No. 15-551

In the Supreme Court of the United States

RICKY N. EASON, PETITIONER

v.

HUNTINGTON INGALLS INDUSTRIES, INC., F/K/A NORTHRUP GRUMMAN SHIPBUILDING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK A. REINHALTER
GARY K. STEARMAN
Counsels
MATTHEW W. BOYLE
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Employees covered by the Longshore and Harbor Workers' Compensation Act (Act), 33 U.S.C. 901 *et seq.*, are entitled to compensation for their loss of wage-earning capacity due to injuries they incur in the course of their employment. When a claimant suffers a permanent partial disability resulting from an injury listed in the Act's schedule of benefits under Section 908(c), the amount of his compensation is fixed by the schedule and the extent of his loss of wage-earning capacity is likewise conclusively presumed, even if his actual loss of wage-earning capacity differs from the scheduled amount. *Potomac Elec. Power Co.* v. *Director*, 449 U.S. 268, 269, 282-283 (1980). The question presented is:

Whether a claimant who is receiving scheduled compensation for a permanent partial disability can receive additional compensation for a temporary partial disability due to the same injury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 15-551

RICKY N. EASON, PETITIONER

v.

HUNTINGTON INGALLS INDUSTRIES, INC., F/K/A NORTHRUP GRUMMAN SHIPBUILDING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 54-79) is reported at 788 F.3d 118. The decisions of the Benefits Review Board of the United States Department of Labor (Pet. App. 18-26, 48-53) and the administrative law judges (Pet. App. 1-17, 27-47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2015. A petition for rehearing was denied on July 31, 2015 (Pet. App. 80). The petition for a writ of certiorari was filed on October 26, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, establishes a workers' compensation system for employees disabled or killed in the course of covered maritime employment. See 33 U.S.C. 903(a), 908, 909. The Director of the Office of Workers' Compensation Programs of the United States Department of Labor (Director) is charged with administering the Act and is authorized to appear as a litigant in LHWCA proceedings. *Ingalls Shipbuilding, Inc.* v. *Director*, 519 U.S. 248, 270 (1997).

a. The Act defines "disability" as "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." 33 U.S.C. 902(10). The Act divides disability into four categories and separately prescribes the method and duration of compensation for each: permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. 33 U.S.C. 908(a), (b), (c), and (e); *Potomac Elec. Power Co.* v. *Director*, 449 U.S. 268, 273-274 (1980) (*PEPCO*).

A claimant is totally disabled when the work-related injury "renders him unable to return to prior employment, and * * * the employer subsequently fails to establish the availability of suitable alternative employment." *Hawaii Stevedores, Inc.* v. *Ogawa*, 608 F.3d 642, 652 (9th Cir. 2010) (citation and internal quotation marks omitted). By contrast, the disability is partial if the claimant is capable of engaging in some gainful work. *General Constr. Co.* v. *Castro*, 401 F.3d 963, 969 (9th Cir. 2005), cert. denied, 546 U.S. 1130 (2006). A disability transitions from temporary

to permanent when a claimant's injury "reaches 'maximum medical improvement,' after which normal and natural healing is no longer likely." *Pacific Ship Repair & Fabrication Inc.* v. *Director*, 687 F.3d 1182, 1185 (9th Cir. 2012) (*Benge*) (citation omitted).

b. The Act compensates a permanent partial disability in one of two ways, depending on whether the employee suffered an injury to a body part listed on the schedule in 33 U.S.C. 908(c)(1)-(20), or whether, as "[i]n all other cases," his disability resulted from an unscheduled injury, 33 U.S.C. 908(c)(21).

For unscheduled injuries, the Act adopts "an economic, not a medical, concept" of disability by opting to compensate not "physical injury alone but the disability produced by that injury." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). Compensation "is predicated on [the employee's] loss of wage-earning capacity," which he must prove. *Ibid.* So long as the claimant can show his "incapacity * * * to earn the wages which [he] was receiving at the time of injury," *ibid.* (quoting 33 U.S.C. 902(10)), he is entitled to two-thirds of the difference between his average weekly wage and his post-injury wage-earning capacity, "payable during the continuance of partial disability," 33 U.S.C. 908(c)(21).[1]

A scheduled injury, by contrast, entitles the employee to a fixed number of weeks of compensation at two-thirds of his average weekly wage, "regardless of whether his earning capacity has actually been impaired." *PEPCO*, 449 U.S. at 269; see 33 U.S.C 908(c)(1)-(17) and (20). Thus, for example, an employ-

---

[1] All temporary partial disability is compensated in the same manner as that set out for unscheduled permanent partial disability. Compare 33 U.S.C. 908(e), with 33 U.S.C. 908(c)(21).

ee who loses a leg or 100% of its use is entitled under the schedule to 288 weeks of compensation at two-thirds of his average weekly wage. 33 U.S.C. 908(c)(2); see 33 U.S.C. 908(c)(18) ("[t]otal loss of use"). For a partial loss of the use of a leg, which includes knee injuries, the number of weeks is multiplied by the percentage of loss. 33 U.S.C. 908(c)(19); see *PEPCO*, 449 U.S. at 272 n.4. Thus, a claimant with a 50% loss of the use of his leg would receive weekly compensation of two-thirds of his average weekly wage for 144 weeks.

Scheduled amounts for permanent partial disability compensate claimants for conclusively presumed, rather than actual, losses of wage-earning capacity. *PEPCO*, 449 U.S. at 269, 282-283; *Barker* v. *United States Dep't of Labor*, 138 F.3d 431, 435 (1st Cir. 1998) (citing *Rupert* v. *Todd Shipyards Corp.*, 239 F.2d 273, 275-276 (9th Cir. 1956)); *Korineck* v. *General Dynamics Corp. Elec. Boat Div.*, 835 F.2d 42, 43-44 (2d Cir. 1987). Accordingly, if an injury is of a kind specifically identified in the schedule set out in 33 U.S.C. 908(c)(1)-(20), a permanent partial disability resulting from the injury must be compensated under the schedule, and the employee may not instead elect to receive compensation based on actual loss of wage-earning capacity under 33 U.S.C. 908(c)(21). *PEPCO*, 449 U.S. at 271, 273-280.

2. On September 28, 2008, petitioner injured his right knee while working for Huntington Ingalls Industries, Inc. (Huntington). Pet. App. 60. He was unable to work from October 2, 2008, until June 29, 2009, and Huntington compensated him for temporary total disability for this time period. *Ibid.*

The knee injury also left petitioner with a "14% lower-extremity permanent impairment rating." Pet. App. 60-61. Although petitioner returned to work full time on June 29, 2009, Huntington paid him permanent partial disability compensation at the rate of two-thirds of his average weekly wage for approximately 40 weeks, from October 16, 2009, through July 25, 2010, pursuant to the schedule and his 14% impairment rating.[2] *Ibid.*

For a period of time after May 18, 2010, petitioner was unable to perform his duties at Huntington because of pain in both knees, for which his doctor put him on light-duty restrictions. Pet. App. 61-62. Huntington did not offer light-duty employment within those restrictions, and petitioner did not seek alternative employment. *Id.* at 62. On August 10, 2010, he returned to work full-time at Huntington. *Ibid.*

3. Petitioner thereafter claimed additional compensation for either temporary total or temporary partial disability for the work he missed between May and August of 2010. Pet. App. 62-63.

a. An administrative law judge (ALJ) initially denied petitioner's claim for additional temporary disability compensation. Pet. App. 1-17. Relying on *PEPCO*, the ALJ reasoned that "[t]he Act presumes that the scheduled award fully compensates claimant for any loss in wage-earning capacity. Therefore, any temporary loss of wage earning capacity Claimant suffered is not compensable in addition to the scheduled award." *Id.* at 16 (citations omitted).

---

[2] Section 908(c)(2) provides for 288 weeks of compensation for the loss of a leg. Multiplying 288 weeks by 14%, see 33 U.S.C. 908(c)(19), yields 40.32 weeks. See Pet. App. 61 & n.3.

b. Petitioner appealed to the Benefits Review Board (Board), which vacated and remanded. The Board, relying on case law holding that a "claimant is not limited to an award under the schedule when an injury to a scheduled member results in *total* disability," Pet. App. 22-23 & n.2 (emphasis added) (citing, *inter alia*, *Benge*, 687 F.3d 1182), concluded that full payment of scheduled permanent partial disability benefits "is not determinative of a claimant's entitlement thereafter to permanent total, temporary total, or temporary partial disability benefits," *id.* at 23. The Board did not explain why the cases it cited dealing with total disability would also entitle a permanently partially disabled claimant to additional compensation for a temporary flare-up that resulted in only a partial disability. Although the Board directed the ALJ on remand to determine whether the flare-up left petitioner "unable to perform any work," and thus totally disabled, *id.* at 23-24, it gave no further instruction on how temporary partial disability compensation would be calculated if the ALJ were to find petitioner could have performed some suitable alternative work.

c. On remand before a second ALJ, petitioner contended he was entitled to compensation for temporary total disability for the period from May through August of 2010, during which he was unable to perform his usual work for Huntington. Pet. App. 38. In the alternative, he sought temporary partial disability compensation. *Ibid.*

The ALJ first concluded that petitioner was not totally disabled because Huntington had presented several other available employment options for which petitioner was qualified. Pet. App. 43-44; see *id.* at 40-

44. The ALJ then determined that because petitioner could have engaged in suitable alternative employment from May 19 through August 20, 2010, he was only temporarily partially disabled under 33 U.S.C. 908(e). See Pet. App. 44. The ALJ accordingly awarded petitioner compensation representing two-thirds of the difference between his normal wages and his residual wage-earning capacity based on the available alternatives. *Id.* at 44-45 & n.3, 66 n.4.

d. Huntington appealed to the Board, arguing that *PEPCO* limited petitioner to the scheduled award. Noting that it had previously rejected that argument, the Board affirmed the ALJ's award of compensation for temporary partial disability from May 19 to August 20, 2010. Pet. App. 47.

4. The court of appeals reversed. Pet. App. 54-79. Deferring to the Director's interpretation of the LHWCA, the court held that, because petitioner had suffered a scheduled injury, his permanent partial disability compensation was set by the schedule, and "[s]uch scheduled compensation is presumed to cover [petitioner]'s actual *partial* loss of wage-earning capacity due to that *partial* disability." *Id.* at 69-70 (citing *ITO Corp. of Balt.* v. *Green*, 185 F.3d 239, 242 n.3 (4th Cir. 1999), and *Bethlehem Steel Co.* v. *Cardillo*, 229 F.2d 735, 736 (2d Cir.), cert. denied, 351 U.S. 950 (1956)). The court explained that once the schedule fixed his compensation, petitioner was "not entitled to receive *additional* disability compensation for the *same* scheduled injury unless the circumstances warrant[ed] a reclassification of that disability to permanent total or temporary total." *Id.* at 70 (citing *Benge*, 687 F.3d at 1185-1187; *Norfolk Shipbuilding & Drydock Corp.* v. *Hord*, 193 F.3d 797, 801-802 (4th Cir.

1999); and *DM & IR Ry.* v. *Director*, 151 F.3d 1120, 1122-1123 (8th Cir. 1998)). Additional compensation is warranted where the disability becomes total, the court explained, because total disability reflects a complete loss of wage-earning capacity, such that "it makes no sense to apply a presumption designed to approximate a claimant's permanent *partial* disability compensation."[3] *Id.* at 70-71.

By contrast, the court of appeals reasoned, there is no additional loss of wage-earning capacity when a claimant's scheduled permanent partial disability "allegedly changes to a temporary partial disability" because of a flare-up of the claimant's injury. Pet. App. 71. So long as the claimant is able to perform suitable alternative work, the scheduled award presumptively accounts for his entire loss, and any additional compensation for the temporary partial disability would constitute an impermissible double recovery for the same injury. *Id.* at 71-72. In short, the court concluded that petitioner's "temporary partial disability claim is subsumed by the compensation he received under the schedule." *Id.* at 71.

The court of appeals further noted that additional compensation for temporary partial disability would "defeat[] the intent of the schedule" to "provide quick compensation" and "fix the employer's liability exposure." Pet. App. 72-73 (citing *PEPCO*, 449 U.S. at 282). The court explained that under petitioner's construction, the employer's liability would be "subject to increase essentially any time a scheduled

---

[3] The court of appeals further noted that a claimant may receive additional scheduled compensation when the scheduled injury worsens "to reflect a higher percentage of permanent loss." Pet. App. 73 n.7.

claimant is placed on temporary work restrictions. Such a construction of the LHWCA makes little sense." *Id.* at 73.

Based on similar reasoning, however, the court of appeals rejected Huntington's argument that a scheduled award for permanent partial disability also forecloses compensation for temporary *total* disability. Pet. App. 73. That argument, the court explained, was inconsistent with its prior decision in *Hord*, 193 F.3d at 802, and the Ninth Circuit's decision in *Benge*, 687 F.3d at 1185-1187, both of which permit permanent partial disability claimants to receive additional compensation when their disability later progresses into a temporary total disability. Pet. App. 73-74. The court further found Huntington's argument incompatible with Section 908(c)'s command that permanent partial disability compensation be paid "in addition to" compensation for temporary total disability. *Id.* at 74 (citing 33 U.S.C. 908(c)). The court reiterated that "[t]he receipt of such additional temporary total disability compensation ensures that the claimant is compensated for his actual loss of wage-earning capacity (including the loss not presumed by the schedule) and, thus, fulfills the basic purpose of the LHWCA." *Ibid.*

The court of appeals recognized that the Act's schedule permits overcompensation in some cases and undercompensation in others, such that, "[f]or example, a claimant with a scheduled injury may be compensated even though he never misses a day of work and, thus, incurs no actual wage loss whatsoever." Pet. App. 74-75. But as the court of appeals explained, this Court recognized in *PEPCO* that "such inequities simply are a manifestation of the system created by Congress which we are not at liberty to disturb." *Id.*

at 75 (citing *PEPCO*, 449 U.S. at 282-283). The court accordingly remanded the case to the Board with instructions to dismiss petitioner's claim for temporary partial disability. *Id.* at 76, 79.

ARGUMENT

The court of appeals held that an employee who is receiving scheduled compensation for a permanent partial disability pursuant to the LHWCA may not receive additional temporary partial disability compensation for that same injury. At the same time, the court made clear that an individual who becomes totally disabled or suffers a greater degree of permanent partial loss may qualify for additional compensation. Pet. App. 72, 73 n.7. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals properly deferred to the Director's reasonable interpretation of the LHCWA, see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 137 (1997), and correctly held that petitioner's award of scheduled permanent partial disability compensation precluded a subsequent award of temporary partial disability compensation for the same injury. As petitioner concedes (Pet. 10), a scheduled award presumes the extent of a claimant's loss of wage-earning capacity. Once set, the scheduled award fixes the amount of compensation a claimant may receive for that partial disability. *Potomac Elec. Power Co.* v. *Director*, 449 U.S. 268, 269, 282-283 (1980); *Barker* v. *United States Dep't of Labor*, 138 F.3d 431, 435 (1st Cir. 1998) (citing *Rupert* v. *Todd Shipyards Corp.*, 239 F.2d 273, 275-276 (9th Cir. 1956)); *Korineck* v. *General*

Dynamics Corp. Elec. Boat Div., 835 F.2d 42, 43-44 (2d Cir. 1987).

Applying these principles, the court of appeals correctly determined that the subsequent temporary flare-up of petitioner's injury did not cause an additional loss of wage-earning capacity that required additional compensation. Huntington established that, during the flare-up, petitioner retained the capacity to work in gainful employment, and so remained only partially disabled, as before. The temporary partial wage-loss and disability he experienced between May and August of 2010 were thus "subsumed" by the presumed wage-loss and permanent partial disability that had been fixed by the schedule. Pet. App. 71 ("[T]he scheduled compensation accounts for all the lost wages due the claimant under the LHWCA.").

A subsequent award for temporary partial disability in addition to the scheduled award would have amounted, as the court of appeals concluded, to an "impermissible double recovery." Pet. App. 72 (citing *Port of Portland* v. *Director*, 932 F.2d 836, 839 n.1 (9th Cir. 1991)); accord *Stevedoring Serv. of Am.* v. *Price*, 382 F.3d 878, 885 (9th Cir. 2004) (collecting cases), cert. denied, 544 U.S. 960 (2005). Petitioner would have recovered twice for the same partial loss of wage-earning capacity stemming from the same injury—once based on the statutory presumed loss, and once based on a case-specific calculation of his actual loss.

2. Petitioner's arguments to the contrary are unpersuasive.

a. Petitioner proposes (Pet. 13-14) that double recovery can be avoided by suspending his scheduled compensation for the period of time for which he seeks

temporary partial disability compensation. But it is not the mere concurrency of the payments that would be contrary to the statute, but rather the fact that the payments would twice account for the same partial loss of wage-earning capacity.

Nor is it any answer to suggest that the court of appeals' ruling conflicts with Section 908(c)'s directive that scheduled compensation "shall be in addition to compensation for temporary total disability or temporary partial disability." Pet. 10 (quoting 33 U.S.C. 908(c)). Section 908(c) contemplates that an employee is entitled to temporary disability payments until he "reaches 'maximum medical improvement,' after which normal and natural healing is no longer likely." *Pacific Ship Repair & Fabrication Inc.* v. *Director*, 687 F.3d 1182, 1185 (9th Cir. 2012); cf. S. Rep. No. 588, 73d Cong., 2d Sess. 2 (1934) (explaining amendment intending "to provide that in case of permanent partial disability—for example, the loss of an arm—compensation shall first be paid during the 'healing period' and that such payments shall be *in addition* to the compensation payable on account of the permanent partial disability as fixed in the schedule" (emphasis added)). Nothing in the decision below prevents a claimant from receiving compensation for temporary partial disability or temporary total disability (as petitioner did here) before his condition fully heals and becomes permanent. Moreover, the court explicitly acknowledged that a claimant may receive temporary total disability compensation even after obtaining a scheduled award. Pet. App. 70.

b. Petitioner concedes (Pet. 10) that "[t]he schedule sets a presumptive loss of earning power for specific defined injuries." He nonetheless suggests (Pet.

9-12) that temporary partial disability should be treated the same as temporary total disability, such that he may obtain "additional compensation * * * for the time period in which he was not able to perform his usual work, due to a temporary flare-up" of his scheduled injury.

That argument ignores the fact that Congress chose to use a schedule that conclusively presumes lost wage-earning capacity for the specified injuries. See *PEPCO*, 449 U.S. at 282-283. The reason subsequent permanent total disability and subsequent temporary total disability are treated differently from subsequent temporary partial disability is that the claimant's permanent partial disability under the schedule presumes the extent of his *partial* loss of wage-earning capacity. That presumption does not address total disability of either variety. As the court of appeals explained, so long as the employee is not totally disabled, the use of a scheduled presumption precludes a claimant from receiving "*additional* disability compensation for the *same* scheduled injury." Pet. App. 70. By contrast, if the disability progresses from partial to total, the presumption of *partial* loss of wage-earning capacity must yield to the loss of *all* wage-earning capacity. See *id.* at 70-71.

As this Court has recognized, the LHWCA's schedule may result in awards that over- or undercompensate a claimant relative to his actual loss. *PEPCO*, 449 U.S. at 282-283.[4] More specifically, while unscheduled permanent partial disability, like temporary partial disability, results in payment based on the employee's actual loss of wage-earning capacity "dur-

[4] Here, the court of appeals determined that petitioner's scheduled award overcompensated him by $28,771.91. Pet. App. 76 n.8.

ing the continuance of partial disability," 33 U.S.C. 908(c)(21); see 33 U.S.C. 908(e) (same), a scheduled permanent partial injury results in a specified quantum of payment "for a finite period of time," *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 296-297 (1995). That means that employees whose partial disabilities under the schedule result in no actual loss of wage-earning capacity are overcompensated, while employees who experience a greater loss of wages than allowed for in the schedule's "finite period of time" may be undercompensated. But while "the schedule may produce certain incongruous results," "the federal courts may not avoid them by rewriting or ignoring" the statute. *PEPCO*, 449 U.S. at 282-283.

For this reason, petitioner's reading of the statute would undermine "the central bargain of workers' compensation regimes—limited liability for employers; certain, prompt recovery for employees," *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1354 (2012), by causing an increase in compensation "essentially any time a scheduled claimant is placed on temporary work restrictions," Pet. App. 73. As the court of appeals explained, an award of temporary partial disability compensation here was inconsistent with the underlying purpose of the schedule, which is designed to provide quick and certain compensation. *Ibid.*; see *PEPCO*, 449 U.S. at 282 ("The use of a schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.").

3. Contrary to petitioner's contention (Pet. 7-8, 11-12), the decision below does not conflict with any decision of this Court or of another court of appeals.

As an initial matter, the court of appeals did not prohibit any and all reclassification of a compensation award. To the contrary, the court observed that once a "claimant is classified in a particular disability category, he need not necessarily remain in such category." Pet. App. 59 (citing *Benge*, 687 F.3d at 1187). The court further specifically approved of an increase in compensation when a partial disability worsens to total, either temporarily or permanently, *id.* at 59, 70-71, or worsens "to reflect a higher percentage of permanent loss," *id.* at 73 n.7. The court also approved of a decrease in compensation when a total disability diminishes to partial due to changes in the labor market or the claimant's underlying medical condition. *Id.* at 59-60. By its terms, then, the decision below is limited to precluding a claimant who is receiving compensation for a scheduled permanent partial disability from later receiving additional temporary partial disability compensation for the same injury.[5]

Petitioner cites no court of appeals decision, and the government is aware of none, that is inconsistent with that decision. Despite petitioner's contention (Pet. 7-8, 11-12), none of the cases on which he relies even addresses compensation for temporary partial disability, much less temporary partial disability compensation after a scheduled permanent partial disability award based on the same injury. See *Nor-*

[5] Petitioner's physician put him on light-duty restrictions from May through August of 2010 for discomfort in both knees. See Pet. App. 9, 19-20, 61-62. Petitioner, however, never made a claim for his left knee problems.

folk Shipbuilding & Drydock Corp. v. *Hord*, 193 F.3d 797, 801-802 & n.4 (4th Cir. 1999) (permitting temporary total disability compensation after award of scheduled permanent partial disability compensation);[6] *Benge*, 687 F.3d at 1185-1187 (permitting temporary total disability compensation after unscheduled permanent partial disability compensation); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654-655 (5th Cir. 1968) (holding that there was substantial evidence to support the determination that a disability was permanent and total and noting that "[t]he determination that [the claimant] is permanently disabled does not foreclose the possibility that his condition may change"), cert. denied, 394 U.S. 976, and 395 U.S. 920 (1969); *Pittsburgh & Conneaut Dock Co.* v. *Director*, 473 F.3d 253, 260 (6th Cir. 2007) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN JAMES
Associate Solicitor
MARK A. REINHALTER
GARY K. STEARMAN
Counsels
MATTHEW W. BOYLE
Attorney
Department of Labor

JANUARY 2016

---

[6] The court below expressly noted that in its own decision in *Hord*, the claimant's permanent partial disability was properly reclassified as total. Pet. App. 70.