No. 20-1013

In the Supreme Court of the United States

CLARENCE J. SIMON, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Benefits Review Board's determination that an administrative law judge properly applied collateral estoppel to bar petitioner from relitigating the existence of a third-party settlement agreement for purposes of Section 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 933(g).

ADDITIONAL RELATED PROCEEDING

United States Court of Appeals (5th Cir.):

Simon v. *Director*, No. 19-60215 (Aug. 20, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a[1]) is not published in the Federal Reporter but is reprinted at 816 Fed. Appx. 1006. The decision and order of the Benefits Review Board of the United States Department of Labor (Pet. App. 4a-21a) is not published but is available at 2018 WL 6017792.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2020. A petition for rehearing was denied on October 19, 2020 (Pet. App. 3a). The petition for a writ

[1] The appendix to the petition for a writ of certiorari is not consistently paginated with "a." This brief treats it as if it were, beginning with 1a and appending an "a" to the consecutively numbered pages.

of certiorari was filed on January 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, establishes a federal 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 Longshore Act is generally the exclusive remedy injured maritime employees have against their employers. 33 U.S.C. 905(a). It does not bar suits against third parties that are also liable, but the employer can offset a third-party recovery against any Longshore Act compensation owed. 33 U.S.C. 933(a) and (f).

To protect this offset right, Section 33(g) of the Act requires a claimant to obtain his employer's written approval before settling with a third party for less than the amount of compensation due under the Act. 33 U.S.C. 933(g)(1). Because a settlement for less than the amount of compensation owed can "reduce but not extinguish the employer's liability," Section 33(g) "'protects the employer against his employee's accepting too little for his cause of action against a third party.'" *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 482 (1992) (quoting *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U.S. 459, 467 (1968)). Significantly, if a claimant fails to comply with this requirement, he forfeits "all rights to compensation and medical benefits" under the Act. 33 U.S.C. 933(g)(2); see *Cowart*, 505 U.S. at 483.

2. Petitioner Clarence Simon worked as a longshoreman for Longnecker Properties, Inc. (Longnecker). *Simon* v. *Longnecker Props.*, No. 12-cv-1178, 2015 WL

9482899, at *1 (W.D. La. Dec. 28, 2015) (*Simon I*), aff'd in part and dismissed in part, 671 Fed. Appx. 277 (5th Cir. 2016) (per curiam). While loading pipes on a boat, petitioner slipped, fell, and twisted his ankle, an injury which he alleges left him permanently disabled. *Ibid.*; Pet. App. 5a. Before the Department of Labor, he filed a Longshore Act claim against Longnecker. See U.S. Dep't of Labor ALJ Order 1-2 (Apr. 10, 2017) (4/10/17 ALJ Order).[2] He also filed a tort suit in federal district court against several defendants, including Longnecker and Tri-Drill, LLC (Tri-Drill), a company he alleged had inspected the pipes on which he slipped. *Simon* v. *Longnecker Props. Inc.*, No. 12-cv-1178 (W.D. La. filed May 7, 2012).

Tri-Drill and several other defendants moved for summary judgment in the tort action. Petitioner opposed most of those motions. He did not oppose Tri-Drill's motion, however, stating that he and Tri-Drill had "compromised their differences." 12-cv-1178 D. Ct. Doc. (D. Ct. Doc.) 262, at 1 n.1 (W.D. La. Sept. 29, 2015).

Realizing that an unapproved settlement would bar petitioner's Longshore Act claim under Section 33(g), Longnecker subpoenaed Tri-Drill and obtained emails and documents reflecting that petitioner's and Tri-Drill's counsel had agreed to settle the claim against Tri-Drill. D. Ct. Doc. 277-1, at 1-4 (W.D. La. Oct. 23, 2015). Longnecker asked the district court to confirm the settlement and dismiss Tri-Drill's motion for summary judgment as moot. *Id.* at 1. Petitioner opposed the motion, arguing that Longnecker lacked standing

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[2] This order is available at https://www.oalj.dol.gov/DECISIONS/ALJ/LHC/2015/SIMON_CLARENCE_J_v_LONGNECKER_PROPERTIE_2015LHC00110_(APR_10_2017)_164710_CADEC_SD.PDF.

and was collaterally and equitably estopped from seeking confirmation of the settlement. D. Ct. Doc. 289, at 2-3 (W.D. La. Nov. 23, 2015). Tri-Drill also opposed the motion, arguing that Longnecker lacked standing. D. Ct. Doc. 280, at 1 (W.D. La. Nov. 12, 2015). The district court granted Longnecker's motion "[b]ased on the clear evidence of settlement between Tri-Drill and Mr. Simon." *Simon I*, 2015 WL 9482899, at *2. Petitioner appealed to the Fifth Circuit, which affirmed "essentially for the reasons stated by the district court." *Simon* v. *Longnecker Props., Inc.*, 671 Fed. Appx. 277, 277 (2016) (*Simon II*) (per curiam).

3. Longnecker moved to dismiss petitioner's Longshore Act claim based on the settlement between petitioner and Tri-Drill. After the Fifth Circuit denied rehearing in the tort case, an administrative law judge (ALJ) granted the motion to dismiss.[3] 4/10/17 ALJ Order 15. The ALJ determined that petitioner was collaterally estopped from arguing that he and Tri-Drill had not entered into a settlement. *Id.* at 12. Because it was undisputed that Longnecker had not approved the settlement and that the settlement amount was less than the amount of petitioner's Longshore Act claim, the ALJ held that Section 33(g) of the Act barred recovery. *Id.* at 13-14. The ALJ subsequently denied reconsideration. U.S. Dep't of Labor ALJ Order 7 (July 17, 2017).[4]

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[3] The ALJ had denied Longnecker's prior motion to dismiss, which was filed before the emails between Tri-Drill's and petitioner's counsel came to light. Pet. App. 6a.

[4] This order is available at https://www.oalj.dol.gov/DECISIONS/ALJ/LHC/2015/SIMON_CLARENCE_J_v_LONGNECKER_PROPERTIE_2015LHC00110_(JUL_17_2017)_132229_MODIS_SD.PDF.

4. The Benefits Review Board (Board) affirmed. Pet. App. 4a-21a. The Board noted that petitioner did not challenge the ALJ's findings that the settlement amount was less than the compensation to which he would be entitled under the Longshore Act or that Longnecker did not give prior written approval. *Id.* at 10a. Therefore, the sole question was whether the ALJ had properly applied collateral estoppel. *Ibid.* The Board concluded that the ALJ had. *Id.* at 12a. The issue before the district court—whether a settlement existed—was identical to the one before the ALJ; the issue was actually litigated since the court explicitly ruled on it; the court's judgment was final and valid; and the issue was necessary to the court's resolution of petitioner's claim against Tri-Drill. *Id.* at 12a-14a. The Board also rejected petitioner's argument that purported differences in the burden of proof in the two proceedings made collateral estoppel inapplicable. *Id.* at 14a-15a.

5. The court of appeals denied a petition for review. Pet. App. 1a-2a. It found "no error of fact or law" in the Board's affirmance of the ALJ's decision that a "settlement existed and was valid based on collateral estoppel." *Ibid.* The court subsequently denied rehearing. *Id.* at 3a.

ARGUMENT

Petitioner largely asks (Pet. i, 3-4, 14, 16) this Court to revisit the fact-bound question of whether he agreed to settle with Tri-Drill. The court of appeals correctly sustained the Board's ruling that collateral estoppel precluded relitigation of that question. The decision below does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld the Board's determination that collateral estoppel barred petitioner from relitigating whether he entered into a settlement agreement.

a. "Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same." *B & B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138, 140 (2015). Under the doctrine of collateral estoppel, or issue preclusion, "the general rule is that '[w]hen [1] an issue of fact or law is [2] actually litigated and [3] determined by a valid and final judgment, and [4] the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Id.* at 148 (quoting Restatement (Second) of Judgments § 27, at 250 (1982)) (first set of brackets in original). Because all of those elements are satisfied here, the ALJ and the Board correctly determined that they were bound by the district court's decision, and the Fifth Circuit correctly denied the petition for review.

First, both the ALJ and the Board correctly found that the issue resolved in petitioner's earlier tort lawsuit was the same one at issue in his Longshore Act proceeding: whether petitioner had entered into a settlement with Tri-Drill. Pet. App. 12a; 4/10/17 ALJ Order 9.

Second, the question of whether petitioner entered into a settlement with Tri-Drill was actually litigated in the tort suit. "When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated"

for purposes of collateral estoppel. Restatement (Second) of Judgments § 27 cmt. d, at 255. As the Board explained, whether petitioner had settled with Tri-Drill was placed squarely before the district court in Longnecker's motion to confirm settlement. Pet. App. 12a-13a. The district court granted the motion "[b]ased on the clear evidence of settlement between Tri-Drill and Mr. Simon," which had been "filed into the record by Longnecker." *Simon* v. *Longnecker Props.*, No. 12-cv-1178, 2015 WL 9482899, at *2 (W.D. La. Dec. 28, 2015), aff'd in part and dismissed in part, 671 Fed. Appx. 277 (5th Cir. 2016) (per curiam).

Third, the district court's judgment on that issue was both final and valid. Petitioner appealed the ruling to the Fifth Circuit, which affirmed and denied rehearing. *Simon* v. *Longnecker Props., Inc.*, 671 Fed. Appx. 277 (2016) (per curiam). That ruling became indisputably final when petitioner did not seek certiorari. And petitioner has offered no suggestion that the district court's ruling, as affirmed by the Fifth Circuit, was somehow invalid.

Finally, that issue was essential to the judgment in the earlier proceeding. As the ALJ and Board explained, the district court's settlement finding was essential to both its granting of Longnecker's motion to confirm settlement—which disposed of petitioner's claim against Tri-Drill—and its denial of Tri-Drill's motion for summary judgment as moot. See Pet. App. 13a; 4/10/17 ALJ Order 9.

b. Petitioner appears to contend in his third question presented (Pet. i, 4) that the questions before the district court and the ALJ were not the same for purposes of collateral estoppel. That is incorrect.

As an initial matter, petitioner erroneously suggests that the district court might have applied the Jones Act (Merchant Marine Act, 1920), ch. 250, 41 Stat. 988; general maritime law; 33 U.S.C. 905(b); or some other source of law in determining whether a settlement existed. Pet. i, 4. As the Board correctly determined, however, the district court applied Louisiana law. Pet. App. 14a. In support of its motion to confirm settlement, Longnecker specifically argued that a settlement existed under Louisiana law, and the district court granted that motion. D. Ct. Doc. 277-1, at 5; *Simon I*, 2015 WL 9482899, at *2. Petitioner did not propose an alternative legal regime. Indeed, he urged the Fifth Circuit on appeal to "look to the law of the state, here Louisiana." Appellee C.A. Opening & Reply Br. at 8, *Simon II*, *supra* (No. 15-31113).

Nor is there any material difference between Louisiana law and Section 33(g), such that a settlement could exist for purposes of the former but not the latter. Neither Section 33(g) nor its implementing regulation, 20 C.F.R. 702.281, defines "settlement." In the absence of a Longshore Act-specific definition, courts and the Board rely on state law to determine whether a settlement exists. See, *e.g.*, *Mallott & Peterson* v. *Director*, 98 F.3d 1170, 1173-1174 (9th Cir. 1996) (applying California law in determining whether the claimant had ratified a settlement agreement), cert. denied, 520 U.S. 1239 (1997), overruled on other grounds by *Price* v. *Stevedoring Servs. of Am., Inc.*, 697 F.3d 820 (9th Cir. 2012) (en banc); *Williams* v. *Ingalls Shipbuilding, Inc.*, 35 Ben. Rev. Bd. Serv. (MB) 92, 95 (2001) (noting, in the Section 33(g) context, that "an attorney's ability to bind his client to an agreement or stipulation is governed by state agency principles"). Had the ALJ been tasked

with deciding whether a settlement existed in the first instance, he would have looked to Louisiana contract law—exactly what the district court did. See 4/10/17 ALJ Order 4 (noting that petitioner urged the ALJ to decide whether a settlement existed as a matter of Louisiana law). The issue in the two proceedings was therefore the same, and the decisions below correctly gave preclusive effect to the district court's determination, as affirmed by the court of appeals.

c. Petitioner's first two questions presented essentially ask this Court to revisit the district court's determination that petitioner and Tri-Drill entered into a settlement. Pet. i, 3-4. That fact-bound question does not warrant this Court's review, and, in any event, is not properly presented here. Neither the ALJ nor the Board nor the court of appeals below considered the merits of whether petitioner settled his claims against Tri-Drill. Instead, they determined that the issue had already been decided by the district court in the tort action. Pet. App. 1a, 12a-14a; 4/10/17 ALJ Order 9, 12. Petitioner appealed the district court's decision in the tort suit to the Fifth Circuit, which affirmed, and petitioner declined to seek this Court's review at the time. He cannot now obtain review of that long-final determination via his Longshore Act claim.

2. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. In particular, none of the cases petitioner identifies involved collateral estoppel, the sole issue decided by the court of appeals below and thus presented here.

a. Petitioner suggests (Pet. 7-8) that the court of appeals' decision conflicts with this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992). *Cowart* held that Section 33(g) applies "to a

worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor yet subject to an order to pay under the Act." *Id.* at 471. Thus, as here, an unapproved third-party settlement barred the claimant from receiving Longshore Act benefits. *Id.* at 475.

Petitioner does not allege that the decision below conflicts with *Cowart*'s holding. Instead, he postulates a conflict with an argument that was acknowledged but not resolved in *Cowart*. Pet. 7. In *Cowart*, the employer had funded the entire settlement under an indemnification agreement with the defendant in the tort suit. 505 U.S. at 471-472. As this Court explained, the *Cowart* petitioner's "attorney suggested at oral argument that [the employer's] participation in the [third-party] settlement brought this case outside the terms of § 33(g)(1)." *Id.* at 483. This Court did not express "any view on the merits of this contention * * * because it [wa]s not fairly included within the question on which certiorari was granted." *Ibid.* Petitioner here does not specifically allege that Longnecker's motion to confirm his settlement with Tri-Drill somehow rendered that settlement not with a "third person." See Pet. 7, 16. In any event, the decisions below did not address any such argument, and petitioner points to no authority resolving this issue in the manner he appears to advocate.

b. The decision below also does not conflict with any of the four Ninth Circuit decisions cited in the petition. Pet. 6-7. Like *Cowart*, none of those cases involved collateral estoppel.

Petitioner quotes a portion of *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir. 1990), holding that a claimant is not required to notify his employer about certain third-party settlements before the employer

pays or is ordered to pay the claimant. Pet. 6. But Section 33(g) bars benefits in two circumstances: "[1] [i]f no written approval of the settlement is obtained and filed as required by [Section 33(g)(1)], or [2] if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. 933(g)(2). The quoted portion of *Mobley* involved the latter notice requirement, which applies to any third-party settlement or judgment. 920 F.2d at 561. This case involves the former approval requirement, which only applies to third-party settlements for less than the amount of Longshore Act compensation. 33 U.S.C. 933(g)(1). As this Court held in *Cowart*, that requirement applies as soon as the right to recovery vests. 505 U.S. at 477. Petitioner does not dispute that the approval requirement applied here, assuming a settlement occurred.

In both *Hale* v. *BAE Systems San Francisco Ship Repair, Inc.*, 801 Fed. Appx. 600 (9th Cir. 2020), and *Mallott*, *supra*,[5] the question was whether the person who entered into the settlement was "the person entitled to compensation" or "the person's representative," as required to trigger Section 33(g)'s forfeiture provision. 33 U.S.C. 933(g)(1); *Hale*, 801 Fed. Appx. at 601-602; *Mallott*, 98 F.3d at 1172. Here, there is no question that petitioner was both the "person entitled to compensation" and the person the district court determined had entered into a settlement with Tri-Drill. *Simon I*, 2015 WL 9482899, at *2 (noting "clear evidence of settlement between Tri-Drill and *Mr. Simon*") (emphasis added).

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[5] In asserting a conflict with *Mallott*, petitioner block quotes another portion of *Hale*. Pet. 7. Assuming petitioner intended to allege a conflict with *Mallott*, it is inapposite.

Finally, petitioner asserts that *O'Neil* v. *Bunge Corp.*, 365 F.3d 820 (9th Cir. 2004), stands for the proposition that a claimant's signature is required for a valid settlement. Pet. 7. But *O'Neil* involved a settlement between a claimant and his employer under Section 8(i) of the Longshore Act, 33 U.S.C. 908(i). Section 8(i) settlements require approval from the Department of Labor and, by regulation, must be "signed by all parties." 20 C.F.R. 702.242(a); see 33 U.S.C. 908(i). There is no analogous requirement for Section 33(g) settlements, which occur between a claimant and a third party. See 33 U.S.C. 933(g); 20 C.F.R. 702.281. Instead, what suffices to establish an agreement for purposes of Section 33(g) turns on state law. See pp. 8-9, *supra*. Like the other cases petitioner invokes, *O'Neil* did not address collateral estoppel and presents no conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021