary hearing is obviously not a "power[ ], dut[y], or responsibilit[y] with respect to . . . hearings," so it remains the responsibility of the deputy commissioners ("district directors"). The fact that they commonly do not perform that duty does not establish any reason they *can*not, or will not when requested by the employer, promptly enter orders on currently undisputed claims. Once the

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> the claim. *If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.*

(Emphasis added.) Thus, in the typical serious-injury case in which the employer has reported the claimant's employment-related injury to the district director under § 30(a) of the Act, has acknowledged the resulting temporary total disability and instituted payments without an award, has reported such payment to the district director under § 14(c), and has not suggested that such disability has reached an end within the thirty-day period, an award is to be entered for continuing temporary total disability, without the need for any cessation of the payments without an award, or for any litigation. That continuing award will then be subject to modification, under the same procedures applicable to original claims, under § 22 of the Act. 33 U.S.C. § 922.

effect of § 6(c) is recognized, insurers will need only insist on ministerial entry of orders in such undisputed cases at the outset, and the applicable maximum or minimum, subject to § 10(f) adjustments if the case is one of permanent total disability, will be established by such entry. The situation in which § 6(c) makes a difference will be confined to cases in which the claimant's right to compensation is disputed and payments are delayed.

The other untoward result that the Director asserts will follow from the time-of-first-award determinant of § 6(c) is that it will produce "inequitable" results in that "benefits paid to otherwise-identical claimants would vary drastically based solely on one arbitrary difference in the procedural history of the claim." (Br. in Opp. 12). The Director's first mistake is in assuming that "workers who suffer the same injury on the same day, and incur the same disability that prevents them from earning the same wages during the same time period" but are distinguished by the entry of a compensation order in their favor are relevantly "identically situated." The claimant who receives a compensation order has the security, throughout the time the order is in effect and unless and until it is modified, of knowing that he will continue to receive the compensation to which he is entitled. The claimant without such an order receives such compensation only so long as the employer continues to be willing to provide it and is always at risk of faring no better than the Petitioner in this case, who was underpaid and had his

compensation stopped, reinstated, reduced, and terminated in the four and a half years between onset of disability and the filing of the award.

Cases affected by the § 6(b) upper limit are the highest-value cases, in which employers have the most incentive to encourage the claimant to accept a lump-sum settlement by being difficult, arbitrary, and dilatory. Those affected by the § 6(b) lower limit concern claimants who are likely to be the most vulnerable, in the event of any unwarranted suspension of payments, to extreme pressure to accept a settlement for substantially less than their full entitlement rather than wait for the outcome of the Act's slow-moving adjudication procedures to vindicate that entitlement. Both those groups of claimants therefore warrant an extra incentive for the employer to acknowledge the claimant's rights and agree to entry of a continuing award. The particular determinant of the applicable year's limits provided by Congress in § 6(c) provides such a disincentive to foot-dragging and pursuit of lump-sum discharges under the Act's settlement-approval procedure (§ 8(i); 20 C.F.R. §§ 702.241-.243) by application of financial pressure in such cases.

II. Review at the Present Juncture is Warranted.

The Director attempts to minimize the conflict between the decision of the court below in this case and the Fifth Circuit's decision in *Wilkerson v.*

Ingalls Shipbuilding, Inc., 125 F.3d 904 (1997), and argues that the question should be permitted to "percolate" in the lower courts before this Court intervenes. The first assertion is spurious, and the second undervalues the time of the federal judiciary and the long-suffering claimants who are subjected to an unreasonable interpretation of a clear statutory provision.

First, the characterization of the clear conflict between the decisions of the Ninth and Fifth Circuits as mere "tension" is difficult to comprehend. The Fifth Circuit held that "the statute makes plain that compensation is governed by the maximum rate in effect at the time of an award" and that § 6(c), in fact, was an "unequivocal statutory imperative" compelling application of the maximum in effect for the year in which the ALJ entered a compensation order in the claimant's favor. *Wilkerson*, 125 F.3d 906.[2] The court below explicitly disagreed with the Fifth Circuit, stating that it was "not persuaded" (Pet. App. 9). The conflict could not be clearer. Second, the Director (like the court below) criticizes the Fifth Circuit for providing "little support" for its "conclusory statements." The *Wilkerson* court, however, explicitly based its

[2] The Director suggests (Br. in Opp. 17) that *Wilkerson* is distinguishable because it involved a separate issue regarding whether the 1972 amendment to § 6 of the Act controlled. That assertion proves too much, however, as that argument merely presented a second hurdle that the Fifth Circuit had no difficulty concluding was overcome by the clarity of the statutory language.

decision on the plain language of the statute, which it found not only clear but also "unequivocal." This Court has long recognized that no more is necessary. *E.g.*, *Estate of Cowart*, 505 U.S. at 475.

The fact that the issue is also now pending in the Eleventh Circuit (*Boroski v. DynCorp Int'l*, No. 11-10033), and in a district court within the Fifth Circuit, Br. in Opp. 17-18, provides no basis for delaying this Court's resolution of the clear conflict, but rather suggests that the issue will continue to occupy the time and attention of the lower courts until resolved by this Court. This case presents no "frontier legal problems" (*cf. Arizona v. Evans*, 514 U.S. 1, 23-24 (1995) (Ginsburg, J., dissenting), but simply involves a straight-forward question of statutory construction. It is thus unlikely that resolution by this Court in this case will "stunt[ ] the natural growth and refinement of alternative principles." *Cf. California v. Carney*, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting). In any event, *Boroski* was orally argued on July 29, 2011, and the court inquired into the timetable for action on the present petition, and appeared inclined to act quickly enough for its disposition to be considered by this Court in the present case.

CONCLUSION

For these reasons, and the reasons stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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