No. 10-1399

In the Supreme Court of the United States

DANA ROBERTS, PETITIONER

v.

SEA-LAND SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, disabled maritime workers are paid compensation based on their average weekly wage at the time of their disabling injury. See 33 U.S.C. 908, 910. This compensation is subject to a maximum of twice the "applicable" fiscal year's national average weekly wage. 33 U.S.C. 906(b)(1). The Secretary of Labor determines the national average wage for each fiscal year, 33 U.S.C. 906(b)(3), and that determination applies "to employees or survivors * * * newly awarded compensation during such period." 33 U.S.C. 906(c). The question presented is whether the "applicable" Secretarial determination is the national average wage for the year during which an employee suffers a disabling injury or the year during which a formal compensation order is issued.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 625 F.3d 1204. The decisions of the Benefits Review Board of the United States Department of Labor (Pet. App. 14-27) and the administrative law judge (Pet. App. 28-32, 33-109) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2010. A petition for rehearing was denied on February 10, 2011 (Pet. App. 110-111). The petition for a writ of certiorari was filed on May 11, 2011, and granted on September 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 906(b) and (c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, provide:

(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.

Additional statutory provisions appear in the appendix to this brief.

STATEMENT

1. The Longshore Act establishes a federal workers' compensation system for an employee's disability or death arising in the course of covered maritime employment. 33 U.S.C. 903(a), 908, 909. The Act 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 Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 636 (1983). "Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Ibid.*

Under the Longshore Act, disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). Accordingly, the Longshore Act has from the beginning provided 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 com-

pensation." 33 U.S.C. 910; see 33 U.S.C. 910 (Supp. I 1928) (same).

Subject to a specified maximum and minimum, discussed below, (see pp. 5-6, *infra*), a totally disabled worker's compensation rate is two-thirds of his average weekly wage at the time of injury. 33 U.S.C. 908; see 33 U.S.C. 908(a) (Supp. I 1928) (same).[1] "This proportion," which is common to many workers' compensation schemes, "represent[s] a rough judgment about the adjustments needed to reflect the reduction in the disabled worker's work-related expenses, and to provide him an incentive to return to work." *The Report of the National Commission on State Workmen's Compensation Laws* 56 (1972) (*National Commission Report*).

> As the proportion of wages replaced is increased, the worker is assumed to have less incentive to return to work. Of course, if the proportion is too low, a worker may be in such dire circumstances that he may be forced to return to work before he is properly

[1] Partially disabled employees, who are able to work after their injuries at a diminished wage, are typically entitled to two-thirds of the difference between their pre-disability average weekly wage and their "residual earning capacity" (*i.e.*, the wages they earn or could earn through suitable alternative employment). See 33 U.S.C. 908(c)(21). In addition to this classification of disabilities as total or partial, disabilities under the Act are also categorized as "temporary" or "permanent." A disability is "temporary" if the claimant's medical condition is improving, and it becomes "permanent" when the claimant reaches maximum medical improvement. See 33 U.S.C. 908(a)-(e); see also *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). As happened in this case, a claimant's disability status can change even after it becomes "permanent" if, for example, suitable alternative employment is later identified, thus transforming the disability from permanent total to permanent partial.

> recovered or he may become so demoralized as to be indefinitely disabled.

Ibid.

a. The Act has always placed upper and lower limits on compensation rates, applied after the calculation of two-thirds of the worker's average weekly wage at the time of injury. Maximum benefit levels are a typical feature of workers' compensation schemes because high-wage workers can obtain their own private disability insurance to replace part of their lost income, and because such limits conserve resources for the system to provide to more-needy disabled employees. See *National Commission Report* 37-38. Conversely, minimum benefit levels are intended to prevent low-wage disabled workers from ending up on public assistance because a "low-wage worker, if totally disabled, may be unable to live on the same proportion of lost remuneration that is appropriate for most workers." *Id.* at 37.

The floor and ceiling levels have changed through the years. But with each change, those levels, like the employee's average weekly wage that provides the starting point for benefit calculation, have been keyed to the time of an employee's disabling injury. As originally enacted in 1927, the Longshore Act provided that "[c]ompensation for disability shall not exceed $25 per week nor be less than $8 per week: *Provided, however*, That if the employee's wages at the time of injury are less than $8 per week he shall receive his full weekly wages." 33 U.S.C. 906(b) (Supp. I 1928).

In 1948, Congress enacted the first of a series of increases to the minimum and maximum benefit levels under the Longshore Act. See Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602 (increasing maximum weekly benefit level to $35 and minimum level to $12). Congress

specified that those increases (along with the other changes made by the 1948 amendment) "shall be applicable only to injuries or deaths occurring on or after the effective date" of the amendments. See *id.* § 6, 62 Stat. 604. Because of that provision, an employee who suffered a disabling injury (or death) before enactment of the 1948 amendments was subject to the old minimum and maximum benefit levels, even if he received a formal compensation order (a formal administrative order specifying benefit levels under the Act, see 33 U.S.C. 919(e)) after enactment.

Congress increased both maximum and minimum benefit levels again in 1956 and the maximum benefit level in 1961. See Act of July 26, 1956, ch. 735, § 1, 70 Stat. 655 (maximum to $54 and minimum to $18); Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (maximum to $70). In both instances, Congress again expressly provided that the increases would be tied to the time of disabling injury (or death), not the time of a formal compensation order. See § 9, 70 Stat. 656 (amendments made to benefit floor and ceiling "shall be applicable only with respect to injuries and death occurring on or after the date of enactment"); § 4, 75 Stat. 204 ("The amendments made by the foregoing provisions of this Act shall become effective as to injuries or death sustained on or after the date of enactment.").

b. Throughout this period, Congress was aware that "economic changes * * * affect[ing] the levels of wages and living costs" made periodic increases in the maximum and minimum benefit levels necessary because the Act lacked a "self-adjustment feature." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 1-2 (1956); see S. Rep. No. 481, 87th Cong., 1st Sess. 2 (1961). Without such a feature, maximum and minimum benefit levels eroded over

time, and the only remedy was for Congress to amend the Act. Thus, "[t]he $70 maximum on death and disability benefits, established in 1961, gradually lost real value as inflation exacted its annual toll, and in 1972 Congress moved to give covered workers added protection." *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 32 (1979) (footnote omitted); see *id.* at 32 n.4 ("The $70 limitation on death and disability benefits precluded most employees and their survivors from receiving 66 $^{2}/_{3}$% of the employee's average weekly wages, and in some cases the $70 maximum constituted as little as 30% of the employee's average weekly wages."). In response to this problem, when Congress amended the Longshore Act in 1972, it not only made the maximum and minimum benefit levels more generous, but also provided a self-adjustment mechanism. See 33 U.S.C. 906. The result was to make later statutory revisions of maximum and minimum benefit levels unnecessary.

The 1972 amendments provided that the previous fixed-dollar maximum and minimum benefit levels would be replaced with calculations based on the "applicable national average weekly wage." 33 U.S.C. 906(b)(1) and (2); see 33 U.S.C. 902(19) (defining "national average weekly wage" as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls"); *Rasmussen*, 440 U.S. at 32.[2] The

[2] Unlike with the 1948, 1956, and 1961 amendments, "[t]he drafters of the 1972 amendments decided that the newer, more generous statutory terms should also apply to pre-1972 cases of disability and death." *Director, OWCP* v. *Bath Iron Works Corp.*, 885 F.2d 983, 986 (1st Cir. 1989) (Breyer, J.), cert. denied, 494 U.S. 1091 (1990). But Congress effectuated this choice in a way that textually preserved the link between time of injury and benefit levels. The amendments provided that compensation for "total permanent disability or death which com-

national average weekly wage is determined by the Secretary of Labor each year, and is "applicable" for the "period," or fiscal year (FY), from October 1 of that year until September 30 of the next. 33 U.S.C. 906(b)(3). For FY 1973 (which ended on September 30, 1973), Congress set the maximum benefit rate under the Longshore Act at 125% of the "applicable" national average weekly wage. Congress then increased that rate by 25% per year until it reached 200% of that average wage for FY 1976 and all subsequent fiscal years. 33 U.S.C. 906(b)(1) (Supp. II 1972). Congress likewise used the national average weekly wage as the basis for calculating minimum benefits under the Act, providing that compensation for total disability shall not be less than 50% of the national average weekly wage (unless the employee's own average weekly wage was below that figure). See 33 U.S.C. 906(b)(2).[3]

The Act provides that the national average weekly wage for a particular year "shall apply to employees or survivors [1] *currently receiving* compensation for permanent total disability or death benefits during such period," and [2] "those *newly awarded* compensation during such period." 33 U.S.C. 906(c) (emphases added).

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menced or occurred prior to enactment of [the 1972 amendments] shall be adjusted" by "computing the compensation to which such employee or survivor would be entitled *if the disabling injury or death had occurred on the day following such enactment date*." Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 11, 86 Stat. 1258 (emphasis added); see 33 U.S.C. 910(h)(1).

[3] The historical list of national average weekly wages may be found at http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm. The national average weekly wage for the current fiscal year (October 1, 2011 to September 30, 2012) is $647.60, resulting in a maximum Longshore Act weekly benefit of $1295.20 and a minimum of $323.80.

The Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), who administers the Longshore Act, see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997), has long interpreted the "newly awarded" clause of Section 906(c) to require application to initial benefit calculations of "the national average weekly wage * * * applicable at the time of injury," United States Dep't of Labor, Employment Standards Administration, OWCP, *Workers' Compensation Under the Longshoremen's Act* (1979), not the time of any later compensation order, if one is ultimately entered.[4] By contrast, the "currently receiving" clause of Section 906(c) operates as a cost-of-living adjustment and applies each year's national average weekly wage to adjust maximum and minimum compensation levels, but applies only to persons currently receiving death or permanent total disability benefits on a prospective basis. See 33 U.S.C. 906(c); see also 33 U.S.C. 910(f).

c. The Act obligates an employer to pay compensation "promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. 914(a). If an employer that does not file a notice controverting liability fails to start payments within 14 days of receiving notice of a disabling injury from the employee, it must pay an additional ten percent of the overdue amount. 33 U.S.C. 914(e). While the employee must give notice of disability to the employer in order to be entitled to benefits, see 33 U.S.C. 912; 20 C.F.R. 702.211(a), the employee need not file a formal claim with the OWCP if the employer commences payments

[4] The most recent version of this document is from 2003 and includes the same statement. See http://www.dol.gov/owcp/dlhwc/LS-560pam.htm.

and there is no disagreement about the amount. And even when an employee does file a formal claim, the district director of the OWCP often is able to resolve the matter informally. See 20 C.F.R. 301 *et seq.*[5] "[I]n practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975).

2. On February 24, 2002, petitioner slipped on ice and was injured while working for respondent Sea-Land Services, Inc. (Sea-Land) in Dutch Harbor, Alaska. Pet. App. 34, 37. He sought medical treatment two days later, but continued working until March 11, 2002. *Id.* at 37-38. Sea-Land's insurer, respondent Kemper Insurance Company (Kemper), paid petitioner compensation for temporary total disability from March 11, 2002 until July 15, 2003, and again from September 1, 2003 until May 17, 2005. *Id.* at 101. Kemper did so without entry of a compensation order. See 33 U.S.C. 914(a). After Kemper ceased payments at the end of that period, the matter was referred to an administrative law judge (ALJ) for a hearing in January 2006. Pet. App. 34; 20 C.F.R. 702.317.

3. a. In October 2006, the ALJ found that petitioner had suffered a disabling injury in the course of his maritime employment and was entitled to Longshore

[5] District directors are officials in the OWCP responsible for the day-to-day administration of the Act, including attempts to informally resolve disputes. Because awards by ALJs are not effective until filed by a district director, 33 U.S.C. 921(a), district directors are frequently charged with the responsibility to calculate the amount of compensation due under ALJ decisions. The statute uses the term "deputy commissioner" rather than "district director," but the authority of the position remains unchanged. 20 C.F.R. 701.301(a)(7).

Act benefits. Petitioner was awarded compensation for temporary total disability from the date he became disabled, March 11, 2002, until his condition reached maximum medical improvement, or permanence, which the ALJ found was on July 11, 2005. Pet. App. 107-108. For the subsequent period from July 12, 2005, through October 9, 2005, petitioner was awarded compensation for permanent total disability. *Id.* at 107. The ALJ further found, however, that, beginning October 10, 2005, suitable, albeit lower-paying, alternative employment was reasonably available to petitioner, *id.* at 104-107. The ALJ consequently determined that petitioner was entitled to compensation for permanent partial disability from that date until Sea-Land and Kemper were ordered otherwise. *Id.* at 107-108.

The ALJ determined that petitioner's average weekly wage at the time of his injury, as calculated under Section 910 of the Act, was $2853.08, and that his residual earning capacity after October 10, 2005 was $720 per week. Pet. App. 95, 107. Based on his average weekly wage, petitioner's compensation rates, as calculated under Section 908, were: $1902.05 for his periods of total disability ($2853.08 x 2/3); and $1422.05 for his periods of partial disability (($2853.08 - $720.00) x 2/3). See p. 4 & n.1, *supra*.

Both of these compensation rates exceeded $966.08 per week, the maximum rate in effect for the year in which petitioner was injured (FY 2002). Consistent with the Director's longstanding position, see p. 9, *supra*, the ALJ found that petitioner was limited to that maximum rate for all periods of temporary total and permanent

partial disability. Pet. App. 107-108.[6] The ALJ also ordered Sea-Land to "pay interest on each unpaid installment of compensation from the date the compensation became due." *Id.* at 108. The ALJ ordered the district director to make the calculations necessary to implement the award. *Ibid.*

b. Although petitioner had previously agreed that the maximum compensation rate applicable at the time of his disabling injury ($966.08) applied, see Pet. App. 101, he sought reconsideration, arguing that he was entitled to the FY 2007 maximum rate of $1114.44 because the ALJ's compensation order (dated October 12, 2006, see *id.* at 33) was issued in that fiscal year. In a supplemental memorandum, however, petitioner conceded that the ALJ's application of the FY 2002 maximum rate was correct under binding Benefits Review Board (Board) precedent, *Reposky* v. *International Transp. Servs.*, 40 Ben. Rev. Bd. Serv. (MB) 65 (Oct. 20, 2006), which was issued after the ALJ's initial decision. Pet. App. 29. The ALJ agreed that *Reposky* controlled and thus denied the motion for reconsideration. *Id.* at 28-32.

In *Reposky*, the Board, adopting the longstanding position of the Director, held that a claimant is "newly awarded" compensation, for purposes of Section 906(c), "when benefits commence, generally at the time of injury." 40 Ben. Rev. Bd. Serv. (MB) at 74. Accordingly, the Board rejected the contention that the applicable

[6] For periods of permanent total disability, the ALJ determined that petitioner was entitled to that same rate, "plus any increases required under section [906] of the Longshore Act." Pet. App. 107. The ALJ was apparently referring to Section 906(c)'s "currently receiving" clause, which applies a new fiscal year's national average wage to claimants "currently receiving compensation for permanent total disability or death benefits during such period." 33 U.S.C. 906(c).

national average weekly wage is the one in effect at the time a formal compensation order is issued. *Id.* at 74-76. The Board agreed with the Director's position that applying the national average weekly wage for the year of the disabling injury "maintains consistency in the statute and yields rational results." *Id.* at 76; see *ibid.* (approach "achieve[s] consistent results for all claimants").

4. Petitioner, Sea-Land, and Kemper appealed the ALJ's decision to the Board, which affirmed in all respects. Pet. App. 14-27. The Board, relying on *Reposky*, rejected petitioner's argument that he was "newly awarded" compensation in October 2006, when the ALJ's order was issued, and thus entitled to the FY 2007 maximum compensation rate. *Id.* at 18-20.

5. The court of appeals affirmed in relevant part. Pet. App. 1-13. The court noted that the Act uses the verb "award" in two different ways: as either "[t]o give or assign by sentence or judicial determination," *id.* at 6 (quoting *Astrue* v. *Ratliff*, 130 S. Ct. 2521, 2526 (2010) (citation omitted)) or "to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order," *ibid.* The court cited several examples of the Act's use of the word "award" that had the latter meaning. See *id.* at 6-8 (citing 33 U.S.C. 908(c)(22) (defining the "award" for loss of specified body parts, which must be paid even absent a formal compensation order); 908(c)(20) (requiring compensation to be "awarded" for disfigurement without a formal compensation order); 910(h)(1) (using "awarded compensation" and "entitled" to compensation to mean the same thing); 933(b) (defining award, for purposes of that subsection only, as a compensation order)). The court held that Section 906(c) used the word "awarded" in that same sense, concluding that an employee is "newly

awarded" compensation when he first becomes disabled and entitled to benefits, whether or not a formal compensation order is ultimately entered. Pet. App. 7.

Reading Section 906(c) "with a view to [its] place in the overall statutory scheme," the court of appeals concluded that its interpretation of the section "accords with the structure of the [Longshore Act], which identifies the time of injury as the appropriate marker for other calculations relating to compensation"—including determinations under Section 910 of the employee's average weekly wage, "the starting point for determining compensation." Pet. App. 8 (internal citation omitted). "To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled," the Court reasoned, "would be to depart from the Act's pattern of basing calculations on the time of injury." *Id*. at 8-9.

The court also noted that making the date of a formal compensation order dispositive would produce "inequitable results." Pet. App. 9 n.1. "Two claimants injured on the same day could be entitled to different amounts of compensation depending on when their awards are entered." *Ibid.* The court rejected petitioner's contention that the possibility of a higher maximum compensation rate for employees with later-filed compensation orders would "encourage[] employers to expedite administrative proceedings rather than delay the process." *Ibid.* The court pointed out that the Act includes other provisions expressly designed to discourage such conduct. See *ibid.* (citing 33 U.S.C. 914(e) (imposing additional payment obligation when employer that does not

file notice controverting liability fails to pay compensation due without an award)).[7]

SUMMARY OF ARGUMENT

The national average weekly wage in effect at the time of an employee's disabling injury—not the one in effect when a formal administrative compensation order may be later entered—serves as the basis for calculating the employee's maximum benefit level under the Longshore Act.

1. The Longshore Act takes "the average weekly wage of the injured employee at the time of the injury * * * as the basis upon which to compute compensation," 33 U.S.C. 910, and sets compensation for total disability at two-thirds of that figure, 33 U.S.C. 908(a)-(b). The Act caps benefits, however, at 200% of the "applicable national average weekly wage," 33 U.S.C. 906(b)(1), and provides that the calculation of that average for a fiscal year "shall apply to employees or survivors * * * newly awarded compensation during such period," 33 U.S.C. 906(c).

Examined in isolation, the word "awarded" is ambiguous. It can mean either granted by adjudicatory order

[7] Based on Section 906(c)'s "currently receiving" provision, the court of appeals held that the FY 2005 maximum rate applied to the compensation for permanent total disability to which petitioner was entitled from July 12, 2005, to September 30, 2005, and that the FY 2006 maximum rate applied to the period from October 1, 2005, to October 9, 2005. See Pet. App. 11-12 & n.2; 33 U.S.C. 906(c). Petitioner sought review of that question as well, contending that the "currently receiving" provision of Section 906(c) made the FY 2007 maximum rate applicable because that was the fiscal year in which he was ultimately paid benefits for those earlier periods. See Pet. ii, 21-22. This Court's order granting certiorari, however, limited review to his first question presented (on the "newly awarded" clause), see 132 S. Ct. 71; Pet. ii.

or simply bestowed upon. Different provisions of the Longshore Act use the word "award" in each sense. While the Act sometimes uses "award" to mean provide in an administrative compensation order, it also frequently uses the word to refer to payment of compensation required by operation of the Act itself, even absent a compensation order. It is thus necessary to examine the context of each provision that uses the term to determine which meaning Congress intended. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341-344 (1997).

The statutory context and role of the maximum compensation level in the statutory scheme establish that an employee is "newly awarded compensation" within the meaning of Section 906(c) when he is awarded compensation "by force of the Act," *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947)—at the time of a disabling injury. That construction of Section 906(c) harmonizes it with two fundamental features of the Longshore Act: the calculation of initial benefit levels based on circumstances at the time of disabling injury and the requirement that employers pay disabled workers without a compensation order.

Section 906 places a ceiling on compensation levels that are calculated based on an employee's wages at the time of a disabling injury. See 33 U.S.C. 910; 33 U.S.C. 906. The national average wage level used to calculate that ceiling logically should be taken from the same time period. Moreover, most employees are not subject to the maximum benefit levels established by Section 906, and they unquestionably have their wages calculated based entirely on circumstances existing at the time of injury. See 33 U.S.C. 910. There is no reason to think Congress would have wanted the arbitrary date of a compensation order to serve as the basis for benefit cal-

culations in the relatively small number of cases, like this one, that do implicate the statutory maximum.

Interpreting Section 906(c) to make applicable the national average weekly wage from the year of a disabling injury, rather than the year of a compensation order, also harmonizes that provision with the Act's requirement that employers pay compensation within 14 days of notice of injury and "without an award." 33 U.S.C. 914(a) and (b). It does not make sense to read Section 906(c) as making applicable the national average weekly wage for the year in which a compensation order may later be issued, given that the Act requires compensation payments to be made without such an order.

Indeed, in the many Longshore Act cases in which employers immediately pay compensation as required by the statute, no compensation order is ever entered. In such cases, a rule requiring application of the national average weekly wage from the year a compensation order issued would be impossible to apply. And even in cases in which a compensation order does ultimately issue, that event can take place years after an employer is required to start compensation. Under petitioner's view of the Act, such situations would make retroactively applicable the national average weekly wage from the year of the compensation order, thus penalizing an employer that began paying compensation just after an injury for having failed to divine when in the future a compensation order might issue and what the national average weekly wage would be at that future time.

Petitioner's response to this problem is to suggest that compensation orders be promptly entered in every Longshore Act case. See Pet. Br. 43. That would upend decades of settled practice under the Act because "many pending claims are amicably settled through voluntary

payments without the necessity of a formal order." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975). Indeed, when the employer begins prompt payment of compensation and there is no dispute with the employee, the Act does not even require the employee to file a claim, which makes Section 919—the provision on which petitioner relies for his argument that compensation orders are mandatory—inapplicable. See 33 U.S.C. 919.

Petitioner also contends that giving employees the benefit of the (higher) national average weekly wage applicable at the time of a compensation order, rather than at the time of the disabling injury, would encourage employers to accede to compensation orders quickly. As noted, however, compensation orders are not required, and, in any event, using a higher national average weekly wage as a remedy for delay would be both under- and over inclusive. That remedy would provide no help to the majority of workers who are not subject to the statutory maximum at all, while at the same time providing a windfall to employees whose compensation orders issue in a fiscal year later than their injury through no fault of the employer. Instead, providing interest on delayed compensation is the sensible way the Act addresses compensation delay.

Application of the national average weekly wage rate for the year in which the injury occurred is also confirmed by the statutory evolution of the Longshore Act and the legislative history of the 1972 and 1984 amendments to the Act concerning Section 906.

2. Analysis following the normal rules of statutory construction establishes that Section 906(c) makes applicable the national average weekly wage from the year of an employee's disabling injury, not that of a compensa-

tion order. To the extent the statute is ambiguous on this question, however, the Court should defer to the reasonable interpretation advanced by the Director, OWCP, who has been delegated the authority to administer the Longshore Act. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984). The Director has consistently articulated the position that the national average weekly wage at the time of injury applies, and he has done so as a participant in formal agency adjudications and in his day-to-day administration of benefits under the Act. That position is, at the least, a reasonable interpretation of the statute, and it is entitled to deference.

ARGUMENT

The Longshore Act requires employers to begin compensation payments to a disabled worker "promptly" after the injury, without entry of a formal compensation order, 33 U.S.C. 914(a), and it consistently bases benefit-level calculations on circumstances that existed at the time of injury, see, *e.g.*, 33 U.S.C. 910. Petitioner's contention—that maximum benefit levels should be calculated based on circumstances at the time an administrative compensation order is entered, potentially years after the disabling injury—is irreconcilable with both of those structural features of the Act. Petitioner's interpretation of the Act would also render its maximum and minimum benefit levels impossible to calculate in large numbers of cases in which the employer pays benefits under the compulsion of the Act itself rather than awaiting a compensation order that reduces that statutory obligation to an administrative judgment. The Court should interpret Section 906(c) consistently with the longstanding interpretation of the Director, OWCP,

as making applicable the national average weekly wage at the time of the disabling injury, not at the time of any formal compensation order that may later happen to be entered.

I. THE APPLICABLE NATIONAL AVERAGE WEEKLY WAGE FOR PURPOSES OF CALCULATING BENEFITS UNDER THE LONGSHORE ACT IS THAT IN FORCE AT THE TIME OF A DISABLING INJURY

A. Section 906(c) Makes Applicable The National Average Weekly Wage In Force At The Time Compensation Is Mandated By Operation Of Law

The Longshore Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). That is "in essence an economic, not a medical, concept." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 297 (1995). The Act has from the beginning provided 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." 33 U.S.C. 910; see 33 U.S.C. 910 (Supp. I 1928) (same). Accordingly, "in order to calculate benefits under the Act, one must be able to identify the appropriate time of injury." *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U.S. 153, 164 n.13 (1993). And the employer must make that determination—and all benefit calculations that flow from it—very quickly, because the Act requires that "[c]ompensation * * * 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." 33 U.S.C. 914(a); see 33 U.S.C. 914(b) (first payment due 14 days after employer receives notice of injury); 33 U.S.C. 914(e) (extra payment

of ten percent due for not meeting payment deadline, unless employer has filed notice with district director that it is controverting liability).

In cases of total disability, the employee's default benefit level is two-thirds of his own average weekly wage at the time of injury. See 33 U.S.C. 908(a) and (b). That benefit level, however, is capped at "an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary [of Labor]." 33 U.S.C. 906(b)(1). The Secretary's calculation "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." 33 U.S.C. 906(c).

In petitioner's view, there is only one permissible meaning of the phrase "those newly awarded compensation" in Section 906(c)—it means those who newly received a formal compensation order, thus making issuance of such an order the controlling event for determining which national average weekly wage applies. *E.g.*, Pet. Br. 15; accord *Boroski* v. *DynCorp Int'l*, No. 11-10033, 2011 WL 5555686, at *8-*17 (11th Cir. Nov. 16, 2011); *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997). That is incorrect. When read in light of the Act as a whole and the role that maximum and minimum benefit levels play in the larger scheme, the phrase "newly awarded compensation" is best read to mean newly due "by force of the Act" itself at the time of a disabling injury, *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947), not an administrative compensation order.

1. The Longshore Act often uses "award" to mean entitlement to benefits by operation of law, not pursuant to a compensation order

The verb "award" can mean to formally grant by judicial decree (as petitioner would have it interpreted in Section 906(c) and throughout the Act), but it also can simply mean to confer upon. See, *e.g.*, *Webster's New International Dictionary* 192 (2d ed. 1958) ("[t]o give by sentence or judicial determination" *and* "[t]o confer or bestow upon"); *Black's Law Dictionary* 174 (rev. 4th ed. 1968) ("[t]o give or assign by * * * judicial determination" *and* "[t]o grant, concede, or adjudge to"); see also *American Heritage Dictionary of the English Language* 124 (4th ed. 2006) ("[t]o grant as merited or due" and "[t]o give as legally due").[8]

As demonstrated below, Congress used the word "award" (both as a noun and as a verb) in both senses in the Longshore Act. It is therefore necessary to consider the statutory context to determine which meaning Congress intended in a particular provision. For that reason, this case is analogous to *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). That case presented the question whether the term "employees" in the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 was

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[8] Amicus American Association for Justice notes (Br. 10-11) that the Court in *Astrue* v. *Ratliff*, 130 S. Ct. 2521 (2010), explained that "[t]he transitive verb 'award' has a settled meaning *in the litigation context*: It means '[t]o give or assign *by* sentence or judicial determination.'" *Id.* at 2526 (quoting *Black's Law Dictionary* 125 (5th ed. 1979)) (first emphasis added). That is true "in the litigation context." *Ibid.* But, as noted in the text, the word can have a different meaning in other contexts, and here, a fundamental feature of the Longshore Act is the employer's obligation to pay benefits (and the employee's entitlement to receive them) *without* litigation. See 33 U.S.C. 914(a).

limited to "current employees" or also included former employees. *Id.* at 339. The Court observed that different sections of Title VII used the term "employee" in each distinct sense; "employee" accordingly did not have "the same meaning in all * * * sections and in all * * * contexts." See *id.* at 342-343. "Once it is established that the term 'employees' includes former employees in some sections, but not in others," the Court reasoned, "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 343-344.

The same mode of analysis is called for here. The Act at times uses the word "award" to mean compensation order. See, *e.g.*, 33 U.S.C. 914(a) ("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."). In other parts of the statute, however, context demonstrates that Congress used "award" to mean a grant of compensation by operation of the Act itself. Some of those provisions are described below:

Section 908(d)(1). As a supplement to its other forms of compensation, the Act provides for additional payments for employees who suffer certain loss-of-use injuries on the job. See 33 U.S.C. 908(c)(1)-(19), (22). For example, an employee who loses an arm as the result of an on-the-job accident is entitled to a payment of two-thirds of his average weekly wage for 312 weeks. See 33 U.S.C. 908(c)(1). The Act provides that if an employee who is receiving such loss-of-use compensation "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." 33 U.S.C. 908(d)(1) (emphasis added). Because employees often receive compensation under the Longshore Act without a formal compensation order, see 33 U.S.C. 914(a); pp. 9-10, *supra*, many employees who received benefits under Section 908(d)(1) will not have had an "award" in that sense. If petitioner's reading of the Act were correct, such an employee's survivors would not be entitled to any compensation under Section 908(d)(1) if the employee died. There is no reason to think that Congress intended such an arbitrary result.

Section 908(c). Section 908(c) of the Act also "uses the terms 'award' and 'awarded' to refer to an employee's entitlement to compensation under the Act, even in the absence of a formal order." Pet. App. 6. For example, that provision (titled "Compensation for disability") provides that "compensation not to exceed $7,500 shall be *awarded* for serious disfigurement of the face, head, or neck." 33 U.S.C. 908(c)(20) (emphasis added); see also 33 U.S.C. 908(c)(22) ("the *award* of compensation" for loss of multiple body parts "shall be for the loss of, or loss of use of, each such member or part * * *, which awards shall run consecutively") (emphasis added). As the court of appeals noted, "[b]y use of the term 'awarded'" in those subsections, "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; see 33 U.S.C. 914(a).

Petitioner speculates that "[t]hose references merely contemplate that *awards will be entered*." Pet. Br. 30. But, as noted above, the statute expressly contemplates that compensation will be paid "without an award" in the

form of a formal compensation order, 33 U.S.C. 914(a); indeed, the statute mandates such payments. Unless the employer controverts liability, it is thus legally obligated to pay $7500 to an employee who suffered a "serious disfigurement of the face, head, or neck," whether or not the employee has received a compensation order. See *ibid.*; 33 U.S.C. 908(c)(20).

Section 910(h)(1). Section 910(h)(1) provides another example of the Act's use of "the term 'awarded' to refer to an employee's entitlement to compensation, irrespective of a formal compensation order." Pet. App. 7. That provision, which was added by the 1972 amendments to the Act, authorized 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" the 1972 amendments to the Act. 33 U.S.C. 910(h)(1). In general, it provided that those individuals would have the post-amendment national average weekly wage substituted for their own average weekly wage and would then have their compensation calculated as if their injury had occurred in 1972. See *ibid.*; see n.2, *supra*. The Act provided an alternative method of adjustment, however, "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." 33 U.S.C. 910(h)(1) (emphasis added). Those individuals had their benefits calculated based on their own average weekly wage at the time of the injury, but would receive a percentage increase based on inflation. See *ibid.*

If petitioner were correct that "awarded" always means entry of a formal compensation order, then the applicability of the alternative method of adjustment in

Section 910(h)(1) would be strangely incomplete. It would arbitrarily distinguish between employees based on whether or not they had received benefits under a formal compensation order. If so, they would be subject to the alternative method of calculation. If not, they would receive a higher compensation rate by having their benefits calculated as if the relevant injury had occurred in 1972.

We are not aware of any decision (and petitioner cites none) making such a distinction when interpreting Section 910(h)(1), and the provision's legislative history makes clear that it was intended to apply to all individuals who "had received less than the maximum rate of compensation," S. Rep. No. 1125, 92d Cong., 2d Sess. 22 (1972), with no suggestion that it mattered whether the payment obligation was embodied in a compensation order. That interpretation is confirmed by the final sentence of Section 910(h)(1), which provides that "[w]here 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." 33 U.S.C. 910(h)(1). That sentence—which does not use the word "award" at all—makes clear that what matters is the time of "injury," not whether the obligation to provide compensation for it arose from a compensation order as well as the Act itself.

Section 933(b). Finally, Section 933(b) of the Act provides another example of a provision that precludes a conclusion that the Act invariably uses the word "award" to mean compensation order. That provision states that, under certain circumstances, "[a]cceptance of [Longshore Act] 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" a third party for the injury. 33 U.S.C. 933(b) (emphasis added). That provision is triggered by only one particular type of "award": an "award in a compensation order." *Ibid.* If "award" in the Longshore Act always means "compensation order," as petitioner contends (Pet. Br. 22), it would have been unnecessary for Congress to include the phrase "in a compensation order" in Section 933(b). Congress's decision to do so reflects its understanding that there can exist awards *not* in a compensation order, *i.e.*, when an employer pays benefits after a disabling injury because of its obligation to do so directly under the Act itself, see 33 U.S.C. 914(a).

This reading of Section 933(b) is confirmed by this Court's decision in *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U.S. 529 (1983) (*Pallas Shipping*). That case presented the question "whether a longshoreman's acceptance of voluntary compensation payments," *i.e.*, without a compensation order, "gives rise to an assignment" under Section 933(b). *Id.* at 531. The Court answered that question in the negative:

> Section [933(b)] triggers an assignment of an injured longshoreman's cause of action against a third party only after he has accepted compensation "under an award *in a compensation order* filed by the deputy commissioner or Board." (Emphasis added.) The term 'compensation order' in the [Longshore Act] refers specifically to an administrative award of compensation following proceedings with respect to the claim. 33 U.S.C. § 919(e). In this case, no adminis-

> trative proceedings ever took place, and no award was ever ordered by the Deputy Commissioner.

Id. at 534 (footnote omitted). Instead, the compensation at issue in *Pallas Shipping* was provided by the employer as required by operation of the Act itself, and therefore did not result in assignment of any cause of action against a third party.

Congress subsequently amended Section 933(b) in 1984 expressly to provide that "[f]or 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." Longshore and Harbor Workers' Compensation Act Amendments of 1984 (Act of 1984), Pub. L. No. 98-426, § 21(a), 98 Stat. 1652. As the court of appeals noted, this provision "contemplates that the meaning of the term 'award' in other sections is not limited to a formal compensation order." Pet. App. 8. "Unless 'award' is used in other sections to mean something broader than a formal compensation order, the specific definition in section [933(b)] would be unnecessary." *Ibid.*

Petitioner does not attempt to provide independent significance to the new definitional provision in Section 933(b), instead acknowledging that, on his reading of the statute, it was "unnecessary" because the term award "had the unmistakable meaning, even before that sentence was added and *throughout* the Act, that the added sentence sought to nail down." Pet. Br. 29. That contention disregards the "cardinal principle of statutory construction that [the courts] must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (quotation marks and internal citation omitted); see *Board of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*,

131 S. Ct. 2188, 2196 (2011) (relying on this canon to reject a construction that would have rendered an element of a definitional provision "surplusage") (internal citation omitted). Moreover, it is telling that the new definitional provision in Section 933(b) (which congressional conferees noted was "in accord with the decision in *Pallas Shipping*," H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 36 (1984)) ensured that the specialized meaning of "award" *Pallas Shipping* gave to that term would be limited to "this subsection," *i.e.*, Section 933(b), and not the entire Act, as petitioner contends should be the case.

2. Like other parts of the Act, Section 906(c) contemplates an "award" that is not the result of a compensation order

Section 906(c) "must be read in * * * context and with a view to [its] place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); see *Reno* v. *Koray*, 515 U.S. 50, 62 (1995) (rejecting interpretation of statutory provision that was "plausible * * * if the phrase [was] read in isolation" but that did "not carry the day" in light of further "textual and historical analysis"); *Robinson*, 519 U.S. at 343-344. Read in the context of the broader statutory scheme, Section 906(c), like the provisions discussed above, cannot sensibly be read to use "award" to mean "issue a compensation order." Instead, the provision contemplates that an employee is "newly awarded compensation" by force of the Act itself once he suffers a disabling injury. That is consistent with how this Court has described Longshore Act benefits, see *American Stevedores*, 330 U.S. at 456 ("The

employee thus receives compensation payments quite soon after his injury by force of the Act."), and payments made under other workers' compensation schemes, see *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 500 (1939) (referring to "provisions of the California [workers' compensation] statute awarding compensation for injuries to an employee occurring within its borders").

a. As an initial matter, the Director's interpretation is the only one consistent with the Act's singular focus on the time of disabling injury as the basis for initial benefits calculations. See Pet. App. 8.[9] The Act defines

[9] "[I]n most cases of traumatic injury," like the one in this case, "the time of injury will coincide almost exactly with the time the worker is disabled." *Johnson* v. *Director, OWCP*, 911 F.2d 247, 249 (9th Cir. 1990) (citation omitted), cert. denied, 499 U.S. 959 (1991); see 33 U.S.C. 902(2) (statutory definition of injury distinguishing between "accidental injury or death" and "occupational disease or infection"); 33 U.S.C. 910(i) (special rules for occupational disease cases). There was actually a slight lag in this case—petitioner was injured on February 24, 2002, but continued working until March 11, 2002, Pet. App. 4—but both injury and onset of disability occurred in the same fiscal year. The court of appeals thus did not need to determine whether the national average weekly wage applicable at the time of the accident or at the time of subsequent onset of disability applied, and it used the two times interchangeably in articulating its rule. See, *e.g.*, *id.* at 8 ("Our 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.").

Given that, just as in the typical traumatic injury case, the injury and onset of disability here occurred in the same fiscal year, there is no occasion for this Court to decide that question either. In any event, it is the position of the Director that in a traumatic injury case in which, unlike here, the accident and onset of disability were in different fiscal years, the national average weekly wage for the year of onset would

"disability"—a foundational term underlying the entire benefit scheme—as "incapacity because of injury to earn the wages which the employee was receiving *at the time of injury*." 33 U.S.C. 902(10) (emphasis added). Accordingly, "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." 33 U.S.C. 910 (emphasis added).

Section 906(c) in turn establishes a floor and a ceiling for compensation levels that are initially calculated based on the employee's wages at the time of the disabling injury. That provision is thus logically read to apply to an initial benefit calculation the maximum and minimum benefit levels that are likewise based on circumstances that existed at the time of the injury. Conversely, there is no apparent justification for determining a basic compensation rate based on an employee's average weekly wage at the time of his disabling injury, but capping that initial compensation based on a national average weekly wage from years later. It seems even less likely in light of the fact that the "applicable national average weekly wage" increases each year, while the employee's own average weekly wage does not, meaning petitioner's interpretation would require comparison not only of average wages from different years, but of a fixed sum (the employee's average weekly wage) to one that changes annually (the national average weekly wage).[10]

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apply because that is when the employee is "newly awarded compensation" by force of the Act, *i.e.*, when the disability commenced.

[10] Because of Section 906(c)'s "currently receiving" provision, the maximum compensation for permanent total disability and death benefits will increase each year to reflect increases in the national average weekly wage. 33 U.S.C. 906(c); see 33 U.S.C. 910(f). That increase, akin

Interpreting Section 906(c) to make applicable the national average weekly wage at the time of a disabling injury also harmonizes that provision with the way the Act applies to employees whose average weekly wages are not high enough for Section 906's maximum rate to apply. Regardless of the nature or extent of such a worker's disability, or when—or even if—the worker later receives a compensation order, the amount of compensation is based on the worker's average weekly wage at the time of the injury. See 33 U.S.C. 910; 33 U.S.C. 908(a), (b) and (c). For most workers, that compensation rate does not change over time. There is an exception for claimants receiving compensation for death or permanent total disability, who are entitled to annual increases tied to the increase in the national average weekly wage. 33 U.S.C. 910(f). But whether entitled to annual increases under Section 910(f) or not, no claimant who is unaffected by Section 906's maximum rate receives a higher *initial* compensation rate based on whether or when a compensation order is issued.

The Director's interpretation of the Act, as adopted by the court of appeals, gives this same treatment to claimants who *are* affected by Section 906's maximum rate: they initially receive the maximum rate in effect at the time of the injury, and those receiving compensation for death or permanent total disability are entitled to prospective annual increases tied to the national average weekly wage. See 33 U.S.C. 906(c) (applying a given fiscal year's determination to any claimant "currently receiving compensation for permanent total disability or death"). But, as with claimants not at the maximum

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to a cost-of-living adjustment, is prospective and does not affect the initial benefit calculation. See Pet. App. 10-12.

rate, no claimant is entitled to a higher *initial* maximum rate based on the date of any compensation order that may later be entered.

Under petitioner's interpretation of the Act, by contrast, an employee's compensation would often increase due to the mere fortuity of the timing of a compensation order, a matter that is often beyond the control of both employee and employer. This case illustrates the point. The hearing before the ALJ took place in January 2006, but the ALJ did not issue the compensation order until October 12, 2006. See Pet. App. 33-34. For that reason, petitioner contends that the FY 2007 national average wage should apply. But if the ALJ had issued his order a mere 13 days earlier, petitioner's theory would call for application of the FY 2006 average. Basing calculations on circumstances existing at the time of a disabling injury prevents benefit levels from changing based on mere administrative happenstance.[11]

[11] Congress's understanding that the time of disabling injury is to be the trigger for benefits calculations under the Act is reflected in its practice of adopting special, statutorily defined times of injury to make benefit adjustments. As discussed above, Congress in 1972 adjusted benefit levels for previously disabled employees by providing them with a special, post-1972 "time of injury." See n.2, *supra*. Congress followed the same route when it addressed benefits for employees disabled by occupational diseases. See 33 U.S.C. 910(d)(2) and (i); *Bath Iron Works Corp.*, 506 U.S. at 157 (describing provisions). The Act provides that in cases of "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 * * * should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. 910(i). When that "time of injury" occurs within a year of an employee's retirement, then his "average weekly wage" for purposes of calculating benefit levels is the average weekly wage for the year immediately preceding his retirement. 33 U.S.C. 910(d)(2)(A). Congress went on expressly to link the national

b. Interpreting Section 906(c)'s use of the phrase "newly awarded compensation" to mean newly awarded compensation by force of the Act itself, rather than by an administrative compensation order, also harmonizes the provision with the Act's requirement that employers pay compensation absent compensation orders. See 33 U.S.C. 914(a) ("Compensation under this Act shall be paid periodically, promptly, and * * * without an award, except where liability to pay compensation is controverted by the employer."). Because the Act mandates that "compensation payments" be paid "quite soon after [an] injury by force of the Act" itself, *American Stevedores*, 330 U.S. at 456 (citing 33 U.S.C. 914), it is logical to interpret Section 906(c) as contemplating payments of the same nature.

Petitioner's interpretation of Section 906(c), by contrast, would render it impossible to apply in the many Longshore Act cases in which the employer pays compensation pursuant to Section 914(a), with no compensation order ever being issued. If the applicable maximum benefit level were calculated based on the date a compensation order was entered, as petitioner contends should be the case, an employer that begins providing benefits without such an order (as it is required to do by Section 914(a)) would not know what maximum to apply.

Consider a highly compensated worker injured, like petitioner, in FY 2002. As required by 33 U.S.C. 914(b),

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average weekly wage with the (special statutorily-defined) time of injury in occupational disease cases when it provided that if the "time of injury" occurs more than a year after retirement, the employee's "average weekly wage" for purposes of benefit calculations "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*." 33 U.S.C. 910(d)(2)(B) (emphasis added).

the employer pays compensation within 14 days, and does so at the FY 2002 maximum rate. This situation continues until 2005, when a dispute develops. Litigation ensues and the worker prevails, resulting in a formal compensation order in FY 2007. On petitioner's interpretation of Section 906(c), the employer is required to pay benefits at the FY 2007 maximum rate—not only going forward, but also retroactively to the date of disability, with interest on the difference between the total sums payable under the FY 2002 and FY 2007 maximums.

Indeed, under petitioner's understanding of the Act, this same hypothetical employee would apparently be entitled to the same increase in his maximum benefit level even if he *lost* his later dispute with the employer. If the ALJ sided with the employer in the dispute and decided that the employee was not entitled to a higher rate of compensation, the ALJ would still embody that decision in a "compensation order" because, under the Act, that term means not only an "order" "making the award" but also an "order rejecting the [employee's] claim" and ordering that payment of compensation be maintained at current levels. 33 U.S.C. 919(e). Because the first and only "compensation order" in that situation would be issued in FY 2007, it appears that, under petitioner's view, the employee who litigated and lost would nonetheless be entitled to a retroactive increase in benefits to the FY 2007 maximum level.

Petitioner contends that such problems would not arise because, in his view, a compensation order should be entered in every case just after the start of benefit payments. See Pet. Br. 43. Petitioner's solution to the problem created by his interpretation of Section 906(c) would upend decades of settled practice under the Long-

shore Act, under which many employers pay—and employees receive—compensation without either party ever obtaining a formal compensation order. "[I]n practice many pending claims are amicably settled through voluntary payments without the necessity of a formal order by the deputy commissioner." *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 4 n.4 (1975); see *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 498 (1992) (Blackmun, J., dissenting) ("[T]he Act presumes that employers, as a rule, will promptly recognize their [Longshore Act] obligations and commence payments immediately, without the need for a formal award.") (*Cowart*). Even petitioner acknowledges that "district directors rarely issue compensation orders on uncontested claims in which the employer is making payments." Pet. Br. 43.

Notwithstanding this long-settled practice, petitioner appears to contend (Pet. Br. 29 n.16, 43) that entry of compensation orders is compelled by the Act in every case in which compensation is paid. That is incorrect. In arguing that compensation orders are mandatory in all cases, petitioner relies on the final sentence of Section 919(c), which provides that if no hearing is ordered within 20 days after notice that a claim is filed, the district director "shall, by order, reject the claim or make an award in respect of the claim." 33 U.S.C. 919(c). Section 919, however, is titled "Procedure in Respect of *Claims*," and addresses the actions to be taken by the district director after "a claim for compensation [is] filed." 33 U.S.C. 919(a) (emphasis added). But if an employer begins paying compensation within 14 days of notice of an injury, as required by Section 914(b), the employee is not required—and if satisfied with payment, has no need—to file a claim. In that event, Section

919—including its Subsection (c), on which petitioner relies—is not triggered.

The Act's limitations provision recognizes this feature of the Act. That provision generally requires a claim to be filed within a year of the injury or death, but it also provides that "[i]f 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." 33 U.S.C. 913(a); see 20 C.F.R. 702.221(a) (same); see also 33 U.S.C. 919(a) (cross-referencing Section 913). Accordingly, an employer could pay without a compensation order for years, and if no dispute leads the employer to cease payments—*i.e.*, there never is a "last payment"—then Section 913 contemplates that no claim need ever be filed. Unless a claim is filed, Section 919 simply has no application, and Subsection (c) could not require the issuance of an order.

Moreover, Department of Labor regulations provide that a formal compensation order is not required even when an employee elects to file a claim. In "the vast majority of cases" in which an employer has disputed a claim or an employee has contested some benefit-related action by the employer, "the problem giving rise to the controversy results from misunderstandings, clerical or mechanical errors, or mistakes of fact or law." 20 C.F.R. 702.301. "Such problems seldom require resolution through formal hearings," and "district directors are empowered to amicably and promptly resolve such problems by informal procedures." *Ibid.*; see 20 C.F.R. 31.8 (1972) (requiring prehearing conferences to try to "amicably * * * dispose of controversies wherever possible"). When agreement is reached through such informal procedures, the district director can "embody the

agreement in a memorandum *or* * * * issue a formal compensation order." 20 C.F.R. 702.315(a) (emphasis added); see *ibid.* (district director is required to file a formal compensation order only if a party requests it).

As a background practice involving legal disputes generally, parties often resolve the dispute informally or through a settlement agreement, without entry of a judgment or order by a tribunal. There is no reason to conclude that Congress intended to foreclose such informal resolution of disputes under the Longshore Act, especially where, as is the case under governing regulations, discussions between employee and employer occur under the auspices of the district director, and the district director (or ALJ) must approve any resolution by means of a settlement agreement or memorandum, 20 C.F.R. 702.241-701.243, 702.315(a). Cf. *United States* v. *Mezzanatto*, 513 U.S. 196, 200-204 (1995) (interpreting rule of evidence in light of background legal practices). To the contrary, under the Longshore Act, informal resolution of a dispute implements in an amicable manner the employer's statutory obligation to pay compensation promptly, whether or not a formal compensation order is entered, see 33 U.S.C. 914(a), and thus places the parties in the same position they would have occupied if no dispute had ever arisen. That informal dispute resolution process also reasonably implements the provisions of Section 919 establishing procedures for resolving a claim, including the authority of a district director under Section 919(c) to "make or cause to be made such investigations as he considers necessary in respect of the claim" before ordering a hearing. 33 U.S.C. 919(c). Section 919(c) cannot reasonably be read to require a district director to issue a formal compensation order even

if the parties resolve their difference informally and no party requests a compensation order.

c. Petitioner's interpretation of Section 906(c) should also be rejected because there is no indication Congress intended the arbitrary distinctions in compensation levels between similarly-situated employees that flow from it. See Pet. App. 9 n.1. Compare petitioner with a similarly situated worker who suffered the same injury on the same day, but who never has occasion to file a claim and obtain a compensation order. The only difference is that the hypothetical worker's employer pays compensation at the FY 2002 rate, $966.08 per week, from the date of the injury. Petitioner, on the other hand, secures a compensation order in 2007, which, on his reading of Section 906(c), entitled him, retroactively to FY 2002, to the $1114.44 maximum rate in effect for FY 2007. As a result, even though both employees are receiving compensation for the same disability that prevented them from earning the same wages during the same time period, petitioner would receive substantially higher benefits on his understanding of the Act.

Petitioner contends that these varying benefit rates are necessary to compensate claimants for delayed receipt of compensation. Pet. Br. 42. There are several flaws in that contention. First, petitioner's interpretation does not limit use of the date-of-order maximum to cases in which there has been a delay in payment. As discussed above, on petitioner's view he would be entitled to the FY 2007 maximum rate retroactively back to 2002, even if his employer had promptly paid weekly benefits at the FY 2002 maximum rate since the day he was injured but a compensation order was nonetheless entered at a later date. Second, compensation can be

delayed in any case, not just the relatively few cases involving the maximum rate, making Section 906(c) a poor vehicle to remedy that problem. Third, it would be a vehicle available only to the highest-paid and lowest-paid claimants (those subject to maximum or minimum benefit levels), not to the many employees in between for whom delay might cause hardship. Finally, there is no need to resort to petitioner's interpretation of Section 906(c) to compensate employees for delay because a broadly applicable and calibrated tool is available: the payment of interest. See *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1059 (9th Cir. 1998) (interest accrues from the date benefits became due, not from the date of the ALJ's judge's award); *Sea-Land Serv., Inc.* v. *Barry*, 41 F.3d 903, 910 (3d Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Strachan Shipping Co.* v. *Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971), cert. denied, 406 U.S. 958 (1972); *Quick* v. *Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Indeed, petitioner received interest here. Pet. App. 108.

d. Contrary to petitioner's argument (Pet. 21), there is no conflict between the Director's interpretation of Section 906(c) and this Court's decision in *Cowart*, *supra*. *Cowart* involved Section 933 of the Act, which allows a "person entitled to compensation" under the Act to pursue claims against third parties responsible for injuries compensable under the Act without forgoing such compensation. See 33 U.S.C. 933(a). Section 933(g), however, provides that if the "person entitled to compensation" settles with a third party for less than the amount of compensation to which he is entitled, without first receiving written approval from the liable employer, all future benefits are forfeited. 33 U.S.C.

933(g)(1)-(2). The Court held that an employee was a "person entitled to compensation" as soon as he suffered an injury giving him a right to compensation under the Act, regardless of whether the employer had paid compensation or was subject to a compensation order. *Cowart*, 505 U.S. at 477. The Court simply held that issuance of a formal compensation order is not the only way to become a "person entitled to compensation" for purposes of Section 933(g). Because that provision does not contain the word "award," the Court in *Cowart* had no occasion to interpret that term, much less hold that compensation cannot be awarded by force of the Act.

e. The Board in *Reposky* v. *International Transportation Services*, 40 Ben. Rev. Bd. Serv. (MB) 65, 76 (Oct. 20, 2006), reached the same result as the court of appeals by focusing on Section 906(c)'s use of the term "during" rather than the term "awarded." See Pet. App. 19-20. It accepted the Director's interpretation that the phrase "newly awarded compensation during such period," 33 U.S.C. 906(c), means "newly awarded compensation *for* such period" rather than petitioner's preferred interpretation, "newly awarded compensation *in* such period." *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 76. Like the court of appeals' interpretation of the Act, the Board's reading makes the "period" in which a disabling injury occurs (not that in which a compensation order issues) dispositive.

Section 908 of the Act uses the word "during" in that same sense. That section provides, in numerous places, that compensation is to be paid "during the continuance" of the relevant disability. 33 U.S.C. 908(a), (b), (c)(21), (23) and (e). This language clearly does not mean that compensation must be paid, or may only be paid, *in* the actual period of disability. Rather, it means that com-

pensation is payable *for* the period of disability. That the compensation may be ordered at some date after the period of disability does not change the period for which—or the rate at which—that compensation is to be paid.[12]

3. The legislative history supports the Director's interpretation of Section 906(c)

The legislative history of the 1972 amendments to the Longshore Act supports the view that Congress did not intend the "newly awarded" provision of Section 906(c) to be based on the time of a formal compensation order, if one happens to be entered in the case. The Senate report identified workers newly awarded compensation under Section 906(c) as "those who begin receiving compensation for the first time during the period." S. Rep. No. 1125, 92d Cong., 2d Sess. 18 (1972). As noted previously, employees often "begin receiving compensation" (*ibid.*) in the absence of a formal compensation order. See 33 U.S.C. 914(a). Indeed, many employees never receive such an order. Accordingly, the committee's description of Section 906(c) is irreconcilable with petitioner's interpretation of that provision.

The legislative history of the 1984 amendments to Section 906 likewise supports the conclusion that it is the national average weekly wage rate at the time of injury that controls. After the 1972 amendments eliminated maximum and minimum rates fixed in the Act itself in favor of limits on disability benefits tied to the

[12] Petitioner does not argue that Section 908 should be given a different reading, but does contend that "during" cannot mean "for" in Section 906(c) because "during" is an adverbial modifier of "awarded." Pet. Br. 21. He does not explain how this is grammatically different from Section 908, in which "during" is an adverbial modifier of "paid."

national average weekly wage as calculated by the Director, there was disagreement over whether Congress intended death benefits to be subject to any maximum rate. Resolving this conflict, the Court held that the maximum-rate formulas in Section 906(b)(1) applied only to compensation paid for disability, and not to compensation paid for death. *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 47 (1979).

In 1984, Congress amended Section 906(b)(1) to fill the gap identified by *Rasmussen* and apply the maximum rate to death benefits as well. Compare 33 U.S.C. 906(b)(1) ("Compensation for disability *or death* * * * shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage.") (emphasis added) with 33 U.S.C. 906(b)(1) (1982) ("[C]ompensation for disability shall not exceed * * * 200 per centum" of the national average weekly wage.). The Conference Committee explained that this amendment "impose[d] a cap on death benefits of 200% of the national average weekly wage, the same maximum applicable to disability cases. The conferees intend that the national average weekly wage subjected to the cap shall be the national average weekly wage applicable on the date of death." H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28-29 (1984); see also H.R. Rep. No. 570, 98th Cong., 1st Sess. 8-9 (1983) ("[C]ompensation payments for death shall be limited to a maximum of 200% of the National Average Weekly Wage applicable on the date of death."); *id.* at 26 (same). Congress thus understood that it was applying the "same" maximum benefit levels to death that had previously applied to disability, and that those levels would be calculated based on the national average weekly wage in force at the time of death. It therefore necessarily understood that, in cases of dis-

ability, Section 906 rendered the average from the time of disabling injury applicable.

II. THE DIRECTOR'S INTERPRETATION OF THE LONGSHORE ACT, AS ARTICULATED IN FORMAL ADMINISTRATIVE PROCEEDINGS AND HIS ADMINISTRATION OF THE ACT, IS ENTITLED TO DEFERENCE

For the reasons given above, Section 906(c) is best read to refer to the national average weekly wage applicable at the time of an employee's disabling injury, not at the time of any compensation order that may later be entered. To the extent, however, that there is any ambiguity in the Act on that question, the Court should defer to the Director's reasonable interpretation of the statute he administers. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).

Congress in the Longshore Act assigned the Secretary of Labor the "responsibility" of "supervising" and "administering" the "calculation of benefits and processing of claims" under the Act. *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 130-131 (1995). The Secretary has in turn delegated her responsibilities under the Act to the Director. See 20 C.F.R. 701.201; 74 Fed. Reg. 58,834 (Nov. 13, 2009).

There are several ways in which the Director interprets the Longshore Act in exercising his statutory duty to administer the Act. He may promulgate regulations. See 33 U.S.C. 939(a). He may "appear as a litigant before the relevant adjudicative branches of the Department of Labor, the ALJ, and the Benefits Review Board." *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 519 U.S. 248, 263 (1997); see 20 C.F.R. 702.333(b). And through district directors, he interprets and applies the Act on a daily basis when he resolves disputes infor-

mally, calculates benefits awards, and issues legally binding compensation orders. See 20 C.F.R. 702.301-703.315.

A regulation promulgated by the Director would clearly be entitled to *Chevron* deference; so too should the Director's authoritative interpretation of the Act when provided in formal agency adjudications, articulated in official guidance on the calculation of benefit levels, or used as his basis for making actual benefit calculations. See *United States* v. *Mead Corp.*, 533 U.S. 218, 230-231 (2001) (notice-and-comment rulemaking is good indicator of entitlement to *Chevron* deference but "the want of that procedure * * * does not decide the [question]"); *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002) ("[T]he 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 all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

The Director's interpretation of the Longshore Act in administrative proceedings "*is* agency action, not a *post hoc* rationalization of it." *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). "Under these circumstances, the [Director's] litigating position before the [Department] is as much an exercise of delegated lawmaking powers as is the [Director's] promulgation of a [regulation]." *Ibid.;* accord *Gilliland* v. *E.J. Bartells Co.*, 270 F.3d 1259, 1262 (9th Cir. 2001) ("[T]he Director's interpretation of the [Longshore Act] is entitled to deference if it is contained either in a regulation or in the Director's litigation posi-

tion within an *agency* adjudication, so long as the interpretation is reasonable.").[13] But see *Boroski*, 2011 WL 5555686, at *6-*7.

As relevant here, the Director has long interpreted Section 906(c) to require application of the national average weekly wage in effect at the time of disabling injury, not at the time of any formal compensation order that may be entered later. He stated that position more than 30 years ago in an overview publication about the Longshore Act, outside the context of any litigation, see United States Dep't of Labor, Employment Standards Administration, OWCP, *Workers' Compensation Under the Longshoremen's Act* (1979), and, through the district directors, he has acted on that interpretation in his day-to-day administration of the Act, including in the informal resolution of disputes and in calculating benefit levels. In this case, the ALJ decided to apply the national average weekly wage from the time of injury, but in the administrative proceeding that led to the Eleventh Circuit's recent decision in *Boroski*, that determination was made by a district director. See 2011 WL 5555686, at *2.

Moreover, the Director successfully advocated adoption of his position by the Benefits Review Board in *Reposky*. See pp. 12-13, *supra*. The fact that the Director in *Reposky* advocated a different textual route to the same ultimate conclusion is of no import. To the extent there is ambiguity in Section 906(c), it inheres in the provision as a whole, and the Director in *Reposky* resolved that ambiguity just as he has now, by interpret-

[13] The Ninth Circuit recently granted rehearing en banc to consider the proper level of deference to be extended to the Director's interpretation of the Act. See *Price* v. *Stevedoring Servs. of Am., Inc.*, 653 F.3d 928 (2011), granting reh'g of 627 F.3d 1145 (2010). En banc proceedings in *Price* have been stayed pending this Court's decision in this case.

ing the provision in light of both the role it plays in the larger statutory scheme and his day-to-day experience administering the statute. Indeed, the Board's decision in this case summarized *Reposky* as holding "that the pertinent maximum rate is determined by the date the disability commences, as this interpretation of the language of Section [906(c)] 'maintains consistency in the statute and yields rational results.'" Pet. App. 20 (quoting *Reposky*, 40 Ben. Rev. Bd. Serv. at 76).

Although the Board's decision itself is not entitled to deference, see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), its adoption of the Director's interpretation of Section 906(c) obviated any need for him to issue a regulation on the question. The fact that the Director was successful in having his interpretation adopted in a formal adjudication (that the agency's ALJs would subsequently be required to follow in all subsequent cases) should not result in the foreclosure of deference to that interpretation.

In all events, the Director's interpretation of the Act is, at the least, entitled to *Skidmore* deference. *Rambo*, 521 U.S. at 136 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).[14] That interpretation is persuasive for the reasons described above, and it is based on "a body of experience and informed judgment." *Skidmore*, 323 U.S. at 140.

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[14] *Rambo* extended *Skidmore* deference to the Director's litigating position before this Court. See 521 U.S. at 136. That case did not present the question of the appropriate level of deference for positions taken by the Director in proceedings before the agency. Likewise, the Director has sought only *Skidmore* deference in *Pacific Operators Offshore, LLP* v. *Valladolid*, No. 10-507 (argued Oct. 11, 2011), because the Director in that case had not stated a position on the question presented in agency proceedings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 33 U.S.C. 902 provides, in pertinent part:

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.

* * * * *

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

* * * * *

2. 33 U.S.C. 906 provides:

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.

3. 33 U.S.C. 908 provides, in pertinent part:

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.

* * * * *

4. 33 U.S.C. 909 provides:

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 bene-

fits 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.

5. 33 U.S.C. 910 provides:

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 applica-

ble 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 deter-

mined 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.

6. 33 U.S.C. 913 provides, in pertinent part:

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.

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7. 33 U.S.C. 914 provides:

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 installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under 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.

8. 33 U.S.C 919 provides, in pertinent part:

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 prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) 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

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

this chapter, on 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.

9. 33 U.S.C. 933 provides, in pertinent part:

Compensation for injuries where third persons are liable

(a) Election of remedies

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

(b) Acceptance of compensation 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.

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