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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act, as amended, 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, 910. 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.

QUESTION PRESENTED – Continued

33 U.S.C. § 906(c) (emphasis added). The determinant of the years whose limits are "applicable" under this provision has divided the three courts of appeals that have addressed it. The Court granted certiorari to resolve the question:

Whether the phrase "those newly awarded compensation during such period" in Longshore Act § 6(c) makes the time an award is first entered determinative, or can and should be read to mean "those first *entitled to* compensation during such period," regardless of when an award is first entered.

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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 judgment of the court of appeals was entered on November 10, 2010. The order denying rehearing was entered on February 10, 2011. The petition for a writ of certiorari was filed on May 11, 2011, and was granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The only directly relevant provisions of the Longshore Act are those of § 6(b)-(c), as amended in 1972 and reenacted without substantive change (other

[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 (Nov. 9, 2011) (all dates appended to web addresses herein are the dates the sites were last visited).

than extension to death-benefits cases) in 1984,[2] 33 U.S.C. § 906(b)-(c):

> (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 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

[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).

> 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.

Other provisions of the Act implicated by the question presented are set forth in the Appendix of Relevant Statutory Provisions, *infra*.

STATEMENT

1. The Longshore Act requires employers to compensate workers who are disabled by employment injuries within its coverage. For total disability, whether temporary or permanent, the Act provides for periodic payments at a rate based on two-thirds of the workers' average weekly wage at the time of the injury; if the total disability is permanent, the rate of the continuing compensation is adjusted annually, proportionally to the previous year's increase in the national average weekly wage.[3] For most partial disabilities, the rate is two-thirds of the difference

[3] Longshore Act §§ 8(a), (b), 10(f), 33 U.S.C. § 908(a), (b), 910(f).

between that wage and the worker's residual earning capacity.[4] 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[5] to determine, by October 1 of each year, the national average weekly wage that "shall be . . . applicable . . . for the period" of the following fiscal 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, *id*. § 6(b)(1); 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), *id*. § 6(b)(3). Section 6(c) of the Act specifies which annual determination of the national average is "applicable": a given fiscal year's

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[4] *Id*. § 8(a), (b), (c)(21), (e), 33 U.S.C. § 908. The exceptions to the Act's general scheme of replacing two-thirds of lost earning capacity are permanent partial disabilities within the "schedule" of § 8(c)(1)-(20) and occupational diseases that become manifest after retirement, as to all of which the extent of physical impairment determines how much is payable. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); *Bath Iron Works Corp. v. Director, OWCP (Brown)*, 506 U.S. 153 (1993). Roberts's case is not within those exceptions.

[5] 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).

limits "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during [year], as well as those newly awarded compensation during such [year]."

2. The Act requires the employer to file a report with OWCP (*see* note 5, *supra*) of any injury within its coverage that causes loss of at least one shift of work, within ten days of awareness of it, and to pay compensation "periodically, promptly, and directly to the person entitled thereto, without an award, except where liability . . . is controverted"; the "first installment" is due within fourteen days. Longshore Act §§ 30(a), 14(a)-(b), 33 U.S.C. §§ 930(a), 914(a)-(b). If the employer does "controvert" its liability, it is required to file a notice, stating its grounds, with the OWCP district director (the statutory "deputy commissioner"[6]). *Id*. § 14(d). If it does not, "[a]ny installment of compensation payable without an award" that is not timely paid is augmented by 10 percent. *Id*. § 14(e). Any "payment of compensation . . . without an award" extends the time for the filing of a claim under § 13(a), 33 U.S.C. § 913(a).

Section 19 of the Act, 33 U.S.C. § 919, sets forth the procedures leading to the filing of a "compensation order" – "the order rejecting the claim or making

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[6] The title "district director" has been administratively substituted for the statutory term. *See* 20 C.F.R. §§ 701.301(a)(7), 702.105.

the award," § 19(e). Section 19(b)-(c) establishes very prompt timelines for disposition of a claim once it is filed, without reference to whether payments without an award are continuing. In particular, if no hearing is requested or considered necessary by the district director within 20 days of notice of the claim, "the [district director] shall, by order reject the claim or make an award in respect of the claim," § 19(c). If a hearing is required, the case is to be referred by the district director to the Department of Labor's Office of Administrative Law Judges, § 19(d); *see* 20 C.F.R. §§ 702.316-.317, and the ALJ is directed "by order [to] reject the claim or make an award" within 20 days after the hearing, § 19(c).[7]

If payments due under such an award are not made when due, they are subject to 20-percent augmentation, and the award is subject to judicial enforcement. Longshore Act §§ 14(f), 18(a), 21(d), 33 U.S.C. §§ 914(f), 918(a), 921(d). Compensation orders, whether denying claims or making awards, are subject not only to appellate review under § 21(b)-(c), 33 U.S.C. § 921(b)-(c), but also to "modification" by a "new compensation order," on grounds of either a "change in conditions or . . . a mistake in a determination of fact" in the original order, under the same procedures as provided for resolution of original claims. *Id*. § 22, 33 U.S.C. § 922. Acceptance of

[7] By no means do the OWCP or the ALJs comply with the prompt-action directives of § 19(c). *See* pp. 43-44 *infra*.

compensation paid "under an award in a compensation order" starts the six-month period after which the right to bring suit against any "third party" legally liable for the injury passes from the injured worker, if he or she has not done so, to the employer. *Id*. § 33(b), 33 U.S.C. § 933(b).

3. Dana Roberts slipped and fell on ice in the course of his work as a longshoreman for Respondent Sea-Land 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, filed notices of controversion pursuant to Longshore Act § 14(d), but paid Roberts compensation for temporary total disability for periods in 2002-2005 at a rate ($933.82 per week) that was less than any applicable maximum, and paid for some medical treatment. As of May 2005, it disputed Roberts's claim, and stopped paying anything (Pet. App. 46, 51-52, 101).

4. 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. The ALJ found that Roberts had remained temporarily totally disabled from March 2002 through July 11, 2005, after which his residual condition was permanent; he found that a job for which Roberts was particularly suited had become

available to him in Anchorage, paying $720 a week, as of October 10, 2005. Accordingly, the ALJ awarded Roberts compensation for temporary total disability from March 2002 through July 11, 2005; for permanent total disability from July 12 to October 9, 2005; and for permanent partial disability from October 10, 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,[8] the rates specified by § 8(a), (b), and (c)(21) – two-thirds of his loss ($1,902.05 a week for periods of total disability, and $1,422.05 for his continuing permanent partial disability) – were 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

[8] The national average weekly wages, and consequent maximum and minimum rates, for each fiscal year from 1973 (national average $131.80) to 2012 ($647.60), are tabulated on the OWCP's web site, at www.dol.gov/owcp/dlhwc/NAWWinfo.htm (Nov. 8, 2011).

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 § 6(c) and *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. He pointed out, however, 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 days of permanent total disability, in FY 2006, should be that year's maximum of $1,073.64, rather than $991 (the previous rate of $966.08 increased only by the percentage increase in the national average weekly wage for FY 2005 to that for FY 2006, under the annual-adjustment provision of § 10(f)), as calculated by OWCP and paid (Pet. App. 28-32).

5. 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).[9] 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 of the Fifth Circuit in *Wilkerson* to the contrary. 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* during such period, i.e., *first entitled to* compensation during such period, in order to "maintai[n] consistency in the statute and yiel[d] rational results." *Reposky*, 40 BRBS at 76. With respect to the "currently receiving" clause of § 6(c), applicable to

[9] 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.

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.

6. 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 his 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 – neither the 2002 limit applied by the Board nor the 2007 limit urged by Roberts (*id*.).

7. The several approaches to application of the maximum rates under § 6(b)-(c) are illustrated by their effects on the weekly rates of compensation payable for the periods of Roberts's temporary total, permanent total, and permanent partial disability (TTD, PTD, and PPD):

> (a) Paid before entry of the ALJ's FY 2007 award (unexplained by any maximum rate; presumably based on an "average weekly wage" about half that determined by the ALJ):
>
> TTD 3/12/02 – 7/15/03: $933.82
>
> TTD 9/1/03 – 5/17/05: $933.82
>
> (b) ALJ's original decision as implemented by OWCP:
>
> TTD 3/12/02 – 7/11/05: $966.08 (FY 2002 limit)
>
> PTD 7/12/05 – 9/30/05: $966.08
>
> PTD 10/1/05 – 10/9/05: $991.00 (§ 10(f) adjustment)

PPD 10/10/05 – present: $966.08

(c) ALJ's Order on Reconsideration, affirmed by BRB: Same as ALJ's original award, except:

PTD 10/1/05 – 10/9/05: $1,073.64
(FY 2006 limit)

(d) Court of appeals's decision: Same as (c), except:

PTD 7/12/05 – 9/30/05: $1,047.16
(FY 2005 limit)

(e) Due if Roberts was "newly awarded compensation during [FY 2007]" within the meaning of § 6(c):

All periods[10]: $1,114.44
(FY 2007 limit)

[10] Roberts's two-and-a-half-month period of permanent total disability was entirely before the entry of the ALJ's award. If the "newly awarded" clause makes the time an award is entered determinative, the "currently receiving" clause is irrelevant to this case. Its function is to allow continuing compensation for permanent total disability and death to receive the annual adjustments provided for such cases by § 10(f) of the Act, 33 U.S.C. § 910(f), in maximum-rate cases as in all others, rather than leaving such continuing benefits subject to the maximum rate at any earlier time. In granting certiorari, the Court limited the subject of its review to the "newly awarded" clause.

SUMMARY OF ARGUMENT

A. When Congress uses unambiguous terms, they are supposed to provide the beginning and the end of inquiry into their meaning, except in the most extraordinary circumstances; and when it uses *different* terms as the determinants of the application of different provisions in the same statute, there is a strong presumption that the determinants are different. The terms of § 6(c) are perfectly clear. The Longshore Act provides for entry of "the order . . . making the award," and repeatedly distinguishes compensation payable "without an award" from that "payable under the terms of an award." It attaches a number of legal consequences to the latter that the former does not carry. The verbal form of the word "award" in § 6(c) does not change its clear meaning; a claimant is "newly awarded compensation" only when an order "making the award" is filed.

The court of appeals relied on the specificity in the final sentence of § 33(b) of the Act, defining "award" "[f]or purposes of this subsection" as a compensation order, as an indication that it must mean something else in other provisions, because otherwise the definition "would be unnecessary." That reliance was misplaced. By the time that sentence was added to § 33(b) in 1984, this Court had already held in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), that "award" had the plain meaning provided by that definition even without it; it was indeed "unnecessary." Likewise, the court's assertion that some provisions of the Act use the term "award" or

"awarded" in contexts in which it could not have referred to a § 19(e) compensation order is incorrect; in each instance, Congress *was* referring to an award, not a mere entitlement. "[T]hose newly awarded compensation during such period" in Longshore Act § 6(c) cannot fairly be said to present any relevant ambiguity, and nothing elsewhere in the Act provides any basis for reading one into it.

B. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), the Court rejected the reading of § 33(g) of the Act, as amended in 1972 and modified in 1984, by the Benefits Review Board (and, until the question reached this Court, the Director). That subsection provides that if a "person entitled to compensation" settles a third-party tort action without the formal approval of the employer and insurer liable for compensation, the right to deficiency compensation under § 33(f) is forfeited. Despite misgiving about the result, the Court held that "entitle[ment]" was too clearly a different concept to be "interpreted" to refer only to claimants who had been awarded compensation or were receiving it at the time of settlement. This logically condemns the court of appeals's reading of "awarded" to mean "entitled to."

C. The court of appeals was likewise in error in relying on the general "structure" of the Act, which it thought "identifies the time of injury as the appropriate marker for other calculations relating to compensation." Its sole examples were § 10 of the Act, designating the worker's "average weekly wage at the time of the injury" as the basis of compensation rates,

and § 8(h), providing for determination of the worker's residual "wage-earning capacity." The latter provision actually is silent on the relevant time, although the courts of appeals have held that in order to make the comparison with the § 10 figure fair, the worker's residual earnings years after the injury should be converted to their time-of-injury equivalent. The only other provisions relevant to the calculation of the appropriate rate (besides § 6(b)-(c)), however, also added in 1972, are the inflation-adjustment features of § 10. The annual-adjustment provision of § 10(f) or 10(h)(3) applies depending on the time "the injury . . . occurred," regardless of when the resulting permanent total disability or death commenced or occurred, but the *initial*-adjustment provision of § 10(h)(1) depends on when "permanent total disability or death commenced or occurred," regardless of the time of the original injury. The annual-adjustment feature of § 10(f), (h)(1) is itself inconsistent with the supposed overarching "structure," in effectively substituting the *current* equivalent of the earnings at the time of the injury for the original figure as the basis for continuing compensation rates, including the vast majority to which § 6(b)-(c) has no application. Congress used various terms to establish the times of relevant determinants under the several rate-determinative provisions. There is no basis for imposing a "uniform" rule where Congress has provided different rules for different purposes.

D. In other provisions enacted at the same time as § 6(c), Congress used different terms, making their

applicability turn on the time entitlement, or the commencement of a particular class of disability. This further undermines the lower court's conclusion that the very different natural signification of the terms of § 6(c) should be read to make the maximum rate turn on the same thing naturally expressed in the other provisions. Roberts was never *awarded* any compensation until FY 2007. The fact that he was *entitled to* it from 2002 forward cannot be made to determine the "applicable" year's limit, on the two-thirds of his pre-injury earnings payable for his disability, without denying effect to the terms of § 6(c).

E. Applying § 6(c) as written produces no "inequitable" or incongruous results. It need have no effect at all except where there are delays attendant to litigation of disputes. So long as there is initial agreement on the claimant's right to temporary-disability compensation, entry of an award, embodying the agreement concerning the then existing and continuing entitlement, should be available on request, even if not entered as a matter of course as § 19(c) directs. In cases where litigation of a dispute does cause delays in entry of any award, the use of the § 6(b) rate limits applicable during the year in which the award is entered, in accordance with the ordinary meaning of § 6(c), merely imposes additional liability on the employer as a result. Contrary to the court of appeals's reasoning, this does not duplicate the remedy for delay provided by § 14(e), as the employer can readily avoid any such remedy by filing

a simple form (as employers nearly always do, and Sea-Land did here).

This Court has declined to read other terms into other provisions of the Act in several previous decisions, despite the fact that the results of the statutory terms in those cases produced far more apparent incongruity than that asserted as to § 6(c). "Awarded" should be given the meaning it has both in ordinary legal usage and in the rest of the Longshore Act.

ARGUMENT

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.

As this Court 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. The Eleventh Circuit most recently has examined the question extensively, and rejected the reasoning and result of the court below in the present case. *Boroski v. DynCorp Int'l*, ___ F.3d ___, 2011 U.S. App. LEXIS 21776, No. 11-1033 (Oct. 27, 2011). In this case as in *Estate of Cowart*, "[t]he controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476. The supposedly inconsistent uses of the term "award" in the Act on which the court of appeals based its escape from the "statutory imperative" are illusory.

A. The Act Consistently Uses the Words "Award" and "Awarded" to Refer to an Order Establishing the Claimant's Rights, as Distinct from Entitlement or Even Payment.

Despite *Wilkerson*'s recognition of the statutory clarity, the Director purported to find ambiguity in § 6(c), and the Board accepted his position in *Reposky*. The ambiguity they found was not, however, the same as that found by the court of appeals. The Board never relied upon any ambiguity in the term "awarded compensation," nor did the Director, OWCP, either in urging the result in *Reposky* or in urging its

acceptance in the proceedings below. Rather, both the Board and, until the decision below, 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 when he or she has become entitled to it but no § 19(e) "compensation order," "making the award," *ibid*., has been filed. They found ambiguity instead in the phrase "*during* such period," which they reasoned 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."[11] The court of appeals did not accept that syntactically untenable reading, which ignores the facts that "during such period" is an adverbial modifier of "newly awarded" rather than of "compensation" and that the phrase does not even refer to the *disability* for which the compensation is payable, and deprives

[11] *See Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 74-76; Br. for Respondent Director, OWCP, 9th Cir. No. 08-70268, at 24-25 ("Roberts relies on the fact that the term 'award' is used to mean 'compensation order' in certain other places within the Act. See Pet. Br. at 14-18. This is true, but it hardly compels the conclusion that the plain language of Section 6(c) – even if it is torn from the Act and examined in a vacuum – is only amenable to Roberts' interpretation. As the Board correctly found, the critical difference between Roberts' interpretation . . . and that employed by the Board and the Director lies not in the term 'awarded,' but in the term 'during.' ").

"newly awarded" of any effect at all. *See Boroski v. DynCorp Int'l*, *supra*, Slip op. at 39-40.[12]

The court of appeals's entirely different 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, is no more valid. The court acknowledged that "[t]he transitive verb 'award' has a settled meaning in the litigation context: It means '[t]o give or assign by sentence or judicial determination.'" 625 F.3d at 1206 (Pet. App. 6), *quoting Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010). In the Longshore Act in particular, although "compensation order" also encompasses an order denying a claim (§ 19(e)), the terms "award" and "compensation order" are otherwise interchangeable. "Award" has a specific meaning, 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 20-percent augmentation of the amount otherwise due under the award. Act § 14(f), 33 U.S.C.

[12] The Director's Brief in Opposition to the petition for certiorari set forth the "construction" he had previously urged only in a footnote (at 11 n.6), and adopted instead the court of appeals's theory that "awarded" (and also, for "consistency" with the result produced by that reading of the "newly awarded" clause, "receiving" in § 6(c)'s other clause as well) should be read as "entitled to."

§ 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). Once a "compensation order making an award" has become "final" against appellate review, resort to mandatory-injunction proceedings directly in district court is available to enforce compliance, under § 21(d), 33 U.S.C. § 921(d). If the employer becomes insolvent, compensation owed "upon any 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) (*see infra* at pp. 25-29). 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).

None of these consequences follows from a claimant's mere *entitlement to* compensation, nor even from the employer's payment of it "without an award." Such payment 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).

The last of these provisions explicitly spells out that the "award" that effects an assignment of third-party tort rights is "an award in a compensation order filed by the deputy commissioner." The 1984 amendment to this section added the final sentence of the current § 33(b):

> For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the

> deputy commissioner, an administrative law judge, or Board.

The court of appeals below relied on the specificity of the added sentence for its conclusion that "awarded" in § 6(c) could be given a different meaning: it

> . . . implicitly contemplates that the meaning of the term "award" in other sections is not limited to a formal compensation order. Unless "award" is used in other sections to mean something broader than a formal compensation order, the specific definition in section 33 would be unnecessary.

625 F.3d at 1207 (Pet. App. 8). That reasoning ignored this Court's decision in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529 (1983), and the legislative history of the addition of that sentence, neither of which it addressed.[13]

Section 33(b) as originally enacted in 1927 (Act of Mar. 4, 1927, c. 509, § 33(b), 44 Stat. 1424, 1440), § 33(b) made *any* "[a]cceptance of compensation" effect an election to accept compensation in lieu of any cause of action against others, and an assignment to the employer of any such rights. In amending it in 1938 to leave third-party actions in the hands of claimants for six months after acceptance of compensation

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[13] Because no party had contested that "newly awarded" referred to a compensation order making "the award" under § 19(e), *see* p.14 n.11 *supra*, the point was not briefed to the court below.

under an award, Congress spelled out that only acceptance of payments under an "award in a compensation order" would effect such an assignment. This valiant attempt to avoid any misunderstanding on the point proved ineffectual; some courts nevertheless ruled that an "informal" approval of payments by a deputy commissioner (or even his or her staff), evidenced by as little as accepting the employer's reports of the injury and notice of its institution of payments "*without* an award" under § 14(c), was enough to invoke the assignment provision.[14] This Court unanimously held to the contrary in *Pallas Shipping*:

> The term "compensation order" in the LHWCA refers specifically to an administrative award of compensation following proceedings with respect to the claim. In this case, no administrative proceedings ever took place, and no award was ever ordered by the Deputy Commissioner.

461 U.S. at 534. The Court emphasized the distinct legal consequences of entry of "an award," as distinct from informal actions on a claim and payments made "without an award." *Id*. at 533, 534-35 & n.3. And it made no distinction between "award" and "award in a

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[14] *E.g.*, *Rodriguez v. Compass Shipping Co.*, 617 F.2d 955 (2d Cir. 1980), *aff'd on other gr.*, 451 U.S. 596 (1981) (*see id.* at 598 n.3); *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977).

compensation order," using the terms interchangeably.

Conversely, in *Czaplicki v. SS Hoegh Silvercloud*, 351 U.S. 525 (1956), the deputy commissioner had entered a compensation order without a hearing, one day after notice was sent to the employer of the filing of the claim, awarding continuing compensation for temporary total disability subject to later modification. The Court held that despite its procedural prematurity (of which the claimant had no cause to complain), the order was an "award" so as to trigger both the appeal time after which its validity could not be challenged, under § 21(b), and the six months after which assignment of the third-party cause of action took effect under § 33(b). *Id*. at 528-29 & nn.9, 11. The Court went on to hold, however, that even after assignment has taken place under § 33(b), in cases of "conflict of interests and inaction by the assignee, the employee should not be relegated to any rights he may have against the assignee, but can maintain the third-party action himself." *Id*. at 529-32.

Before this Court decided *Pallas Shipping* in 1983, provisions amending § 33(b) on the point were included in the pending bills that were thereafter enacted, after amendments to many of their provisions, as the Longshore Act Amendments of 1984, *supra* n.2. The Senate's bill, reported two weeks before issuance of *Pallas Shipping*, and passed by the Senate in that form a month later, contained the additional clarification on which the court of appeals relied in this case. S. 38, 98th CONG., 1st Sess.,

§ 19(a), as reported by S. REP. NO. 98-81 (May 10, 1983). The version of the bill reported and passed by the House would instead have allowed payments *without* an award to begin the six-month period for the claimant to bring suit before assignment of the cause of action to the employer, but provided for reversion to the claimant after a "reasonable time." H.R. REP. NO. 98-570, at 30 (Nov. 18, 1983), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2763. The Conference Committee amendment adopted the current last sentence of the subsection from the Senate's version.[15] It explained that it was "in accord with" *Pallas Shipping*, but added:

> The conferees expect that an employer who does make voluntary payments will be able to obtain without delay the necessary compensation order constituting the formal award, so that the 6-month period may commence.

H.R. CONF. REP. NO. 98-1027, at 36 (Sept. 14, 1984), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2786. The conference substitute was passed by both houses and signed within two weeks. Pub. L. No. 98-426, *supra* n.2, § 21(a), 86 Stat. at 1652.

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[15] The amendment, as adopted by the conference committee, also sought to solve the real problem with the existing version of the provision, which had made the § 33(b) questions that required this Court's attention in *Czaplicki* and *Pallas Shipping* important, by providing for reversion of the right of action to the claimant if the employer failed to exercise it within ninety days after the assignment took effect.

Against this background, the final sentence of § 33(b) did not warrant the court of appeals's reliance on it. The added specificity, "[f]or the purpose of this subsection," was indeed "unnecessary," since the provision had the unmistakable meaning, even before that sentence was added and *throughout* the Act, that the added sentence sought to nail down.

Besides the fact that the extraneous specificity of § 33(b) is not mirrored in § 6(c), the court of appeals relied on the assertion that "the LHWCA uses the terms 'award' and 'awarded' to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order," 625 F.3d at 1206-07 (Pet. App. 6-7), citing §§ 8(c)(20), 8(c)(22), and 10(h)(1). Its purported discovery of uses of the term "award" or "awarded" in the Act that "could not have meant 'assigned by formal order,'" 625 F.3d at 1206-07 (Pet. App. 6-8),[16] is illusory. The cited provisions reflect no necessary or natural inconsistency with the meaning of "the award" provided by § 19(e) and under the law generally, and do not even suggest, much less require, that those terms "refer to an employee's entitlement to compensation under the Act generally,

[16] The court added "in the course of adjudication," Pet. App. 6, but as § 19(c) makes plain (*and see Czaplicki*, *supra* at p. 27, *and* H.R. CONF. REP. NO. 98-1027, *supra*), compensation orders making awards are not intended to be confined to cases in which a dispute requires "adjudication" in any formal sense, but are to be entered promptly, as a matter of course (or at least upon request), if a claim is initially undisputed, subject to later modification under § 22 under the same procedures.

separate and apart from any formal [compensation] order." Section 8(c)(20) provides that compensation "shall be awarded" for serious disfigurement; § 8(c)(22) specifies that where more than one permanent scheduled impairment under § 8(c)(1)-(19) results from an injury, "the award of compensation shall be" the sum of the scheduled allowances, running consecutively. Those references merely contemplate that *awards will be entered*, either promptly and ministerially where there is no dispute or after a formal hearing where there is a dispute, as directed by § 19(c) of the Act. Written in 1927, they did not contemplate the current administrative disregard of the last sentence of § 19(c). Indeed, § 8(c)(20) as originally enacted (44 Stat. at 1428) provided that "*[t]he deputy commissioner shall* award proper and equitable compensation," up to $3,500, for disfigurement of the face or head. In amending the provision in 1972 (at the same time it provided for ALJ hearings and created the Board) to raise the limit and extend its application to other parts of the body, Congress substituted the passive "shall be awarded." 1972 Amendments, *supra* n.2, § 7, 86 Stat. at 1255. Presumably that change was made because thereafter some awards would be made by ALJs and the Board; it evidences no intent to change the unmistakable reference to issuance of a compensation order to a reference to mere entitlement (or even payment without an award).

Likewise, § 10(h)(1) provides 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 therefore been subject to the much lower previous limits of employer liability (maximum rate $70 a week, minimum $18, under § 6(b) as most recently theretofore amended in 1961). This 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*" after the amendments, in its opening clause describing what is subject to the post-1972 "adjust[ment]," and to compensation that "*was 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 "apparently used . . . to mean the same thing" in § 10(h)(1), 625 F.3d at 1207 (Pet. App. 7).

Just as all agreed until the court of appeals's decision, the Act consistently uses the words "award" and "awarded" to refer to the filing of a compensation order under § 19(e) that makes "the award." The other uses of those terms on which the court of appeals relied provide no grounds for taking "newly awarded" in § 6(c) to refer to the time of anything other than the filing of a first award (uncontested or after ALJ litigation).

B. Just as "Entitled to Compensation" in § 33(g) of the Act Could Not Be Read to Mean "Awarded Compensation," a Claimant Cannot Be Considered to Have Been "Awarded Compensation" Within § 6(c) When He or She Is Entitled to It But No Award Has Been Filed.

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 term according to the natural meaning of the quoted phrase, 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 substitution of another concept for 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.

The proposition this Court there rejected – that "person entitled to compensation" could be read to encompass only claimants receiving compensation or having an award of compensation at the relevant time – is the very converse of that advanced by the court of appeals. *Cowart*, 505 U.S. at 476. By a parity

of reasoning, 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 that a legal document *establishing* an entitlement or liability issue. Just as "entitled to compensation" cannot be read to mean "awarded or receiving compensation," so "newly awarded compensation" cannot be read as "newly entitled to compensation." Although of course *Cowart* did not address § 6(c), it addressed the unambiguous difference between "entitle[ment]" and "award" or "payment." The present issue should be controlled by *Cowart*'s recognition of that plain distinction.

C. The Act's Various Provisions Determinative of the Benefit Rates Payable Do Not Have the Singular Focus on the Time of the Injury, or of Commencement of First Disability, Posited by the Court Below.

The court below also justified its "holding that an employee is 'newly awarded' compensation when he first becomes disabled" on the ground that it

> . . . accords with the structure of the LHWCA, which identifies the time of injury as the appropriate marker for other calculations relating to compensation. For instance, the Act provides that the employee's average weekly wage – the starting point for determining compensation – is calculated at the

> time of injury. *See* 33 U.S.C. § 910. The employee's residual wage-earning capacity – used to offset the average weekly wage in cases of partial disability – is also calculated [*sic*; converted to its equivalent] at the time of injury. *See id*. § 908(c)(21), (e); *Johnston v. Dir., Office of Workers' Comp. Programs*, 280 F.3d 1272, 1277 (9th Cir. 2002). To 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.

625 F.3d at 1207 (Pet. App. 8). On the contrary, Congress used different terms, establishing different determinants, in several of the provisions affecting the rates payable.

The average weekly wage calculation under § 10 of course focuses on "the time of the injury." Section 8(h), the Act's provision for determining the worker's residual earning capacity in partial-disability cases under § 8(c)(21), (e), however, is silent on the relevant time; the cited *Johnston* decision is one of many in which the courts of appeals have held that the earning capacity once the claimant can return to some work, often several or more years after the injury, should be converted to its time-of-injury equivalent for comparison to the § 10 figure, so as not to understate the loss of earning capacity as a result of intervening inflation. But nothing in the statute explicitly so provides. The only other provisions determinative of weekly rates payable, besides § 6(b)-(c), are the

inflation-adjustment features of § 10(f), (h)(1), and (h)(3), added in 1972 and tweaked in 1984. Sections 10(f) and (h)(3) provide for annual adjustments in compensation for permanent total disability or death; the former, as enacted in 1972, was limited to cases of such disability or death "ar[ose] out of injuries sustained after" its enactment (1972 Amendments, *supra* n.2, § 11, 86 Stat. at 1258. Section 10(h)(3) made that provision applicable as well to post-1972 compensation in pre-1972-injury cases, with the extra liability borne by an industry-financed fund and appropriations. *Id*.[17] But § 10(h)(1), providing for the more substantial *initial* adjustment to benefits capped by the pre-1972 limits of § 6(b) (and, for death cases, § 9(e)), used a critically different determinant: whether the "permanent total disability or death . . . commenced or occurred" prior to enactment of the amendment. Section 10(h)(3) thus conforms to the "pattern" described by the court below, but § 10(h)(1) does not. The variation in the terms of these provisions has been given effect by recognition – at the urging of the Director – that different determinants apply to their applicability (as well as that their references to the *enactment* date of the 1972 amendments, rather than their effective date thirty days later, dictates the critical dividing line). *E.g.*, *Director, OWCP v. Bath*

[17] Although the explicit limitation to post-1972-injury cases was dropped from § 10(f) when it was amended in 1984, § 10(h)(3) continues to limit § 10(f)'s imposition of liability on *employers* to such cases.

Iron Works Corp., 885 F.2d 983, 991 (1st Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990); *Petro-Weld, Inc. v. Luke*, 619 F.2d 418, 421-23 (5th Cir. 1980).

The annual-adjustment feature of § 10(f) as well is a departure from the supposedly unvarying "pattern" of basing compensation on circumstances at the time of the injury. Its placement in § 10 (like that of § 10(h)), entitled "Determination of Pay," reflects its function: to allow the continuing compensation in the most serious and long-term cases to reflect the *current* loss of income resulting from the injury, years after its onset, by reference to increases in wage levels generally since the time of the injury.

The several provisions of the Act whose application goes into determining the applicable rate for a particular period of disability are not limited to the average-weekly-wage and residual-earning-capacity provisions of § 10(a)-(e) and § 8(h). Some of the others – not uniquely § 6(c) – do not make the time of injury determinative, but specify varying events as those whose timing is critical. Section 10(h)(1) in particular "designat[es]" the national average wage for FY 2003 as the worker's average wage at the time of the injury in pre-1972 permanent total disability and death cases, for purposes of post-1972 benefits, even where the injury occurred decades earlier when the worker's earnings were a small fraction of that current average. The Act creates no unvarying "pattern" of basing everything on the time of injury, much less of basing it on the time of onset of *some* disability for which the

worker is entitled to compensation (sometimes years after the injury that leads to such onset).

Even if there were an all-inclusive pattern of determining benefits by reference to circumstances at the time of the onset of first disability, from which § 6(c) was the sole departure, that would be an insufficient ground for denying effect to the departure, in the absence of strong reasons to conclude that it was inadvertent. In *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), the Court considered whether the 1972 version of § 6 imposed a maximum rate on death benefits under the Act. The Director contended that the 1972 version of what is now § 6(c) should be read to make the § 6(b)(1) maximum applicable to death cases, relying on the pattern maintained under the Act from its inception through three previous amendments, which effectively imposed the same rate limit on death benefits as on disability compensation; on the "assumed . . . congressional intent to avoid disparate treatment"; on his perception that failure to read the statute to impose any upper limit on death benefits would produce "an absurd and discriminatory consequence"; and on an unelaborated statement in a sentence of the drafting Congressional committee's report. *Id*. at 35-47 & nn.8, 15. The Court rejected the arguments: "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said[.]" Congress picked up its pen again in 1984 and amended § 6(b)(1) to its present form, applying maximum rates explicitly to

death and disability cases alike. That was properly a legislative function. *Cf. Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 280 (1980) (rejecting position of the Board, Director, and the court of appeals that worker who lost substantial part of his earning capacity because of "scheduled" injury under § 8(c)(1)-(19) could opt out of the schedule and recover instead compensation based on partial loss of earning capacity under § 8(c)(21); "Respondents suggest two reasons why th[e prior] settled construction is erroneous. They submit that it does not fulfill the fundamental remedial purpose of the Act and that it may produce anomalous results that Congress probably did not intend. The first submission is not entirely accurate; the second, though theoretically correct, has insufficient force to overcome the plain language of the statute itself.").

Finally, in any event, the time of injury, the factor the court below found the consistent focus of the benefit-rate determinants, is not even the same time that is determinative of the § 6(b) maximum according to the Board, the Director, and the court of appeals. Their rule is instead that it is the time of *onset of disability*, or *entitlement*, that is critical – even though that may be years after the injury, as in the case in which the Board first held that it is the time of onset of disability, not injury, that determines the applicable year's maximum (*Kubin v. Pro Football, Inc.*, 29 Ben. Rev. Bd. Serv. (MB) 117, 122 (1995) (five-year difference)). There is no other benefit-rate provision in the Act that makes that the standard,

any more than there is any other that makes the time an award is filed the critical factor. The Director's and court of appeals's "structure" and "pattern" reasoning does not even support their time-of-*commencement-of-disability* rule.

D. Congress Knew How to Make the Time of Injury, or of Onset of Disability and Entitlement, Determinative, as It Did in Other Provisions Enacted at the Same Time as § 6(c).

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* naturally and unambiguously provide the determinant the court below read into "newly awarded" in § 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). "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Surely that presumption is all the stronger where Congress uses different terms, with different established meanings, in the related provisions, so that reading the one section's standard

into the other would require first that its own different terms be read out. Congress's use of a phrase in § 6(c) with a completely different natural signification from that of the readily available terms of §§ 10(h)(1) and 33(g) forecloses reading it as if they had used one of those formulations. The § 6(b) limit for FY 2007, "during" which Roberts was "newly awarded compensation," governs all his compensation.

E. Application of the "Newly Awarded Compensation" Standard Produces No "Inequitable" Results.

The court of appeals added that it believed the natural reading of "newly awarded" "would have the potential for inequitable results" in making the claimant's entitlement vary with delay in entry of an award. It acknowledged Roberts's point that such variation "encourages employers to expedite [entry of an award] rather than delay the process," but reasoned that this "argument is undercut by the fact that section 14[(e)] of the LHWCA already provides penalties for delay by an employer." 625 F.3d at 1208 (Pet. App. 9 n.1). Even if, contrary to *Cowart*, the wisdom or fairness of the result of the statutory terms were legitimately open to consideration, the fact is that § 14(e) *in terms has no application* to any case in which the employer files a one-page form under § 14(d), as Sea-Land did in the present case, stating that it "controverts" the claimant's entitlement (even, according to the Board, if the notice does not state any good-faith or colorably legally sufficient

ground, but is demonstrably pretextual (*Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 38 Ben. Rev. Bd. Serv. (MB) 47 (2004)). Sadly, it thus serves as no disincentive at all to employers' delay of proceedings, and payment, under the Act. Neither in this case nor in *Boroski*, *supra* at p. 20 – in which it took six years from the onset of totally disabling blindness for the claimant to secure the award and any payment at all – was the employer liable for any additional compensation for delay under § 14(e).

Nor will application of the clear meaning of the statutory terms of § 6(c) have harsh or incongruous 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. The court's concern for potential inequitable results if the plain meaning of the language of § 6(c) is followed, is misplaced. Imposing a cost on an employer that delays the payment of compensation (or, where it does pay at least something without an award, nevertheless delays the embodiment of a claimant's so-far-acknowledged rights in a continuing award, summarily enforceable until and unless modified and subject to 20-percent augmentation if not paid when due) 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 neither undercuts

the consistent result of applying § 6(c) as written, nor renders the consequence of its plain meaning either unnecessary or duplicative, as the court reasoned.

If § 19(c)'s directions for prompt issuance of an award on an undisputed claim as soon as the employer has been notified of it, and for prompt hearing and decision in any case in which the district director cannot bring the parties to early agreement on the claimant's rights to date and issue an award of continuing compensation, were a reality, the distinction between the fiscal year in which disability commences and that in which the claimant is first awarded compensation would make little difference. It would affect only those maximum- and minimum-rate cases in which the disability began shortly before the end of a fiscal year, so that the award was not entered until the following year; and even in those cases, its effect would be only the increase of a few percent in the "applicable" national-average figure from one year to the next. But in practice the district directors rarely issue compensation orders on uncontested claims in which the employer is making payments, and never with the promptness directed by the final sentence of § 19(c); and many ALJs frequently take over a year, and occasionally several years, after hearings (which are now routinely preceded by months or more of formal discovery) to file their compensation orders with the district directors. Roberts was relatively fortunate in having an award less than a year and a half after Respondent Kemper had stopped paying any compensation and providing any

medical benefits. *Cf. Boroski supra*. Section 19(c) nevertheless establishes the administration that the Act's provisions contemplate. *See* H.R. CONF. REP. NO. 98-1027, *supra* at p.21.

The court of appeals recognized Roberts's argument that making the time the award is entered determinative of the applicable maximum "encourages employers to expedite administrative proceedings rather than delay the process," but reasoned that this "argument is undercut by the fact that section 14[(e)] of the LHWCA already provides penalties for delay by an employer." 625 F.3d at 1208 (Pet. App. 9 n.1). An employer can avoid paying the augmented compensation 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 is fully consistent with the purposes of the Act.

In *Rasmussen*, in *Potomac Electric*, and in *Cowart*, the Court was told that the clear terms of the statute worked manifest injustice or were inconsistent with underlying basic purposes or patterns of the Act as a whole. It found such claims insufficient to warrant reading ambiguity into the statutory terms where there was none. Anything that may serve as a disincentive for employers and their insurers to the delays that often render the Longshore Act system ineffective will serve the central purpose

of the basic workers'-compensation bargain – to provide its limited forms of relief *promptly* during an injured worker's disability, in lieu of the potential for more complete indemnity after the delays and subject to the limitations of tort-liability litigation.

The decisions of the courts in *Wilkerson* and *Boroski* not only reflect the natural meaning of the words of the statute, but also result 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 Court should reverse the decisions below, and hold that Roberts's compensation is subject to the § 6(b)(1) limit applicable during FY 2007, when he was first "awarded compensation," rather than that for FY 2002.

Respectfully submitted,

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RELEVANT STATUTORY PROVISIONS

Parts of §§ 8, 10, 14, 18, 19, 22, and 33 of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 906, 908, 910, 914, 918, 919, 922, and 933, bear indirectly on the meaning of § 6(c). They provide:

COMPENSATION FOR DISABILITY

Sec. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. . . .

(b) Temporary total disability: In case of disability total in character but temporary in quality 66-2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66-2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

. . .

(12) Fourth finger lost, fifteen weeks' compensation.

. . .

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in th[is] class of disability, the compensation shall be 66-2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

(22) In any case in which there shall be a loss of, or loss of use of, more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

. . .

DETERMINATION OF PAY

Sec. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

. . .

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of –

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b) of this Act, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

. . .

(h)(1) Not later than ninety days after the date of enactment of this subsection [October 27, 1972], the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection, shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date, and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date. . . . Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems

relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

(3) For the purposes of subsections (f) and (g) of this section an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection, shall be considered to have occurred on the day following such date.

PAYMENT OF COMPENSATION

Sec. 14. (a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 12, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner

determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controvered, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section. . . .

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum

thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payment has been issued by the Board or court.

. . .

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

DEFAULTED PAYMENT

Sec. 18. (a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as

provided in section 19, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. . . . Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. . . . No fee shall be required for filing the supplementary order nor for entry of judgment thereon. . . .

PROCEDURE IN RESPECT OF CLAIMS

Sec. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant),

whom the deputy commissioner considers an interested party, that a claim has been filed. . . .

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

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5. Any such hearing shall be conducted by an administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by

registered mail or by certified mail to the claimant and to the employer at the last known address of each.

. . .

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board. . . .

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

. . .

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. . . .

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred. . . . If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

MODIFICATION OF AWARDS

Sec. 22. Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy

commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 33. (a) If on account of a disability or death for which compensation is payable under this Act, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against

such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

. . .

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b) the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. . . .

(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative).

. . .