No. 10-1399

IN THE

Supreme Court of the United States

DANA ROBERTS,

Petitioner,

v.

SEA-LAND SERVICES, INC., *et al.*

Respondents.

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

BRIEF FOR RESPONDENT SEA-LAND SERVICES, INC.

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December 14, 2011

QUESTION PRESENTED

Under Section 6(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 906(c), an employee's disability benefits are capped at twice the national average weekly wage for the year in which the employee is "newly awarded compensation" under the statute.

The question presented is: whether an employee is "newly awarded compensation" when he becomes entitled to compensation under the statute or only if and when he obtains an administrative order formally recognizing his right to compensation.

CORPORATE DISCLOSURE STATEMENT

Petitioner started his employment with respondent Sea-Land Services, Inc., a wholly owned subsidiary of CSX Corporation, in 1994. At the time of the events giving rise to this case in 2002, petitioner was employed by CSX Lines of Alaska, LLC, an (indirectly) wholly owned subsidiary of CSX Corporation and a corporate successor to Sea-Land. CSX Lines was subsequently incorporated and changed its name to Horizon Lines, Inc. While CSX Corporation has divested itself of any ownership interest in Horizon Lines, CSX Corporation contractually retains liability for petitioner's disability benefits. Both CSX Corporation and Horizon Lines are publicly traded. Neither company has a parent corporation, and no publicly held company owns 10% or more of either company's stock.

Although we do not represent respondent Lumbermens Mutual Group (formerly Kemper Insurance Company), we understand that it is a mutual insurance company owned by its policyholders, from its incorporation in 1912 and continuing to today, and that it has no parent company and no shareholders.

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INTRODUCTION

The Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. § 901 *et seq.*, caps an employee's disability benefits at twice the national average weekly wage for the year in which the employee is "newly awarded compensation" under the statute. § 906(c). The Director of the Office of Workers' Compensation Programs, who is charged with administering the Act, has determined that an employee is "newly awarded compensation" for purposes of this provision when he becomes disabled and thus entitled to compensation under the statute. As the Director has explained, this interpretation is consistent with the statutory text, maintains consistency in the statute's compensation scheme, and ensures that similarly situated employees receive the same benefits.

Petitioner Roberts asks this Court to reject the Director's interpretation based on the purported plain meaning of the words "newly awarded compensation," which he contends unambiguously refer to the time when an employee obtains an adjudicated order recognizing his right to compensation. Contrary to Roberts's contention, however, the term "award," standing alone, is necessarily ambiguous and cannot be properly understood without considering the context in which it appears and the broader statutory scheme. By instead focusing on the words in isolation, contrary to basic tenets of statutory construction, Roberts's interpretation wrenches Congress's words from their statutory context, does serious violence to the Act's structure, and produces unworkable, arbitrary, and inequitable results that Congress could not have intended. Roberts's interpretation is deeply flawed and should be rejected.

STATUTORY PROVISIONS

Section 6 of the Longshore Act, 33 U.S.C. § 906, is set out below. Other pertinent statutory and regulatory provisions are contained in an addendum to this brief.

> § 906. Compensation
>
> (a) Time for commencement
>
> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 907 of this title: *Provided, however*, That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability.
>
> (b) Maximum rate of compensation
>
> (1) Compensation for disability or death (other than compensation for death required by this chapter 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 910 of this title 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 for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.

(c) Applicability of determinations

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

STATEMENT OF THE CASE

A. Statutory Background.

1. The Longshore Act establishes a uniform federal compensation scheme for longshoremen and harbor workers disabled or killed on navigable waters of the United States. § 903(a). Originally enacted in 1927, the Act was prompted by this Court's holding that state workers' compensation laws could not constitutionally extend to such employees. *Ne. Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256–58 (1977); *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 119–22 (1962).

Like workers' compensation statutes generally, the Longshore Act "represents a compromise between the competing interests of disabled laborers and their employers." *Potomac Elec. Power Co.* v. *Dir., OWCP*,

449 U.S. 268, 282 (1980). Employees exchange potentially higher payouts and common-law remedies for "prompt and certain recovery." *Id.* at 281–82 & n.24. Employers, in turn, receive "definite and lower limits on potential liability," with "their contingent liabilities identified as precisely and as early as possible," while forfeiting common-law defenses to liability. *Id.* at 281–82; see also *Dir., OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 131 (1995); *Wash. Metro. Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 931 (1984).

2. Computing a disabled employee's compensation under the Longshore Act begins by determining his wages at the time of injury. Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." § 902(10). As a result, the Act directs that "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." § 910.

"Once the 'average weekly wage' is determined, a claimant's [disability] benefits are calculated under § 8 of the Act." *Bath Iron Works Corp.* v. *Dir., OWCP*, 506 U.S. 153, 157 (1993). Section 8 classifies disabilities along two axes according to whether they are (a) total or partial, and (b) permanent or temporary, the combination of which yields four separate categories of entitlement to disability benefits. § 908(a)–(e); *Potomac Elec.*, 449 U.S. at 273–74 & n.8.

Section 8 prescribes the method for calculating benefits for each category of disability. Totally disabled workers receive two-thirds of their average weekly wage at the time of injury throughout the period of disability. § 908(a), (b). For permanent partial disabilities, if the injury is one identified in the statutory schedule, compensation is also set at

two-thirds of the employee's average weekly wage at the time of injury, but is limited to a specified number of weeks. § 908(c)(1)–(20); *Potomac Elec.*, 449 U.S. at 273–74 & n.8. Employees with unscheduled permanent partial disabilities or with temporary partial disabilities are entitled to two-thirds of the difference between their average weekly wage at the time of injury and their residual wage-earning capacity thereafter. § 908(c)(21), (e); *Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 126–27 (1997).

3. Once an employee's basic compensation rate is calculated under Section 8, the inquiry turns to Section 6, which prescribes the Act's maximum and minimum compensation rates. Until 1972, these were fixed dollar amounts that Congress adjusted periodically, with the maximum ranging from $25 to $70 per week and the minimum ranging from $8 to $18 per week. See *Dir., OWCP* v. *Rasmussen*, 440 U.S. 29, 31–32, 36 n.8 (1979); Act of Mar. 4, 1927, ch. 509, § 6(b), 44 Stat. 1424, 1426; Act of June 24, 1948, ch. 623, § 1(b), 62 Stat. 602, 602; Act of July 26, 1956, Pub. L. No. 84-803, § 1(b), 70 Stat. 654, 655.

In 1972, Congress amended the Act, in part to address the fact that the statute's fixed maximum and minimum compensation rates had "lost real value as inflation exacted its annual toll." *Rasmussen*, 440 U.S. at 32; see also *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 82–83 & n.7 (1980); *Caputo*, 432 U.S. at 261–65 & n.18. To remedy this problem, the Act now ties compensation limits to the national average weekly wage, setting the maximum rate at 200% of the "applicable national average weekly wage," § 906(b)(1), and the minimum rate at 50% of that wage, § 906(b)(2).

The national average weekly wage is determined annually by the Secretary of Labor and applies for

the fiscal year running from October 1 to September 30. § 906(b)(3). Section 6(c), in turn, specifies that a given fiscal year's national average weekly wage applies to (a) "employees or survivors currently receiving compensation for permanent total disability or death benefits," and (b) "those newly awarded compensation during such period." § 906(c); see also *Rasmussen*, 440 U.S. at 41–45. For employees and survivors covered by Section 6(c)'s "currently receiving" clause (*i.e.*, those receiving compensation for permanent total disability or death benefits), the applicable maximum rate increases annually, and their basic compensation rate is also adjusted upward each year. § 910(f). For all others, the maximum rate is fixed permanently at the level at which it is first properly applied, and that amount does not change from year to year with the Secretary's annual redeterminations (a feature that applies under either of the competing interpretations of Section 6(c) advanced by the parties here). See *Reposky* v. *Int'l Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), *available at* 2006 WL 3101750, at *12–13.

4. The Act requires employers to pay the benefits described above "periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." § 914(a). Unless it disputes liability, an employer must begin making payments within two weeks after learning of the injury, § 914(b), and notify the Department of Labor's district director that it has done so, § 914(c).[1] This is

[1] Acting under the Director of the Office of Workers' Compensation Programs, district directors are responsible for day-to-day administration of the Act. The statute speaks of "deputy commissioners," but the agency has replaced that term

so regardless of whether the employee has filed a claim. §§ 913(a), 914(a). Accordingly, in many cases, "no administrative proceedings ever [take] place, and no award [is] ever ordered by the [district director]." *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529, 534 (1983); see also *id.* at 536–37; *Am. Stevedores* v. *Porello*, 330 U.S. 446, 455–56 (1947).

Although not necessary to trigger the employer's obligation to pay compensation, an employee may file a claim with the district director within one year of the injury or, if the employer is voluntarily paying compensation, within one year of the last payment. §§ 919(a), 913(a). If neither party requests a hearing on the claim, the district director may resolve the matter informally and enter an order either rejecting the claim or awarding compensation. § 919(c), (e); 20 C.F.R. § 702.311 *et seq.* "[I]n practice," however, "many pending claims are amicably settled through voluntary payments without the necessity of a formal order by the [district director]." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975).

If the parties cannot resolve the matter informally, the case is referred to an administrative law judge (ALJ) for a formal hearing. § 919(c), (d). After the hearing, the ALJ issues a "compensation order" either "rejecting the claim or making the award." § 919(e). Appeals from a compensation order may be taken to the Benefits Review Board, § 921(b)(3), and from there to the court of appeals for the circuit in which the injury occurred, § 921(c).

B. Proceedings Below.

1. Roberts was injured on February 24, 2002, when he slipped on a patch of ice while working as a

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with "district directors" for administrative purposes. 20 C.F.R. §§ 701.301(a)(7), 702.105.

gatehouse dispatcher in Dutch Harbor, Alaska. Pet. App. 34, 37. He sought medical treatment shortly thereafter but continued working until March 11, 2002. *Id.* at 37–38. His injuries ultimately led to surgeries on his right shoulder and neck. *Id.* at 79–80. The employer voluntarily paid Roberts temporary total disability benefits for various periods from the time he stopped working through May 17, 2005. *Id.* at 101. The parties then disputed liability and the matter was referred to an ALJ for a hearing in January 2006. *Id.* at 34.

2. The ALJ issued his decision and order in October 2006. Pet. App. 33. He found that Roberts had suffered disabling injuries to his neck and right shoulder in the course of covered employment and was thus entitled to benefits. *Id.* at 65–90. He then calculated the compensation that Roberts was due. He began by determining that Roberts's average weekly wage at the time of the injury was $2,853.08. *Id.* at 93–97. Next, he found that Roberts reached maximum medical improvement on July 12, 2005, *id.* at 58, 99, and that although he could not return to his former job, suitable alternative employment was available to him as of October 10, 2005, *id.* at 104–07. This meant that Roberts was temporarily totally disabled from March 11, 2002, through July 11, 2005; permanently totally disabled from July 12, 2005, through October 9, 2005; and permanently partially disabled thereafter. *Id.* at 102, 107–08.

These findings, in turn, dictated Roberts's basic compensation rates: $1,902.05 for periods of total disability (two-thirds of his average weekly wage of $2,853.08) and $1,422.05 for periods of permanent partial disability (two-thirds of the difference between his average weekly wage and his residual earning capacity of $720). See § 908(a)–(c).

The maximum weekly compensation rate at the time Roberts became disabled was $966.08, or twice the national average weekly wage for fiscal year 2002. Pet. App. 102–03. Because Roberts's basic compensation rates exceeded this amount, the ALJ held that he was entitled to $966.08 per week for his periods of temporary total and permanent partial disability. *Id.* at 107–08. For the few months in 2005 during which Roberts was permanently totally disabled, the ALJ ordered weekly payments of $966.08 "plus any increases required under section 6." *Id.* at 107; see *supra*, 6 (annual compensation adjustments required for permanent total disability). He also ordered "interest on each unpaid installment of compensation from the date the compensation became due," and credited all compensation that had been paid voluntarily. Pet. App. 108.

Roberts moved for reconsideration seeking an increase in the maximum compensation rate applied to his claim. Pet. App. 28–32. While the motion was pending, the Benefits Review Board decided *Reposky* v. *International Transportation Services*, 40 Ben. Rev. Bd. Serv. (MB) 65 (2006), *available at* 2006 WL 3101750. Adopting the position advanced by the Director of the Office of Workers' Compensation Programs, the Board in *Reposky* held that an employee is "newly awarded compensation" under Section 6(c) when "the disability commences," which is generally at the time of injury. *Id.* at *12–13. The Board agreed with the Director that this interpretation is consistent with the statute's text, "maintains consistency in the statute and yields rational results." *Id.* at *13. Roberts acknowledged that *Reposky*

foreclosed his argument. Pet. App. 29–32. The ALJ agreed and denied the motion. *Id.*[2]

3. The Benefits Review Board affirmed the ALJ's orders in their entirety. Pet. App. 14–27. The Board declined Roberts's request to overrule *Reposky* and confirmed that the maximum rate applicable to his disability benefits is twice the national average weekly wage for fiscal year 2002, when Roberts became entitled to compensation, not fiscal year 2007, when the ALJ issued his order. *Id.* at 18–20.

4. The court of appeals affirmed in relevant part. Pet. App. 12–13. Agreeing with the Director and the Board, the court held that an employee is "'newly awarded compensation' within the meaning of section 6(c) when he first becomes entitled to compensation." *Id.* at 9–10. The court rejected Roberts's contention that the word "award" in the Longshore Act invariably refers to a compensation order. To the contrary, the court observed, Congress used the word "award" variously in the Act, sometimes to mean "a formal compensation order issued in the course of administrative adjudication," *id.* at 6, other times to "refer to an employee's entitlement to compensation under the Act generally, separate and apart from any formal order of compensation," *id.* at 6–8 (citing §§ 908(c)(20), (22), 910(h)(1)).

These latter provisions, the court explained, could not refer to a compensation order because they

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[2] In calculating benefits for the period from July 12, 2005, through October 9, 2005, the district director had mistakenly applied the fiscal year 2002 maximum for the entire period. From October 1 to 9, 2005, however, Roberts was permanently totally disabled and thus was entitled to the fiscal year 2006 maximum rate of $1,073.64 under Section 6(c)'s "currently receiving" clause. The ALJ corrected this error. Pet. App. 30–31.

address the compensation to which an employee is entitled under the Act, and "employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." Pet. App. 6. Moreover, in Section 33(b) Congress expressly defined "award" to mean a compensation order for purposes of that subsection only. *Id.* at 8. This, the court reasoned, implies that "the meaning of the term 'award' in other sections is not limited to a formal compensation order," because otherwise "the specific definition in section 33 would be unnecessary." *Id.*

Because the word "award" has different meanings in different provisions of the Act, the court examined the statutory context to determine which meaning Congress intended in Section 6(c). The court observed that Section 6 "uses 'awarded' in the same context as sections 8 and 10," in that all three provisions "gover[n] determinations of compensation under the Act." Pet. App. 7. The court thus concluded that the word "awarded" in Section 6(c) should be interpreted "[c]onsistent with the meaning of 'awarded' in sections 8 and 10" to refer to an employee's entitlement to compensation under the Act. *Id.*

The court further concluded that Section 6(c) must be read "'with a view to its place in the overall statutory scheme.'" Pet. App. 8 (alteration omitted). Because the Act "identifies the time of injury as the appropriate marker for other calculations relating to compensation," the court concluded that interpreting Section 6(c) to turn on the time when an employee becomes disabled "accords with the structure of the [Act]," whereas Roberts's interpretation "depart[s] from the Act's pattern of basing calculations on the time of injury." *Id.* at 8–9.

The court also noted that Roberts's interpretation would produce "inequitable results" because two

otherwise identically situated employees "could be entitled to different amounts of compensation depending on when their awards are entered." Pet. App. 9 n.1. The court rejected Roberts's argument that this arbitrary result was necessary to "encourag[e] employers to expedite administrative proceedings," noting that the Act "already provides penalties for delay by an employer." *Id.*

Accordingly, the court of appeals held that Roberts was "newly awarded compensation" in fiscal year 2002, when he became disabled and thus entitled to compensation under the Act, and that his compensation was therefore capped based on the national average weekly wage for that year rather than the year in which his compensation order issued. Pet. App. 9–10.[3]

SUMMARY OF ARGUMENT

The decision below is correct and should be affirmed. As both the Director of the Office of Workers' Compensation Programs and the Benefits Review Board have concluded, an employee is "newly awarded compensation" for purposes of Section 6(c) when he becomes entitled to benefits under the Act. That interpretation is fully consistent with Section 6(c)'s text and, unlike Roberts's interpretation, accounts for Section 6(c)'s context and the structure of the Act's compensation scheme, provides a workable rule that applies to the full range of circumstances in which compensation is required and

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[3] The court of appeals also held that Roberts was "currently receiving compensation" during his period of permanent total disability in 2005, and that the applicable maximum rate for that period was therefore based on the national average weekly wage for fiscal year 2005. Pet. App. 10–13. That portion of the court's decision is not at issue here.

leaves no unexplained gap, and produces rational and equitable results. Roberts's attempt to read Section 6(c) in isolation violates basic principles of statutory interpretation and should be rejected.

I. A. Contrary to the central premise underlying Roberts's argument, the word "award" in Section 6(c), standing alone, does not have a plain or unambiguous meaning that decides this case. Although the word "award" often refers to a benefit that is formally assigned in an adjudication, it also often refers to a statutory entitlement, as when a speaker says that a statute "awards" compensation or some other benefit to a person. This latter meaning is particularly apt with respect to the Longshore Act, which requires employers to pay compensation to disabled employees regardless of whether the employee files a claim or obtains a compensation order.

Congress used the word "award" in both of these senses in various provisions of the Longshore Act. Sections 8 and 10 in particular repeatedly use the word "award" to refer to an employee's entitlement to compensation under the statute, even without a compensation order. Moreover, Congress specifically defined the word "award" to mean a compensation order only for purposes of Section 33(b), which provides for an assignment of rights when an employee accepts compensation under an "award" in a compensation order. If the word "award" already bore that meaning uniformly throughout the Act, as Roberts contends, this section-specific definition would be superfluous.

Once it is recognized that Congress did not use the word "award" uniformly in the Longshore Act, the term, standing alone, is necessarily ambiguous, and its meaning in a given provision can be determined only by examining the provision's context and its role

in the statutory scheme. By itself, Section 6(c)'s text does not answer the question presented.

B. The context of Section 6(c) makes clear that an employee is "newly awarded compensation" when he becomes entitled to benefits under the Act. Like Sections 8 and 10—which determine an employee's basic compensation rate before it is capped—Section 6 addresses the amount of compensation to which an employee is entitled under the Act. Nothing in the provision's context suggests that Congress intended the maximum compensation rate to turn on the date when a compensation order is entered.

The structure of the Longshore Act confirms this interpretation. The Act's compensation scheme is keyed to the employee's wages at the time of injury. Under Section 10, the employee's average weekly wage at the time of injury "shall be taken" as the basis for computing compensation. And under Section 8, the employee receives a specified percentage of his average weekly wage at the time of injury as his basic compensation rate. Interpreting Section 6(c) to turn on the time when an employee becomes disabled and thus entitled to compensation best harmonizes Section 6 with the Act's other basic compensation provisions. Nowhere, by contrast, did Congress provide that an employee's measure of compensation depends on the arbitrary date when a compensation order is entered.

Tying the maximum compensation rate to the date of a compensation order would also be unworkable. In most cases, employers voluntarily pay compensation without a compensation order. If Section 6(c) turned on the date when a compensation order issues, then the Act would be silent as to the applicable maximum compensation rate for these cases, leaving a gaping hole in the statute's coverage. Even in cases where a

compensation order is issued, an employer would not be able to determine the appropriate compensation rate at the time it must begin paying compensation, because it would not know the year in which the compensation order will issue or the national average weekly wage for that future year. Indeed, even where the employer immediately and voluntarily begins paying precisely the amount required by the Act, an employee would be able to raise his compensation rate merely by filing a meritless challenge to that amount—a challenge that would not be adjudicated and rejected in a formal compensation order until a future year, at which point a higher maximum rate would be in effect. Tying the maximum rate to the date of disability, by contrast, yields a rule that is immediately capable of application in every case and is not subject to manipulation.

Roberts's interpretation, moreover, would produce arbitrary and inequitable results: Two employees who earned the same wage and became disabled on the same day would be subject to different maximum compensation rates depending solely on the happenstance of whether or when they obtained a compensation order. This result cannot be justified as a means of discouraging employer delay, as the Longshore Act already contains adequate remedies for employers who improperly delay payment, and increasing the maximum compensation rate in the small and random fraction of cases in which the cap happens to apply would be an incoherent way to address the problem.

Reading Section 6(c) to turn on the date when an employee becomes disabled is further supported by analogous state workers' compensation laws, the overwhelming majority of which tie the maximum compensation rate to the state's average weekly wage

at the time of injury. Nothing in the Act's purpose or history suggests that Congress intended to depart from this standard approach.

II. To the extent any ambiguity remains after applying the usual tools of statutory interpretation, the Director of the Office of Workers' Compensation Programs, as the official charged with administering the Act, is entitled to resolve that ambiguity, and his reasonable interpretation is entitled to *Chevron* deference. The Director has power to issue binding interpretations of the Longshore Act and has exercised that power in a manner that warrants judicial deference. His interpretation is not a mere litigating position, but rather represents the official position he has taken before the Benefits Review Board in an exercise of his delegated lawmaking powers, as well as the longstanding position governing district directors' informal adjudication of claims. At a minimum, the Director brings a body of experience and informed judgment to the question, and the Court should defer to his interpretation based on its power to persuade.

ARGUMENT

I. AN EMPLOYEE IS "NEWLY AWARDED COMPENSATION" UNDER SECTION 6(c) WHEN HE BECOMES ENTITLED TO COMPENSATION UNDER THE ACT.

The sole issue in this case is when Roberts was "newly awarded compensation" for purposes of Section 6(c), and thus which fiscal year's national average weekly wage governs his maximum compensation rate. In accord with the position urged by the Director and adopted by the Benefits Review Board in *Reposky*, the ALJ, the Board, and the court of appeals all held that Roberts was "newly awarded

compensation" in fiscal year 2002, when he became disabled and thus entitled to compensation under the Act. Roberts argues that he was "newly awarded compensation" in fiscal year 2007, when his compensation order was entered. According to Roberts, this conclusion is compelled by the plain language of Section 6(c) because the word "award" unambiguously refers to a compensation order and because Congress used the term in that sense uniformly throughout the Longshore Act.

Roberts is wrong. Although the word "award" often refers to a benefit that is assigned by administrative or judicial decree, it can also refer to an entitlement created by statute, separate and apart from any other official recognition of that entitlement. Congress used the word "award" in both senses in various provisions of the Longshore Act. Thus, the word "award," read in isolation, is necessarily ambiguous. To determine which meaning Congress intended in any particular provision, it is necessary to examine the specific context in which the word appears and its place in the broader statutory scheme. That analysis leaves little doubt as to which meaning Congress intended in Section 6(c): An employee is "newly awarded compensation" when he becomes disabled and thus entitled to compensation under the statute. Roberts's contrary interpretation ignores Section 6(c)'s role in the Act's compensation scheme, produces incongruous results, and should be rejected.

A. Standing Alone, The Text Of Section 6(c) Is Ambiguous As To When An Employee Is "Newly Awarded Compensation."

1. Contrary to Roberts's central contention, the word "award" does not have a single plain meaning that dictates the proper interpretation of Section 6(c). Cf. *Boroski* v. *DynCorp Int'l*, No. 11-10033, 2011 WL

5555686, at *17 (11th Cir. Nov. 16, 2011) (relying on the purported "plain reading" of Section 6(c)); *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997) (same).

Of course, the verb "award," particularly when used "in the litigation context," often means "'to give or assign by sentence or judicial determination.'" *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2526 (2010) (quoting *Black's Law Dictionary* 125 (5th ed. 1979) (alterations and emphasis omitted)). But the word has a broader semantic range: It is frequently used more generally to mean "to grant" or "to confer." See, *e.g.*, *New Oxford American Dictionary* 112 (3d ed. 2010) ("grant or assign"); *American Heritage Dictionary of the English Language* 125 (4th ed. 2009) ("To grant as merited or due"); 1 *Shorter Oxford English Dictionary* 160 (5th ed. 2002) ("Grant, assign"); *Webster's New Collegiate Dictionary* 79 (1977) ("to confer or bestow as being deserved or merited or needed"); *Webster's Third New International Dictionary* 152 (1971) ("to confer or bestow upon : GRANT, GIVE").

In this latter sense, the word "award" can be and often is used in reference to a legal entitlement created by statute. Just as a statute may "grant" or "confer" a right, so too may a statute "award" a legal entitlement. An electronic search of federal and state cases yields hundreds of examples in which courts, including this Court, have used the word "award" in this sense. See, *e.g.*, *Astrue*, 130 S. Ct. at 2526 ("the statute awards [attorney's fees] to the prevailing party"); *Connecticut* v. *Doehr*, 501 U.S. 1, 28 (1991) (Rehnquist, C.J., concurring in part and in judgment) ("mechanic's lien statutes award an interest in real property to workers who have contributed their labor"); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 271 (1988) (considering an Ohio "provision that

awards a tax credit" for sales of ethanol); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 456 n.12 (1982) (Blackmun, J., dissenting) ("the statute awards just compensation"); *Orr* v. *Orr*, 440 U.S. 268, 273 n.3 (1979) ("the current statutes award alimony to wives based not solely upon need"); *Reconstr. Fin. Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 171 (1943) ("[t]he statute awards the claim priority of payment"); *Thornley* v. *United States*, 113 U.S. 310, 314 (1885) ("the statute book is now bare of any enactment which awards to any officer of the navy . . . any increase of pay for length of service").[4]

It is thus perfectly acceptable English usage to say that the Longshore Act "awarded" compensation to Roberts when he became entitled to benefits under the Act. Indeed, courts have long characterized workers' compensation statutes as "awarding" compensation to disabled workers.[5] Cf. *Kasten* v. *Saint-*

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[4] *See also, e.g., Canady* v. *Crestar Mortg. Corp.*, 109 F.3d 969, 975 (4th Cir. 1997) (the "statute awards interest on damages"); *Goodrich* v. *Sec'y of Dep't of Health & Human Servs.*, No. 90-637V, 1991 WL 112205, at *1 (Cl. Ct. June 7, 1991) ("The statute awards compensation for" vaccine-related injuries); *Cavender* v. *Donovan*, 752 F.2d 1376, 1377 (9th Cir. 1985) (per curiam) ("the statute awards [unemployment benefits] to those who lost their employment"); *Shelvy* v. *Whitfield*, 718 F.2d 441, 446 (D.C. Cir. 1983) (Bazelon, J., dissenting) ("[t]he relevant statute awards credit for time spent in custody"); *Shands* v. *Tull*, 602 F.2d 1156, 1160 (3d Cir. 1979) ("the statute awards bonuses to states"); *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955) ("the statute awards the lease to the first qualified applicant"); *Associated Music Publishers, Inc.* v. *Debs Mem'l Radio Fund, Inc.*, 141 F.2d 852, 855 (2d Cir. 1944) ("The statute awards copyright protection"); *Barrett* v. *Commercial Credit Co.*, 296 F. 996, 998 (D.C. Cir. 1924) ("the statute awards a lien for work done or materials furnished").

[5] *See, e.g., Pac. Emp'rs Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 500 (1939) (the workers' compensation "statute

Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1332 (2011) (examining "contemporaneous judicial usage," among other things, to ascertain plain meaning). This usage is particularly well suited to the Longshore Act, which requires employers to pay compensation promptly without the compulsion of a compensation order. § 914(a); *Am. Stevedores*, 330 U.S. at 456 ("The employee thus receives compensation payments quite soon after his injury *by force of the Act*.") (emphasis added).

Thus, when used in reference to a statutory right, such as a right to compensation under a workers' compensation statute, the verb "award" means to grant, confer, or entitle. The phrase "newly awarded compensation" in Section 6(c) can therefore naturally be read to mean newly entitled to compensation. Although the phrase, standing alone, could also mean newly issued a compensation order, nothing in the plain meaning of the words Congress used dictates that interpretation. Read in isolation, the words comfortably bear either meaning. Cf. *Kasten*, 131 S.

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award[s] compensation for injuries to an employee"); *Johnson* v. *Merch's. Fertilizer Co.*, 17 S.E.2d 695, 697 (S.C. 1941) ("The Workmen's Compensation Statute awards damages for injuries received in the line and scope of employment."); *Kuczynski* v. *Humphrey*, 192 A. 371, 373 (N.J. 1937) ("The statute awards compensation for personal injuries suffered by accident arising out of and in the course of the employment, if disability results."); *Wasson Coal Co.* v. *Indus. Comm'n*, 143 N.E. 584, 585 (Ill. 1924) ("[t]he statute awards compensation where there is actual dependency at the time of the injury"); *Shaw's Case*, 141 N.E. 858, 859 (Mass. 1923) ("The statute awards compensation for loss of earning capacity caused by the injury as compared with the employee's average weekly wage."); *Taylor* v. *Swift & Co.*, 219 P. 516, 519 (Kan. 1923) ("Th[e] statute awards compensation for accidents and consequent injuries arising in the course of the workman's employment and because of it.").

Ct. at 1332 ("the three-word phrase, taken by itself, cannot answer the interpretive question").

2. Roberts is also mistaken that Congress consistently used the word "award" in the Longshore Act to refer to a compensation order. Congress used the word in that sense in some of the Act's provisions, to be sure. See, *e.g.*, §§ 913(a), 914(a), 919(c), 921(d), 933(b). As the court of appeals correctly recognized, however, in other provisions Congress used "award" to refer to an employee's entitlement to benefits under the Act, even without a compensation order. Pet. App. 6–7; cf. *Wash. Metro. Area Transit Auth.*, 467 U.S. at 934 (concluding that the word "employer" in Longshore Act Section 5(a) includes general contractors based on Congress's "use of the term 'employer' elsewhere in the Act").

Section 8, for example, repeatedly uses the word "award" to refer to entitlement to compensation. Section 8(c)(20) provides that "[p]roper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck." § 908(c)(20). Similarly, Section 8(c)(22) provides that "the award of compensation" for loss of multiple body parts shall be for each body part and that the "awards" shall run consecutively. § 908(c)(22). In both provisions, Congress used the word "award" to refer to the compensation to which an employee is entitled under the statute, regardless of whether the employee obtains a compensation order. That is clear from the structure of Section 8, which begins by directing that "[c]ompensation for disability shall be paid to the employee as follows," and then specifies the amount of compensation that "shall be paid" for different classes of disability. § 908(a)–(c). In context, it is clear that Congress used the word "award" in

Sections 8(c)(20) and (22) to refer to the amount of compensation an employee is entitled to be paid.

Moreover, a contrary interpretation would produce an inexplicable exception to the Act's mandate that compensation must be paid without a compensation order. § 914(a). Roberts seemingly embraces this anomalous result, contending that the "award" language in Sections 8(c)(20) and (22) "merely contemplate[s] that *awards will be entered*." Petr. Br. 30. Under that interpretation, however, an employer would have no obligation to pay compensation for serious disfigurement or loss of multiple body parts unless and until the employee obtained a compensation order. Roberts offers no reason to believe that Congress singled out these two forms of disability for disfavored treatment, and there is none. The court of appeals correctly concluded that "[b]y use of the term 'awarded,' Congress could not have meant 'assigned by formal order in the course of adjudication,' given that employers are obligated to pay such compensation regardless of whether an employee files an administrative claim." Pet. App. 6.

Section 8(d) likewise uses "award" to mean entitlement to compensation. It provides that "[i]f an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)–(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors." § 908(d)(1); see also § 908(d)(2). An employee may of course be "receiving compensation" without a compensation order. § 914(a). If "award" invariably meant a compensation order, as Roberts maintains, then the survivors of such an employee would not be entitled to the unpaid compensation due to the employee under the Act, because there would

be no "award," and hence no unpaid amount of the award, at the time of the employee's death. That contention has been soundly rejected. See, *e.g.*, *Wood* v. *Ingalls Shipbuilding*, *Inc.*, 28 Ben. Rev. Bd. Serv. (MB) 27 (1994), *available at* 1994 WL 186076, at *7 (per curiam) (holding that a survivor is entitled to benefits under Section 8(d) even if no compensation order has been entered at the time of the employee's death). Again, there is no reason to believe Congress disfavored survivors of employees whose employers voluntarily pay the compensation they owe without a compensation order, as the Act expressly requires them to do. See S. Rep. No. 92-1125, at 6 (1972) (explaining that Section 8(d) "provide[s] for payment of survivor benefits in situations where a worker who is *entitled to* benefits" dies) (emphasis added).

Similarly, Section 10 uses the phrase "awarded compensation" to mean "entitled to compensation." See Pet. App. 7. Section 10(h)(1) provides for upward adjustments to the "compensation to which an employee or his survivor *is entitled* due to total permanent disability or death which commenced or occurred prior to October 27, 1972." § 910(h)(1) (emphasis added). Among these adjustments is an increase in the average weekly wage of such an employee who was "awarded compensation" at less than the maximum rate at the time of his injury. *Id.* Under Roberts's logic, this adjustment would apply only to employees who had obtained compensation orders and not to other employees who were entitled to compensation "due to total permanent disability or death which commenced or occurred prior to October 27, 1972." Again, Roberts does not explain why Congress would have adopted an arbitrary distinction

between employees who obtain compensation orders and those who do not.[6]

These provisions show that Congress used the word "award" variously in the Longshore Act, sometimes to refer to a compensation order, other times to refer to an employee's entitlement to benefits under the statute. Thus, the examples Roberts cites in which "award" refers to a compensation order, Petr. Br. 22–23, "at most demonstrate that the term ['award'] may have a plain meaning in the context of a particular section—not that the term has the same meaning in all other sections and in all other contexts," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343 (1997). Because Congress used the word "award" in different senses in different provisions, "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Id.* at 343–44; see also *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010) (the presumption that a term means the same thing throughout a statute "yields readily to indications that the same phrase used in different parts of the same statute means different things"); *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574–76 (2007); *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595–96 (2004);

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[6] Other provisions of the Longshore Act appear to use "award" to mean entitlement to compensation as well. Section 32(a)(2), for example, requires self-insuring employers to post a security deposit and allows the Director to draw upon the deposit as necessary "to pay compensation awards." § 932(a)(2). This provision has been interpreted to permit the Director to draw upon the security deposit in the absence of a compensation order when an employer becomes bankrupt and previously was making voluntary payments. *See* 70 Fed. Reg. 43,224, 43,226 (July 26, 2005).

United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

3. If further confirmation were needed that Congress did not use the word "award" uniformly throughout the Act to refer to a compensation order, it is provided by Section 33(b). Section 33(b) provides that acceptance of compensation "under an award in a compensation order" operates as an assignment to the employer of the employee's cause of action against third parties. § 933(b). In the final sentence of the provision, Congress included a specific definition of "award" that applies only to Section 33(b): "For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the [district director], an administrative law judge, or Board." *Id.*

As the court of appeals observed, "Section 33 implicitly contemplates that the meaning of the term 'award' in other sections is not limited to a formal compensation order," because otherwise "the specific definition in section 33 would be unnecessary." Pet. App. 8; cf. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783–84 (2000) (the fact that Congress expressly defined "person" to include states for purposes of one provision indicated that states were not persons under other provisions). Roberts's argument renders the final sentence of Section 33(b) superfluous, contrary to basic principles of statutory construction. See, *e.g.*, *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010); *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004); *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997).

Roberts concedes that his interpretation of "award" renders Section 33(b)'s specific definition superfluous. Petr. Br. 29 ("The added specificity, '[f]or the purpose

of this subsection,' was indeed 'unnecessary.'"). He attempts to explain away this anomaly by pointing out that shortly before Congress amended Section 33(b) to add the specific definition, this Court held in *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529 (1983), that acceptance of voluntary compensation payments does not trigger an assignment under Section 33(b). Petr. Br. 24–29. But *Pallas Shipping* turned on the meaning of "compensation order," not "award," and the Act consistently uses "compensation order," unlike "award," to mean a formal grant of compensation "following proceedings with respect to a claim." 461 U.S. at 534; see § 919(e) (defining "compensation order" as an "order rejecting the claim or making the award").[7]

Nor does the fact that Congress later ratified *Pallas Shipping*'s holding by adding the specific definition of "award" to Section 33(b) justify reading that language as surplusage. If Congress had intended "award" to mean the same thing throughout the Act, it would have included the definition in Section 2 along with the Act's other generally applicable definitions rather than adding a specific definition to Section 33(b) that by its terms applies only "[f]or the purpose of this subsection." If "award" were interpreted to mean a compensation order throughout the Act, then Congress's "careful limitation" of the definition to Section 33(b) "would be nullified." *Bennett*, 520 U.S. at 173; see also *S.D. Warren Co.* v. *Me. Bd. of Envtl.*

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[7] *Amicus* American Association for Justice (AAJ) contends that Section 19(e) defines the term "award." AAJ Br. 8. It does not. Section 19(e) defines "compensation order," not "award." And although the context makes clear that Section 19(e) uses "award" to mean a formal grant of compensation following administrative proceedings, the provision does not suggest that the word has that same meaning throughout the Act.

Prot., 547 U.S. 370, 384 (2006); *Bates* v. *United States*, 522 U.S. 23, 29–30 (1997) ("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.") (alteration and internal quotation marks omitted).

4. Given that Congress used "award" to mean entitlement to compensation in multiple provisions of the Longshore Act, as well as the clear negative inference arising from Section 33(b)'s specific definition of "award," there is no merit to Roberts's contention that Congress would have written "newly entitled to compensation" if it had intended to make the time of entitlement determinative under Section 6(c). Petr. Br. 40–41. Congress could just as easily have written "newly issued a compensation order" if it had intended to make the date of the compensation order determinative. Instead Congress used a term that, standing alone, is "necessarily ambiguous." *Robinson*, 519 U.S. at 343. Thus, the fact that Congress elsewhere in the Act referred expressly to entitlement to compensation is no more probative than the fact that Congress elsewhere in the Act referred expressly to compensation orders.

Nor does it help Roberts that the "same Congresses that passed and reenacted § 6(c) in 1972 and 1984" used the word "entitlement" elsewhere in the 1972 and 1984 Amendments. Petr. Br. 40. Several of the provisions that use "award" to mean entitlement were also enacted alongside Section 6(c) in the 1972 Amendments. See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, sec. 5(c), § 8(d), 86 Stat. 1251,

1253; *id.* sec. 7, § 8(c)(20), 86 Stat. at 1255; *id.* sec. 11, § 10(h)(1), 86 Stat. at 1258.

Moreover, the Longshore Act uses a variety of different formulations to express the idea of entitlement to compensation. In addition to express references to entitlement and the uses of "award" described above, the Act refers to an employee's "right to compensation," §§ 902(11), 908(j)(2)(B), 913(a), 914(d), 914(h), 915(b), 933(i), as well as to compensation that "shall be payable," §§ 903(a), 903(d)(2), 904(b), 908(d)(1), 909; "shall be allowed," § 906(a); "shall be paid," §§ 908(a)–(c), (d)(1)(B), (D), (f)(2)(A); and that an employee "shall receive," §§ 906(b)(2), 908(g), 910(h)(1). It thus cannot be inferred that Congress always used the word "entitled" whenever it meant to convey the concept of entitlement, or that it necessarily would have done so in Section 6(c) if it intended to make the date of entitlement determinative.

For the same reasons, Roberts errs in relying on *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992). The Court there did not interpret Section 6(c), and it did not construe the word "award." Rather, it held only that an employee may be "entitled to compensation" for purposes of Section 33(g)'s forfeiture provision even if the employer is neither paying compensation voluntarily nor subject to a compensation order. *Id.* at 475–84. Contrary to Roberts's asserted "parity of reasoning," Petr. Br. 33–34, that proposition does not entail the converse proposition that an employee may not be "awarded" compensation for purposes of Section 6(c) by virtue of his entitlement to compensation under the statute. Moreover, *Cowart* was based in part on the Court's conclusion that Congress used the phrase "person entitled to compensation" uniformly throughout the

Longshore Act, see 505 U.S. at 478–79—a premise that does not hold true of Congress's use of "award." Neither *Cowart*'s holding nor its logic "control[s]" the proper interpretation of Section 6(c).[8] Petr. Br. 34.

The upshot is that nothing on the face of the words "newly awarded compensation" answers the question presented in this case. Standing alone, that phrase could mean newly issued a compensation order, and it could also mean newly entitled to compensation. To determine which meaning Congress intended, it is therefore necessary to examine the context in which those words appear, as well as the structure of the Act as a whole. Cf. *Kasten*, 131 S. Ct. at 1333 ("The bottom line is that the text, taken alone, cannot provide a conclusive answer to our interpretive question. . . . We must look further.").

B. The Context Of Section 6(c) And The Structure Of The Act Make Clear That Benefits Are Capped Based On The Year In Which An Employee Becomes Entitled To Compensation.

A basic principle of statutory construction is that the meaning of a statutory term cannot be determined in a vacuum, but rather "turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken* v. *Holder*, 129 S. Ct. 1749, 1756 (2009) (quoting *Robinson*, 519 U.S. at 341). As

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[8] In fact, this Court's only prior decision addressing Section 6(c) assumed that a person is "newly awarded compensation" when he becomes entitled to compensation under the statute. *See Rasmussen*, 440 U.S. at 44 n.16 (providing a hypothetical example assuming that survivors are "newly awarded" death benefits when they become "entitled to" benefits, with no mention of a compensation order).

this Court has repeatedly stressed, "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and alteration omitted). Consequently, "[s]tatutory construction is a 'holistic endeavor,'" and a "'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.'" *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

That is the case here. Once the analysis turns from a narrow focus on the phrase "newly awarded compensation" in isolation to the context in which that phrase appears and the structure of the Act as a whole, Congress's intent becomes clear: An employee is "newly awarded compensation" for purposes of Section 6(c) when he becomes disabled and thus entitled to compensation under the Act. That interpretation best accords with Section 6's role in the statutory scheme as a provision governing entitlement to compensation; harmonizes Section 6(c) with the Act's other compensation provisions; provides a rule of decision that is immediately capable of application in every case; and ensures that similarly situated employees receive the same benefits regardless of whether or when they obtain a compensation order. Roberts's interpretation, by contrast, is inconsistent with Section 6(c)'s context and the overall statutory scheme, and produces a variety of impractical, arbitrary, and inequitable results that Congress could not have intended.

1. It is a "cardinal rule" of statutory interpretation that "the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning . . . of certain words or phrases may only become evident when placed in context."); *McCarthy* v. *Bronson*, 500 U.S. 136, 139 (1991) ("statutory language must always be read in its proper context"). Context is particularly important in determining the meaning of a word where, as here, Congress used the same word in more than one sense in the same statute. See, *e.g.*, *Barber*, 130 S. Ct. at 2506–07; *Duke Energy*, 549 U.S. at 575–76; *Gen. Dynamics*, 540 U.S. at 596; *Robinson*, 519 U.S. at 343–44; *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433–34 (1932).

Thus, in the Longshore Act provisions where "award" refers to a compensation order, it is not any intrinsically plain meaning of the word itself that makes the intended meaning clear, but the context in which the word appears. Cf. *Astrue*, 130 S. Ct. at 2526 ("The transitive verb 'award' has a settled meaning *in the litigation context*.") (emphasis added). Many of those provisions clearly contemplate an order entered after administrative or judicial proceedings. *E.g.*, § 919(c) (district directors may "by order" "reject the claim or make an award"); § 921(c) ("payment of the amounts required by an award shall not be stayed" pending judicial review); § 921(d) (consequences of failure "to comply with a compensation order making an award"); § 928(a) (attorney's fees "shall be awarded, in addition to the award of compensation, in a compensation order"). Other provisions, such as those requiring employers to provide benefits "without an award," clearly refer

to a compensation order, because reading "award" to mean entitlement would produce the absurd result that employers would be required to pay employees compensation to which they are not entitled. *E.g.*, §§ 913(a), 914(a), 928(b).

Section 6(c), by contrast, does not address the litigation context, and reading "awarded" to mean entitled produces no absurd results. Instead, "Section 6 uses 'awarded' in the same context as sections 8 and 10," in that all three sections "gover[n] determinations of compensation under the Act." Pet. App. 7. Entitled "Compensation," Section 6 governs the time at which an employee becomes entitled to compensation, § 906(a), as well as the maximum and minimum compensation to which an employee is entitled, § 906(b). The entire provision concerns the amount of compensation to which an employee is entitled under the statute. Reading "awarded" to mean entitled thus best accords with "'the specific context in which that language is used.'" *Nken*, 129 S. Ct. at 1756 (quoting *Robinson*, 519 U.S. at 341).

2. That reading also best fits with "'the broader context of the statute as a whole.'" *Id.* As the court of appeals explained, "holding that an employee is 'newly awarded' compensation when he first becomes disabled accords with the structure of the [Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation." Pet. App. 8. For example, the Act defines "wages" as the money rate at which an employee is compensated "at the time of the injury." § 902(13). Likewise, under Section 10, an employee's "average weekly wage" is calculated based on the employee's wages "at the time of the injury." § 910. An employee's average weekly wage, in turn, is the benchmark used to determine the compensation to

which he is entitled under Section 8. § 908(a)–(c), (e), (f)(1); see also *Bath Iron Works*, 506 U.S. at 164 n.13.

The Act's basic compensation scheme is thus focused on the employee's wages at the time of injury. There is no apparent reason why Congress would have based the "average weekly wage," used to calculate an employee's basic compensation rate, on the employee's wages at the time of injury, while at the same time capping the employee's compensation rate based on the "national average weekly wage" for the year in which a compensation order is entered. Cf. *Morrison-Knudsen Constr. Co.* v. *Dir., OWCP*, 461 U.S. 624, 633 (1983) ("we would expect the term 'wages' to maintain the same meaning throughout the [Longshore] Act"). The court of appeals correctly concluded that Section 6 should be read consistently with Sections 8 and 10, since those provisions govern an employee's compensation rate before it is capped by Section 6. See Pet. App. 8–9 ("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 at the time of injury.").

Roberts makes three points in response, none of which supports his contention that an employee's maximum compensation rate should turn on the date a compensation order issues. *First*, Roberts argues that "the Act creates no unvarying 'pattern' of basing everything on the time of injury," citing various provisions that "specify varying events as those whose timing is critical." Petr. Br. 35–37. But the force of the structural argument does not require that "everything" in the Longshore Act turn on the time of injury. Rather, the point, which Roberts does not and cannot seriously dispute, is that the Act's basic

compensation scheme keys on the employee's wages at the time of his injury.

Second, Roberts notes that the interpretation adopted by the Director and the court of appeals ties the maximum compensation rate, not necessarily to the time of injury, but to the time when an employee becomes entitled to compensation, *i.e.*, the onset of disability. Petr. Br. 39. But the time of injury and the time of disability will generally coincide. For the scheduled injuries enumerated in Section 8(c)(1)–(20), the injury creates a "conclusive presumption" of disability. *Metro. Stevedore Co.* v. *Rambo*, 515 U.S. 291, 296 (1995); see also *Bath Iron Works*, 506 U.S. at 156 n.4. For other traumatic injuries, the distinction between injury and disability potentially makes a difference only in the relatively rare case in which an employee's loss in wage-earning capacity does not arise until some fiscal year after the year of injury. See § 902(10) (defining "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"); *Rambo*, 515 U.S. at 296–97.[9] And in cases of latent occupational disease (such as asbestosis), the injury by statutory definition does not occur until the employee becomes disabled. § 910(i) (defining the "time of injury" for disability due to an occupational disease that does not immediately result in disability as the date when the employee becomes aware of the

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[9] When an employee does not suffer a loss in wage-earning capacity shortly after the accident causing the injury, the Ninth Circuit has held that the "injury" occurs when the employee's disability becomes manifest. *See Johnson* v. *Dir., OWCP*, 911 F.2d 247, 249–50 (9th Cir. 1990); *but see LeBlanc* v. *Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161–62 (5th Cir. 1997) (holding that the time of injury is the time of the accident causing the injury).

relationship between the employment, the disease, and the disability).[10]

Moreover, the onset of disability, like the date of injury, is also a key marker governing an employee's entitlement to compensation under the Act. See, *e.g.*, § 903(a) (providing that the Act's coverage is based on disability); § 906(a) (providing that compensation is payable from the date of disability); § 910(h)(1) (providing upward adjustments to the compensation of employees whose disability commenced before October 27, 1972); § 919(a) (providing that an employee may file a claim "at any time after the first seven days of disability following any injury"). Nowhere, by contrast, does the Act make an employee's right to compensation depend upon the date when a compensation order is entered—an arbitrary date that has no logical connection to the Act's compensation scheme.

Third, Roberts argues that even if his reading produced the "sole departure" from an otherwise "all-inclusive pattern of determining benefits by reference to circumstances at the time of the onset of first disability," that would be an "insufficient" reason to reject his interpretation. Petr. Br. 38. Nothing better emblematizes Roberts's misguided effort to interpret Section 6(c) in a vacuum, without reference to "the language and design of the statute as a whole." *K-*

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[10] One reason Congress may have chosen not to phrase Section 6(c) in terms of injury or disability is that Section 6(c) applies to survivors as well as employees. Survivors need not be injured or disabled to be entitled to compensation, and a survivor's entitlement to compensation does not arise on the date when the employee was injured or disabled, but rather on the date when the employee died. *See* §§ 908(d), 909; *Ingalls Shipbuilding, Inc.* v. *Dir., OWCP*, 519 U.S. 248, 257–58 (1997); *Rasmussen*, 440 U.S. at 44 n.16.

mart Corp. v. *Cartier, Inc*., 486 U.S. 281, 291 (1988). This Court has consistently examined the structure of the Longshore Act as a whole to determine the meaning of particular provisions. *E.g.*, *Cowart*, 505 U.S. at 477–79; *Wash. Metro. Area Transit Auth.*, 467 U.S. at 934–36; *Morrison-Knudsen*, 461 U.S. at 633–34. Likewise here, the Act's structure provides strong evidence that Congress intended compensation to be capped based on the year in which an employee becomes disabled and thus entitled to compensation, not the year in which a compensation order issues.

3. Another reason to reject Roberts's interpretation is that it would leave a major gap in the statute's coverage for cases in which employers voluntarily pay compensation without a compensation order. The Act expressly requires employers to pay compensation without a compensation order unless they file a notice controverting liability. § 914(a), (d). As a result, in most cases no compensation order is ever issued. Under Roberts's interpretation, however, the statute would be silent as to the applicable maximum and minimum compensation rates for these cases, because without a compensation order an employee would never be "newly awarded compensation" under Section 6(c). Absent some indication that Congress intended to exempt these cases from the Act's maximum and minimum compensation rates, the Court should not interpret Section 6(c) to create such an anomalous result. Cf. *Wash. Metro. Area Transit Auth.*, 467 U.S. at 935–36 (rejecting interpretation of Longshore Act that would leave "no apparent mechanism for enforcing" contractors' obligation to provide compensation); *Muscarello* v. *United States*, 524 U.S. 125, 136–37 (1998) (rejecting interpretation that would "remove [certain conduct] entirely from

the statute's reach, leaving a gap in coverage that we do not believe Congress intended").

Even when a compensation order is entered, Roberts's interpretation is impractical. If Section 6(c) turned on the date of the compensation order, employers who seek to comply with their obligation to pay compensation voluntarily would have no way to determine the appropriate compensation rate at the time they must begin making payments. An employer must generally begin paying compensation within 14 days after learning of the injury. § 914(b). At that point, the employer does not know if or when a compensation order will be entered, and thus does not know which fiscal year's national average weekly wage to apply. Even if the employer could predict the fiscal year in which a compensation order will issue, it still would not know what rate to apply, because the Secretary would not yet have determined the national average weekly wage for that future year. See § 906(b)(3). Congress could not have intended to create a regime at once so unworkable and so at odds with the Act's objective to allow employers to "hav[e] their contingent liabilities identified as precisely and as early as possible." *Potomac Elec.*, 449 U.S. at 282.

Roberts has no answer to this decisive point except to suggest that Section 19(c) requires a compensation order to be issued promptly in every case. See Petr. Br. 43. That is wrong. Section 19(c) comes into play only when an employee files a claim for compensation under Section 19(a). See § 919(a). And no such claim is necessary to trigger an employer's obligation to pay compensation; to the contrary, the Act expressly contemplates that employers who do not contest liability will pay compensation without requiring the employee to file a claim. See § 914(b) (providing that the first payment must be paid 14 days after the

employer learns of the injury, regardless of whether the employee has filed a claim); § 913(a) (providing that an employee must file a claim within one year after the injury or, if the employer voluntarily pays compensation without a compensation order, within one year after the date of the last payment); see also *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 92d Cong. 759 (1972) (letter from John M. Ekeberg, Director, Bureau of Employees' Compensation, U.S. Dep't of Labor) (Ekeberg Letter) ("Since in the vast majority of cases, compensation is voluntarily paid by employers, a formal claim for compensation generally need not be filed by an injured employee.").

Moreover, even when an employee does file a claim, "in practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order." *Intercounty Constr. Corp.*, 422 U.S. at 4 n.4; see also 20 C.F.R. § 702.315 (providing for informal resolution of claims by district directors without a formal compensation order); Ekeberg Letter, *supra*, at 757–58 (out of 84,000 cases closed in fiscal year 1971, only 209 were resolved by a compensation order after a formal hearing); Petr. Br. 43 (acknowledging that "district directors rarely issue compensation orders on uncontested claims in which the employer is making payments").

Roberts's proposed solution would undermine the Act's encouragement of voluntary payment and speedy dispute resolution. Under his approach, an employer who wished to determine the maximum compensation rate would have to contest liability and insist upon issuance of a compensation order, even though the employer does not in fact dispute liability

or have good-faith grounds to do so, and even though the case might otherwise be resolved without litigation. This would impose a substantial burden on employers, employees, and the agency, as most disability cases are resolved without administrative proceedings or a compensation order. See *Morrison-Knudsen*, 461 U.S. at 637 (observing that "more than 95% of all lost-time injuries are immediately compensated without recourse to the administrative process"); 20 C.F.R. § 702.301 (noting that "the vast majority" of cases can be resolved through informal procedures). It would also be contrary to Congress's intent in requiring employers to pay compensation voluntarily without a compensation order. And an employee would then likewise have an incentive to contest the amount the employer is voluntarily paying even when the employee has no actual disagreement with the employer's calculation, because the more protracted the litigation and the greater the delay before the ALJ issues a compensation order, the higher the maximum rate. "Without clear indication from Congress that this approach with its attendant problems is required," the Court should "decline to adopt it." *Morrison-Knudsen*, 461 U.S. at 634.

4. Roberts's interpretation would also produce arbitrary and inequitable results. If Section 6(c) turned on the date when a compensation order issues, then two otherwise identically situated employees could be subject to different maximum compensation rates depending on the happenstance of how long it took to adjudicate their claims. See Pet. App. 9 n.1. For example, an employee who sustained the same injury on the same day as Roberts, suffered from the same disability for the same period of time as Roberts, and earned the same average weekly wage as Roberts, but who obtained a compensation order in

fiscal year 2002 rather than fiscal year 2007, would be entitled to $966.08 per week, whereas Roberts would be entitled to $1,114.44 per week—a difference of about $600 per month. Nothing in the Act suggests Congress intended such incongruous results. See *Potomac Elec.*, 449 U.S. at 283 ("it is not to be lightly assumed that Congress intended that the [Act] produce incongruous results").

Roberts argues that this disparate treatment is justified by the need to discourage employers from contesting liability and thereby delaying payment. Petr. Br. 41–44. But Congress already provided a penalty for employers who unjustifiably delay payment. See § 914(e) (imposing a 10% penalty if "compensation payable without an award is not paid within fourteen days after it becomes due"); § 914(f) (imposing a 20% penalty if "compensation, payable under the terms of an award, is not paid within ten days after it becomes due").

Contrary to Roberts's contention, Petr. Br. 41–42, the fact that Section 14(e)'s penalty does not apply when the employer controverts liability does not suggest that Section 6(c) should be read to impose additional liability on employers who controvert liability. It suggests the opposite: That Congress limited penalties to cases where liability is either uncontested or adjudicated suggests that Congress concluded employers should have the right to contest liability without the specter of a penalty. Further, Congress expressly provided that employers are liable for mandatory attorney's fees if they decline to pay compensation and unsuccessfully contest liability. § 928(a). This provides adequate incentive against unjustified litigation, and further shows that if Congress had intended to impose additional liability

on employers who unsuccessfully contest liability, it would have done so expressly.

Moreover, if Congress had intended to penalize employers for contesting liability, it surely would have done so in a more rational and coherent manner. Most employees are not subject to the maximum or minimum compensation rate, and thus their compensation is not affected by Section 6. Adopting Roberts's interpretation would do nothing to compensate these employees for delayed payment. And under Roberts's interpretation an employer would be subject to the Section 6 "penalty" even if it had voluntarily paid compensation while contesting liability and the final compensation order *upheld* the employer's initial determination of the proper amount in the face of the employee's challenge. In such cases, the increased compensation would simply be a windfall to the employee. As a remedy for delayed payment, Roberts's version of Section 6(c) is thus badly under- and over-inclusive.

Nor is Roberts's interpretation necessary to make employees whole. Employees subjected to delayed payment are entitled to interest that "accrues from the date a benefit became due, rather than from the date of the ALJ's award." *Matulic* v. *Dir., OWCP*, 154 F.3d 1052, 1059 (9th Cir. 1998). This "ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled." *Sproull* v. *Dir., OWCP*, 86 F.3d 895, 900 (9th Cir. 1996). In this very case, Roberts was awarded "interest on each unpaid installment of compensation from the date the compensation became due." Pet. App. 108.

5. Further support for the Director's interpretation can be found in state workers' compensation laws. The Longshore Act was enacted to fill the void

created by this Court's holding that states lacked jurisdiction to enact workers' compensation laws for longshoremen. See *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 217–18 (1917). The Act was designed to afford longshoremen "'the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union.'" *Calbeck*, 370 U.S. at 122 n.10. State laws thus provide an informative backdrop to this Court's interpretation of the Longshore Act.

Like the Longshore Act, most state workers' compensation laws cap benefits based on a percentage of the state's average weekly wage. See 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.04 (2011). The vast majority of these laws apply the average weekly wage for the year in which the injury occurred.[11] Only one state,

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[11] *See* Ala. Code § 25-5-68(a),(e); Alaska Stat. § 23.30.175(a); Ariz. Rev. Stat. § 23-1041(D), (E); Ark. Code Ann. § 11-9-501(b); Cal. Lab. Code § 4453; *Cook* v. *Recovery Corp.*, 911 S.W.2d 581, 581 (Ark. 1995); Colo. Rev. Stat. §§ 8-42-102(5)(a), 8-42-105, 8-42-106, 8-42-111; *Simpson* v. *Indus. Claim Appeals Office*, 219 P.3d 354, 363–64 (Colo. App. 2009), *rev'd in part on other grounds*, 232 P.3d 777 (Colo. 2010); Conn. Gen. Stat. § 31-309(a); Del. Code Ann. tit. 19, §§ 2324, 2325, 2326(h); *E.I. du Pont de Nemours & Co.* v. *Green*, 411 A.2d 953, 957 (Del. 1980); Fla. Stat. § 440.12(2)(a); Haw. Rev. Stat. §§ 386-31(a), 386-32(a); *Survivors of Young* v. *Island Feeling, Inc.*, 125 P.3d 476, 478–79 (Haw. 2006); 820 Ill. Comp. Stat. 305/8(b)(4); *Tal Rauhoff Constr. Co.* v. *Indus. Comm'n*, 501 N.E.2d 295, 296 (Ill. App. Ct. 1986); Iowa Code §§ 85.33(4), 85.34(2), (3)(a), 85.37; Ky. Rev. Stat. Ann. §§ 342.143, 342.730, 342.740; La. Rev. Stat. Ann. § 23:1202; Md. Code Ann., Lab. & Empl. § 9-602(a)(1); *Sanchez* v. *Potomac Abatement, Inc.*, 8 A.3d 737, 738 (Md. 2010); Mass. Gen. Laws ch. 152, § 1(10); Mich. Comp. Laws §§ 418.355, 418.371; Mo. Rev. Stat. §§ 287.170.1, 287.180.1, 287.190.5; Mont. Code Ann. §§ 39-71-701(3), 39-71-702(3), 39-71-703(6), 39-71-721(2), (3); Neb. Rev. Stat. § 48-121; *McGowan* v. *Lockwood*

Vermont, appears to apply the average weekly wage for the year in which benefits are formally "awarded," Vt. Stat. Ann. tit. 21 § 601(16), and Vermont's law is a poor analogy because, unlike the Longshore Act, it provides for annual adjustments to an employee's maximum compensation rate, *id.* § 650(d); Vt. Admin. Code 13-4-1:16.2000.

There is thus no merit to *amicus* AAJ's argument that state workers' compensation laws cap benefits based on the year in which a compensation order issues.[12] AAJ Br. 16–17. Nor is there merit to AAJ's

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Corp., 511 N.W.2d 118, 122 (Neb. 1994); Nev. Rev. Stat. §§ 616A.065, 616C.425; N.H. Rev. Stat. Ann. §§ 281-A:28(II), 281-A:28-a(II); N.J. Stat. Ann. § 34:15-12; N.J. Admin. Code § 12:235-1.6(b); N.M. Stat. Ann. §§ 52-1-41(F), 52-1-48; N.C. Gen. Stat. § 97-29; Ohio Rev. Code Ann. § 4123.62(C); Okla. Stat., tit. 85, § 308(43); Or. Rev. Stat. § 656.005(1); R.I. Gen. Laws § 28-33-17; *Cogswell* v. *Max Silverstein & Sons*, 488 A.2d 732, 733 (R.I. 1985); S.C. Code Ann. §§ 42-9-10(A), 42-9-20; S.D. Codified Laws § 62-4-3.1; Tex. Lab. Code Ann. § 408.061(g); Utah Code Ann. §§ 34A-2-410(1)(a)(i), 34A-2-411(1)(a), 34A-2-412(3)(a), 34A-2-413(2)(a); Va. Code Ann. § 65.2-500(B); Wash. Rev. Code §§ 51.32.060(5)(a), 51.32.080(6), 51.32.090(9)(a); *Cena* v. *Dep't of Labor & Indus.*, 91 P.3d 903, 919–22 (Wash. Ct. App. 2004); W. Va. Code §§ 23-4-6, 23-4-14(a); Wis. Stat. § 102.11(1); Wy. Stat. § 27-14-403(c).

[12] None of AAJ's cited authorities so holds. Florida caps compensation based on "the year in which the injury occurred," Fla. Stat. § 440.12(2)(a); the cited case addresses an inapposite question about offsets and supplemental benefits for permanent total disabilities, *Americana Dutch Hotel* v. *McWilliams*, 733 So.2d 536 (Fla. Dist. Ct. App. 1999). Likewise, *Dunbar* v. *Tammelleo*, 673 A.2d 1063 (R.I. 1996), is about a bonus incentive provision that was repealed during the pendency of the claim and has nothing to do with the general rule governing maximum rates in Rhode Island. *See also supra*, n.11. And Idaho allows maximum rates for some disabilities to increase annually, *see* Idaho Code Ann. §§ 72-409, -413, but for other disabilities fixes the maximum at a percentage of the state's average weekly

argument that the Report of the National Commission on State Workmen's Compensation Laws supports that interpretation. *Id.* at 16. The Report recommended that "'the maximum be linked to the State's average weekly wage for the latest available year,'" *id.*, but did not specify whether that meant the latest available year at the time the employee becomes disabled or at the time when a compensation order issues. It thus has no relevance here.

6. The Court should also reject AAJ's argument that the Longshore Act's purpose requires that the maximum compensation rate turn on the date of the compensation order. In support of this argument, AAJ makes three points, none of which has merit.

First, AAJ argues that because workers' compensation laws are designed to support injured workers during their disability rather than to make them whole, "[t]he relevant baseline for determining the appropriate amount for the claimant's support is not the date of injury," but "instead the date of the compensation order." AAJ Br. 14–16. It is not clear why AAJ believes this conclusion follows from its premise, but it does not matter because Congress clearly disagreed when it made the time of injury the relevant time for determining benefits under the Act.

Second, AAJ argues that basing the maximum compensation rate on the date the employee becomes disabled gives employers an incentive to contest liability and delay payment. *Id.* at 17–22. As discussed above, the Act already addresses employer delay, and Section 6(c) is not an appropriate vehicle to address that concern. See *supra*, 40–41. In any event, Roberts's interpretation would create an equal

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wage "for the year of the injury," *id.* § 72-429; *Vincent* v. *Dynatec Mining Corp.*, 969 P.2d 249, 251 (Idaho 1998).

and opposite incentive for employees to delay proceedings to obtain higher compensation rates, so this consideration is at best neutral.

Third, AAJ "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Newport News*, 514 U.S. at 135. AAJ Br. 13–14. This is nothing more than a naked plea to adopt Roberts's interpretation because it is more favorable to the employee here.[13] As this Court has recognized, however, the Longshore Act "was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen*, 461 U.S. at 636; see also *Potomac Elec.*, 449 U.S. at 282 (the Longshore Act "represents a compromise between the competing interests of disabled laborers and their employers"). The statute's general purpose thus provides no guidance as to the meaning of Section 6(c).

7. Finally, there is no merit to AAJ's contention that the legislative history supports Roberts's interpretation. AAJ Br. 11–12. The passage from the House committee report AAJ cites is irrelevant because it addresses employees and survivors receiv-

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[13] In fact, accepting Roberts's view that "award" refers to a compensation order throughout the Longshore Act—while it would benefit Roberts in this particular case—would produce unfavorable results for employees in some other circumstances. It would mean, for example, that only those employees who had obtained compensation orders would have been entitled to the upward adjustment under Section 10(h)(1). *See supra*, 23–24. And survivors of employees who had not obtained compensation orders would not be entitled to the unpaid balance of the employee's award under Section 8(d). *See supra*, 22–23.

ing permanent total disability or death benefits—the only ones who receive "annual increases" in their maximum compensation rate (under Section 6(c)'s "currently receiving" clause). H.R. Rep. No. 92-1441, at 3 (1972).

The passage from the Senate committee report AAJ cites is likewise inapposite. It suggests that an employee is "newly awarded compensation" when he "begin[s] receiving compensation for the first time." S. Rep. No. 92-1125, at 18. But no party argues that receipt of payment is the relevant time under Section 6(c)'s "newly awarded" clause. To the extent the Senate report is relevant, it supports the Director's interpretation, because "the Act expects employees entitled to compensation to receive payment during their period of disability," regardless of whether they obtain a compensation order. Pet. App. 11 (citing §§ 904(a), 914(a)).

II. THE DIRECTOR'S INTERPRETATION OF SECTION 6(c) IS REASONABLE AND ENTITLED TO DEFERENCE.

After applying the ordinary tools of statutory interpretation, the intent of Congress is clear: An employee is "newly awarded compensation" under Section 6(c) in the year he becomes entitled to compensation under the Act. That should end the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see also *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (ambiguity in isolated term or phrase may be clarified by its context and place in overall statutory scheme). To the extent that any ambiguity remains, however, the Director of the Office of Workers' Compensation Programs is entitled

to resolve that ambiguity, and this Court should defer to his reasonable interpretation. See *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Barnhart* v. *Walton*, 535 U.S. 212, 217–18 (2002).

1. The Director, as delegatee of the Secretary of Labor, is charged with administering and enforcing the Longshore Act.[14] § 939(a); 20 C.F.R. § 701.201; *Newport News*, 514 U.S. at 130–31. In performing these functions, the Director is empowered to issue binding interpretations of the Act. *Newport News*, 514 U.S. at 134 (the Director has "power to resolve legal ambiguities in the statute"). Congress expressly delegated interpretive authority to the Director by authorizing him "to make such rules and regulations . . . as may be necessary in the administration" of the Act. § 939(a); see also *Newport News*, 514 U.S. at 130–31 (the Director is responsible for, among other things, "supervising, administering, and making rules and regulations for calculation of benefits and processing of claims").

The Director also plays a "significant role" in adjudicating claims for compensation under the Act. *Ingalls Shipbuilding, Inc.* v. *Dir., OWCP*, 519 U.S. 248, 262 (1997). Acting under the Director's authority, district directors informally adjudicate compensation claims when, as is generally the case, the matter can be resolved without a formal hearing. See § 919(c); 20 C.F.R. § 702.311 *et seq.*; *Ingalls*, 519 U.S. at 262–63.[15] These proceedings may result in

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[14] For ease of exposition, the Director will hereafter be referred to as the statutory recipient of the powers and duties the Act confers on the Secretary.

[15] The Longshore Act assigns the power to formally adjudicate compensation claims to administrative law judges, whose

binding compensation orders that carry the same legal consequences as compensation orders issued after a formal adjudication. See, *e.g.*, § 914(f) (late payment under compensation order triggers 20% penalty); § 918 (default on compensation order triggers right to supplementary order enforceable in district court); § 933(b) (acceptance of payment under compensation order triggers assignment of rights to employer). In addition, when a formal hearing is required before an administrative law judge or the Benefits Review Board, the Director may appear and participate in the proceeding as an interested party. 20 C.F.R. § 702.333(b); *Ingalls*, 519 U.S. at 263.

Accordingly, there is no question that Congress granted the Director power to make rules carrying the force of law, and thereby delegated to him authority to resolve statutory ambiguities. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

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decisions are subject to review by the Benefits Review Board. §§ 919(d), 921(b); *see Ingalls*, 519 U.S. at 262; *Newport News*, 514 U.S. at 125. The Board is a sub-agency within the Department of Labor whose members are appointed by the Secretary. *See Ingalls* 519 U.S. at 267–68 (describing the Longshore Act's "split-function regime"). Although the Board decides questions of law in the course of adjudicating claims, ultimate interpretive authority rests with the Director, who has "full power to alter" legal rules adopted by the Board. *Newport News*, 514 U.S. at 134; *see also Potomac Elec.*, 449 U.S. at 278 n.18 ("the Benefits Review Board is not a policymaking agency"); *cf. Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152–54 (1991).

2. The Director has exercised his interpretive authority in a manner that warrants judicial deference. Acting pursuant to his authority as administrator and enforcer of the Longshore Act, the Director has appeared before the Benefits Review Board in a formal adjudication and taken the official position that an employee is "newly awarded compensation" under Section 6(c) "when the disability commences," which is generally "when the injury occurs." *Reposky*, 2006 WL 3101750, at *12. As the Director explained, this interpretation is consistent with the statute's text, "maintains consistency in the statute and yields rational results." *Id.* at *13. Moreover, long before *Reposky*, district directors applied this interpretation when informally adjudicating claims under Section 19(c). See Dep't of Labor, Pam. LS-560, *Workers' Compensation under the Longshoremen's Act* (rev'd Nov. 1979) ("compensation payable under the Act may not exceed 200% of the national average weekly wage, applicable at the time of injury").

These forms of administrative action are sufficiently formal and deliberative to merit *Chevron* deference. They are not mere litigating positions. As this Court held in closely analogous circumstances, although "statutory and regulatory interpretations furnished" by appellate counsel "for the first time in the reviewing court" are not entitled to deference, that rule does not apply when an agency administrator advances an interpretation "in an administrative adjudication." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156–57 (1991). Here, as in *Martin*, the interpretation the Director advanced to the Board in *Reposky* "*is* agency action, not a *post hoc* rationalization of it," and "is as much an exercise of delegated lawmaking powers as is the

[Director's] promulgation of a [regulation]."[16] *Id*. at 157. See *Gilliland* v. *E.J. Bartells Co.*, 270 F.3d 1259, 1262 (9th Cir. 2001) (holding that the Director's statutory interpretations advanced to the Board in administrative adjudications are entitled to *Chevron* deference); *Mallott & Peterson* v. *Dir., OWCP*, 98 F.3d 1170, 1172 (9th Cir. 1996) (same); *Dir., OWCP* v. *Gen. Dynamics Corp.*, 982 F.2d 790, 793–95 (2d Cir. 1992) (same).[17]

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[16] Although *Martin* involved an interpretation of a regulation rather than a statute, the Court's analysis did not turn on that distinction. Rather, the Court deferred to the Secretary's interpretation because the Secretary's position before the Commission was "an exercise of the agency's delegated lawmaking powers," 499 U.S. at 157—a rationale that applies equally to interpretations of a statute. *Cf. Mead*, 533 U.S. at 226–27 (*Chevron* applies when the agency interpretation was promulgated in the exercise of delegated lawmaking powers).

[17] The Board in *Reposky* adopted the Director's interpretation of Section 6(c). In a pre-*Chevron* case, this Court stated that the Board is not entitled to judicial deference because it lacks policymaking authority. *Potomac Elec.*, 449 U.S. at 278 n.18; *see also Cowart*, 505 U.S. at 476 (noting Cowart's concession that the Board's position was not entitled to deference). The Board's lack of policymaking authority suggests courts should defer to the Director's interpretation over the Board's in the event the two conflict. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 198 (5th ed. 2010); *cf. Martin*, 499 U.S. at 152–54. Where, as here, the Director and Board concur, the agency has spoken with one voice, further strengthening the case for deference. *See Molineaux* v. *United States*, 12 F.3d 264, 267–68 (D.C. Cir. 1994) ("since the Board approved the Secretary's statutory interpretation, it is basically the Secretary's interpretation that is before us buttressed by the deference *Chevron* requires us to afford"); *Norfolk & W. Ry*. v. *Roberson*, 918 F.2d 1144, 1147 (4th Cir. 1990); *cf. Ingalls*, 519 U.S. at 268 ("an order of the agency's designated adjudicator is in reality an order of the agency itself").

Likewise, when embodied in a compensation order issued by a district director under Section 19(c), "the [Director's] interpretation assumes a form expressly provided for by Congress." *Martin*, 499 U.S. at 157; see also *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority."). Deference is no less appropriate here than in past cases in which this Court has deferred to agency interpretations embodied in informal adjudications. See, *e.g.*, *NationsBank of N.C.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995); *Pension Benefit Guarantee Corp.* v. *LTV Corp.*, 496 U.S. 633, 647–48 (1990); see also 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 184 (5th ed. 2010) (noting that this Court "has consistently applied *Chevron* deference to statutory interpretations adopted in less formal instruments like orders issued in informal adjudications").[18]

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[18] Although *Mead* described notice-and-comment rulemaking and formal adjudication as prototypical examples of agency actions entitled to *Chevron* deference, 533 U.S. at 230, it did not overrule any prior cases granting *Chevron* deference to informal adjudications or otherwise suggest that informal adjudications are categorically ineligible for *Chevron* deference. After *Mead*, lower courts continue to give *Chevron* deference to agency interpretations embodied in informal adjudications in a wide variety of circumstances. *See*, *e.g., Menkes* v. *U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 331–33 (D.C. Cir. 2011); *Vill. of Barrington, Ill.* v. *STB*, 636 F.3d 650, 658–59 (D.C. Cir. 2011); *Am. Fed'n of Gov't Employees* v. *Nicholson*, 475 F.3d 341, 354 (D.C. Cir. 2007); *Groff* v. *United States*, 493 F.3d 1343, 1349–52 (Fed. Cir. 2007); *Cleveland Nat'l Air Show, Inc.* v. *Dep't of Transp.*, 430 F.3d 757, 763–64 (6th Cir. 2005); *Pharm. Research*

For these reasons, the absence of a regulation does not undermine the case for *Chevron* deference. This Court has repeatedly "denied the suggestion" that *Chevron* deference requires notice-and-comment rulemaking. *Walton*, 535 U.S. at 222; see also *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (*Chevron* deference "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power"); *Mead*, 533 U.S. at 231 ("the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"); *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring).

Moreover, although the Director has not promulgated a regulation, he has effectively achieved the same result by persuading the Board to adopt his interpretation in a formal adjudication that operates as a binding precedent on future ALJ decisions. Particularly given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time," "*Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Walton*, 535 U.S. at 222.

3. The Director's interpretation is reasonable and entitled to deference. As explained above, Section 6(c)'s text can reasonably be read to cap compensation based on the national average weekly

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& Mfrs. of Am. v. *Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004); *Davis* v. *EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003); *Pesquera Mares Australes Ltda.* v. *United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001).

wage for the year in which an employee becomes entitled to benefits. And that interpretation best accords with the structure of the Act's compensation scheme; avoids leaving a major gap in the statute for employees who receive compensation without a compensation order; and ensures that similarly situated employees are treated the same. As a reasonable interpretation of a statute that he administers, the Director's interpretation controls. See, *e.g.*, *Nat'l Ass'n of Home Builders*, 551 U.S. at 666; *Brand X*, 545 U.S. at 980; *Barnhart* v. *Thomas*, 540 U.S. 20, 29 (2003); *Chevron*, 467 U.S. at 865–66.

4. At a minimum, the Director's interpretation is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). The Director has extensive experience administering the Longshore Act and other disability compensation programs; Section 6(c) is central to the Act's administration; the Director's interpretation represents his longstanding and consistent position; and his interpretation is reasonable and consistent with the statutory framework. Regardless of whether it has power to control, the Director's interpretation is persuasive and rests on "a body of experience and informed judgment" that this Court should respect. *Id.* at 140; see also, *e.g.*, *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399–402 (2008); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487–88 (2004); *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 449 (2003); *Mead*, 533 U.S. at 234–35; *Rambo*, 521 U.S. at 136.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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December 14, 2011

STATUTORY AND REGULATORY ADDENDUM

LONGSHORE ACT PROVISIONS

33 U.S.C. § 902. Definitions

When used in this chapter—

* * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

* * * *

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring

in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

* * * *

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

* * * *

33 U.S.C. § 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

(b) Governmental officers and employees

No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) Intoxication; willful intention to kill

No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) Small vessels

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee—

> (A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or
>
> (B) if the employee is not subject to coverage under a State workers' compensation law.

* * * *

33 U.S.C. § 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 908. Compensation for disability

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. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(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.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

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

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

(D) The time for filing a notice of injury, under section 912 of this title, or a claim for compensation, under section 913 of this title, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(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 the 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 subsection, 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 subsection shall apply.

(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

(d)(1) If an employee who is receiving compensation for permanent partial disability pursuant to subsection (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such widow or widower,

(B) if the employee is survived only by a child or children, such unpaid amount of the award shall be paid to such child or children in equal shares,

(C) if the employee is survived by a widow or widower and a child or children, such unpaid amount of the award shall be payable to such survivors in equal shares,

(D) if there be no widow or widower and no surviving child or children, such unpaid amount of the award shall be paid to the survivors specified in section 909(d) of this title (other than

a wife, husband, or child); and the amount to be paid each such survivor shall be determined by multiplying such unpaid amount of the award by the appropriate percentage specified in section 909(d) of this title, but if the aggregate amount to which all such survivors are entitled, as so determined, is less than such unpaid amount of the award, the excess amount shall be divided among such survivors pro rata according to the amount otherwise payable to each under this subparagraph.

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subsection (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury,

the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer shall provide compensation for the applicable prescribed period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods. In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability and the disability is found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide compensation for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer shall provide compensation for the lesser of such periods.

In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation for one hundred and four weeks only.

(2)(A) After cessation of the payments for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in section 944 of this title, except that the special fund shall not assume responsibility with respect to such benefits (and such payments shall not be subject to cessation) in the case of any employer who fails to comply with section 932(a) of this title.

> (B) After cessation of payments for the period of weeks provided for in this subsection, the employer or carrier responsible for payment of compensation shall remain a party to the claim, retain access to all records relating to the claim, and in all other respects retain all rights granted under this chapter prior to cessation of such payments.

(3) Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such

claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the Secretary as provided by section 939(c) of this title, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $25 a week. The expense shall be paid out of the special fund established in section 944 of this title.

(h) The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

(i)(1) Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the

settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

(2) If the deputy commissioner disapproves an application for settlement under paragraph (1), the deputy commissioner shall issue a written statement within thirty days containing the reasons for disapproval. Any party to the settlement may request a hearing before an administrative law judge in the manner prescribed by this chapter. Following such hearing, the administrative law judge shall enter an order approving or rejecting the settlement.

(3) A settlement approved under this section shall discharge the liability of the employer or carrier, or both. Settlements may be agreed upon at any stage of the proceeding including after entry of a final compensation order.

(4) The special fund shall not be liable for reimbursement of any sums paid or payable to an employee or any beneficiary under such settlement, or otherwise voluntarily paid prior to such settlement by the employer or carrier, or both.

(j)(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who—

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings,

and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

33 U.S.C. § 909. Compensation for death

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child

shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: *Provided,* That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section 152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each

parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subsection exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but—

(1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and

(2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of

the injury, and except that the Secretary may, at his option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.

33 U.S.C. § 910. Determination of pay

Except as otherwise provided in this chapter, 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:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in

the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d)(1) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(2) Notwithstanding paragraph (1), with respect to any claim based on a death or disability due to an occupational disease for which the time of injury (as determined under subsection (i) of this section) occurs—

> (A) within the first year after the employee has retired, the average weekly wages shall be one fifty-second part of his average annual earnings during the 52-week period preceding retirement; or
>
> (B) more than one year after the employee has retired, the average weekly wage shall be deemed to be the national average weekly wage (as determined by the Secretary pursuant to section 906(b) of this title) applicable at the time of the injury.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

(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 chapter 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 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

(g) The weekly compensation after adjustment under subsection (f) of this section shall be fixed at the nearest dollar. No adjustment of less than $1 shall be made, but in no event shall compensation or death benefits be reduced.

(h)(1) Not later than ninety days after 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 October 27, 1972, 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 906(b) of this title 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 October 27, 1972, and

(B) subtracting therefrom the compensation to which such employee or survivor was entitled on October 27, 1972; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on October 27, 1972. 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 chapter 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 October 27, 1972. 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 944 of this title, 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 October 27, 1972, shall be considered to have occurred on the day following such date.

(i) For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately

result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. § 913. Filing of claims

(a) Time to file

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

* * * *

33 U.S.C. § 914. Payment of compensation

(a) Manner of payment

Compensation under this chapter 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) Period of installment payments

The first installment of compensation shall become due on the fourteenth day after the employer has been notified pursuant to section 912 of this title, 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) Notification of commencement or suspension of payment

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) Right to compensation controverted

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 controverted, 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) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid install-

ment 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 subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award

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 921 of this title and an order staying payment has been issued by the Board or court.

(g) Notice of payment; penalty

Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) Investigations, examinations, and hearings for controverted, stopped, or suspended payments

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.

(i) Deposit by employer

Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) Receipt for payment

An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

33 U.S.C. § 915. Invalid agreements

(a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than $1,000.

(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

33 U.S.C. § 918. Collection of defaulted payments; special fund

(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 or[1] a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, 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. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the

[1] So in original. Probably should read "for".

amount in default. 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. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. 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. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter,

and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may by a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

33 U.S.C. § 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribeed 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) Notice of claim

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. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

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, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, 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 subsection (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on

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[1] So in original. Probably should be "an".

October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter 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.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be

suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. § 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(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 chapter 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.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary

members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

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. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

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 (or to the United States District Court for the District of Columbia if the injury occurred in the District). 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.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

33 U.S.C. § 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation

within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the

amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

* * * *

33 U.S.C. § 932. Security for compensation

(a) Every employer shall secure the payment of compensation under this chapter—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or

(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay

such compensation directly. The Secretary may, as a condition to such authorization, require such employer to deposit in a depository designated by the Secretary either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the Secretary, based on the employer's financial condition, the employer's pre-vious record of payments, and other relevant factors, and subject to such conditions as the Secretary may prescribe, which shall include authorization to the Secretary in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this chapter. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(b) In granting authorization to any carrier to insure payment of compensation under this chapter the Secretary may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this chapter in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this chapter. The Secretary may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No

suspension or revocation shall affect the liability of any carrier already incurred.

33 U.S.C. § 933. Compensation for injuries where third persons are liable

* * * *

(b) Acceptance of compensation operating as assignment

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.

* * * *

(i) Right to compensation as exclusive remedy

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect

the liability of a person other than an officer or employee of the employer.

33 U.S.C. § 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

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REGULATIONS

20 C.F.R. § 701.201. Office of Workers' Compensation Programs.

The Office of Workers' Compensation Programs is responsible for administering the LHWCA and its extensions.

20 C.F.R. § 701.301. Definitions and use of terms.

(a) As used in this subchapter, except where the context clearly indicates otherwise:

* * * *

(7) District Director means a person appointed as provided in sections 39 and 40 of the LHWCA or his or her designee, authorized to perform functions with respect to the processing and determination of claims for compensation under the LHWCA and its extensions as provided therein and under this subchapter. The term District Director is substituted for the term Deputy Commissioner used in the statute. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute.

* * * *

20 C.F.R. § 702.105. Use of the title District Director in place of Deputy Commissioner.

Wherever the statute refers to Deputy Commissioner, these regulations have substituted the term District Director. The substitution is purely an administrative one, and in no way effects the authority of or the

powers granted and responsibilities imposed by the statute on that position.

20 C.F.R. § 702.301. Scope of this subpart.

The regulations in this subpart govern the adjudication of claims in which the employer has filed a notice of controversion under § 702.251, or the employee has filed notice of contest under § 702.261. In the vast majority of cases, the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law. Such problems seldom require resolution through formal hearings, with the attendant production of expert witnesses. Accordingly, by § 702.311 et seq., the district directors are empowered to amicably and promptly resolve such problems by informal procedures. Where there is a genuine dispute of fact or law which cannot be so disposed of informally, resort must be had to the formal hearing procedures as set forth beginning at § 702.331. Supplementary compensation orders, modifications, and interlocutory matters are governed by regulations beginning with § 702.371. Thereafter, appeals from compensation orders are discussed beginning with § 702.391 (the regulations of the Benefits Review Board are set forth in full in part 802 of this title).

20 C.F.R. § 702.311. Handling of claims matters by district directors; informal conferences.

The district director is empowered to resolve disputes with respect to claims in a manner designed to protect the rights of the parties and also to resolve such disputes at the earliest practicable date. This will generally be accomplished by informal discus-

sions by telephone or by conferences at the district director's office. Some cases will be handled by written correspondence. The regulations governing informal conferences at the district director's office with all parties present are set forth below. When handling claims by telephone, or at the office with only one of the parties, the district director and his staff shall make certain that a full written record be made of the matters discussed and that such record be placed in the administrative file. When claims are handled by correspondence, copies of all communications shall constitute the administrative file.

20 C.F.R. § 702.312. Informal conferences; called by and held before whom.

Informal conferences shall be called by the district director or his designee assigned or reassigned the case and held before that same person, unless such person is absent or unavailable. When so assigned, the designee shall perform the duties set forth below assigned to the district director, except that a compensation order following an agreement shall be issued only by a person so designated by the Director to perform such duty.

20 C.F.R. § 702.313. Informal conferences; how called; when called.

Informal conferences may be called upon not less than 10 days' notice to the parties, unless the parties agree to meet at an earlier date. The notice may be given by telephone, but shall be confirmed by use of a written notice on a form prescribed by the Director. The notice shall indicate the date, time and place of the conference, and shall also specify the matters to

be discussed. For good cause shown conferences may be rescheduled. A copy of such notice shall be placed in the administrative file.

20 C.F.R. § 702.314. Informal conferences; how conducted; where held.

(a) No stenographic report shall be taken at informal conferences and no witnesses shall be called. The district director shall guide the discussion toward the achievement of the purpose of such conference, recommending courses of action where there are disputed issues, and giving the parties the benefit of his experience and specialized knowledge in the field of workmen's compensation.

(b) Conferences generally shall be held at the district director's office. However, such conferences may be held at any place which, in the opinion of the district director, will be of greater convenience to the parties or to their representatives.

20 C.F.R. § 702.315. Conclusion of conference; agreement on all matters with respect to the claim.

(a) Following an informal conference at which agreement is reached on all issues, the district director shall (within 10 days after conclusion of the conference), embody the agreement in a memorandum or within 30 days issue a formal compensation order, to be filed and mailed in accordance with § 702.349. If either party requests that a formal compensation order be issued the district director shall, within 30 days of such request, prepare, file, and serve such order in accordance with § 702.349. Where the problem was of such nature that it was resolved by telephone discussion or by exchange of

written correspondence, the parties shall be notified by the same means that agreement was reached and the district director shall prepare a memorandum or order setting forth the terms agreed upon. In either instance, when the employer or carrier has agreed to pay, reinstate or increase monetary compensation benefits, or to restore or appropriately change medical care benefits, such action shall be commenced immediately upon becoming aware of the agreement, and without awaiting receipt of the memorandum or the formal compensation order.

(b) Where there are several conferences or discussions, the provisions of paragraph (a) of this section do not apply until the last conference. The district director shall, however, prepare and place in his administrative file a short, succinct memorandum of each preceding conference or discussion.

20 C.F.R. § 702.316. Conclusion of conference; no agreement on all matters with respect to the claim.

When it becomes apparent during the course of the informal conference that agreement on all issues cannot be reached, the district director shall bring the conference to a close, shall evaluate all evidence available to him or her, and after such evaluation shall prepare a memorandum of conference setting forth all outstanding issues, such facts or allegations as appear material and his or her recommendations and rationale for resolution of such issues. Copies of this memorandum shall then be sent to each of the parties or their representatives, who shall then have 14 days within which to signify in writing to the district director whether they agree or disagree with his or her recommendations. If they agree, the district director shall proceed as in § 702.315(a). If

they disagree (Caution: See § 702.134), then the district director may schedule such further conference or conferences as, in his or her opinion, may bring about agreement; if he or she is satisfied that any further conference would be unproductive, or if any party has requested a hearing, the district director shall prepare the case for transfer to the Office of the Chief Administrative Law Judge (See § 702.317, §§ 702.331–702.351).

20 C.F.R. § 702.317. Preparation and transfer of the case for hearing.

A case is prepared for transfer in the following manner:

(a) The district director shall furnish each of the parties or their representatives with a copy of a prehearing statement form.

(b) Each party shall, within 21 days after receipt of such form, complete it and return it to the district director and serve copies on all other parties. Extensions of time for good cause may be granted by the district director.

(c) Upon receipt of the completed forms, the district director, after checking them for completeness and after any further conferences that, in his or her opinion, are warranted, shall transmit them to the Office of the Chief Administrative Law Judge by letter of transmittal together with all available evidence which the parties intend to submit at the hearing (exclusive of X-rays, slides and other materials not suitable for mailing which may be offered into evidence at the time of hearing); the materials transmitted shall not include any

recommendations expressed or memoranda prepared by the district director pursuant to § 702.316.

(d) If the completed pre-hearing statement forms raise new or additional issues not previously considered by the district director or indicate that material evidence will be submitted that could reasonably have been made available to the district director before he or she prepared the last memorandum of conference, the district director shall transfer the case to the Office of the Chief Administrative Law Judge only after having considered such issues or evaluated such evidence or both and having issued an additional memorandum of conference in conformance with § 702.316.

(e) If a party fails to complete or return his or her pre-hearing statement form within the time allowed, the district director may, at his or her discretion, transmit the case without that party's form. However, such transmittal shall include a statement from the district director setting forth the circumstances causing the failure to include the form, and such party's failure to submit a pre-hearing statement form may, subject to rebuttal at the formal hearing, be considered by the administrative law judge, to the extent intransigence is relevant, in subsequent rulings on motions which may be made in the course of the formal hearing.

(Approved by the Office of Management and Budget under control number 1215-0085)

20 C.F.R. § 702.318. The record; what constitutes; nontransferability of the administrative file.

For the purpose of any further proceedings under the Act, the formal record of proceedings shall consist of

the hearing record made before the administrative law judge (see § 702.344). When transferring the case for hearing pursuant to § 702.317, the district director shall not transfer the administrative file under any circumstances.

20 C.F.R. § 702.319. Obtaining documents from the administrative file for reintroduction at formal hearings.

Whenever any party considers any document in the administrative file essential to any further proceedings under the Act, it is the responsibility of such party to obtain such document from the district director and reintroduce it for the record before the administrative law judge. The type of document that may be obtained shall be limited to documents previously submitted to the district director, including documents or forms with respect to notices, claims, controversions, contests, progress reports, medical services or supplies, etc. The work products of the district director or his staff shall not be subject to retrieval. The procedure for obtaining documents shall be for the requesting party to inform the district director in writing of the documents he wishes to obtain, specifying them with particularity. Upon receipt, the district director shall cause copies of the requested documents to be made and then:

(a) Place the copies in the file together with the letter of request, and (b) promptly forward the originals to the requesting party. The handling of multiple requests for the same document shall be within the discretion of the district director and with the cooperation of the requesting parties.

20 C.F.R. § 702.333. Formal hearings; parties.

(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party.