No. 10-1399

In the Supreme Court of the United States

DANA ROBERTS, PETITIONER

v.

SEA-LAND SERVICES, INC., ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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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. Such compensation is capped, however, at 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, and that determination applies "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). 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 for 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. 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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (Longshore Act or Act), 33 U.S.C. 901 *et seq.*, establishes a federal workers' compensation system for employees disabled or killed in the course of covered maritime employment. See 33 U.S.C. 908, 909, 903(a). 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 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. A totally disabled worker's basic compensation rate is two-thirds of that average weekly wage. 33 U.S.C. 908.[1]

At the same time, the Act has always placed an upper limit on weekly compensation, irrespective of the worker's average weekly wage. From 1927 to 1972, this maximum rate was a fixed sum ranging from $25 to $70 per week. See 33 U.S.C. 906(b) (Supp. I 1928); 33 U.S.C.

[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). Disabilities under the Act are also characterized as "temporary" or "permanent." A disability is "temporary" if the claimant's medical condition is improving and becomes "permanent" when the claimant reaches maximum medical improvement. See 33 U.S.C. 908(a)-(e); *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 alternate employment is later identified.

906(b) (1970). The statute now sets the maximum compensation rate at 200% of the "applicable national average weekly wage." 33 U.S.C. 906(b)(1). The national average weekly wage is determined by the Secretary of Labor each year, and applies from October 1 of that year until September 30 of the next. 33 U.S.C. 906(b)(3).[2]

The statute provides that the Secretary's determination of 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). The dispute in this case centers on the meaning of this provision's "newly awarded" and "currently receiving" clauses.

2. On February 24, 2002, petitioner 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), voluntarily paid petitioner compensation for temporary total disability for various periods before May 18, 2005. *Id.* at 101; 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."). Kemper ceased payments on that date, and the matter was referred to an administrative law judge (ALJ) for a hearing in January 2006. Pet. App. 34.

3. a. In October 2006, the ALJ found that petitioner had suffered a disabling injury in the course of his mari-

[2] This one-year "period," see 33 U.S.C. 906(c), is referred to in this brief as a fiscal year (FY).

time employment and was entitled to Longshore 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 (July 11, 2005). Pet. App. 107. The ALJ found that Sea-Land had proven that suitable, albeit lower-paying, alternative employment was reasonably available to petitioner beginning on October 10, 2005. *Id.* at 104-107. As a result, petitioner was awarded compensation for permanent total disability from July 12, 2005 to October 9, 2005 and for permanent partial disability from October 10, 2005 until ordered otherwise. *Id.* at 107-108.

The ALJ determined that petitioner's average weekly wage at the time of his injury was $2,853.08, and that his residual earning capacity after October 10, 2005 was $720 per week. Pet. App. 95-96, 107; see 33 U.S.C. 910. Based on that average weekly wage, petitioner's basic compensation rates were: $1,902.05 for his periods of total disability ($2,853.08 x 2/3); and $1,422.05 for his periods of partial disability (($2,853.08 - $720.00) x 2/3). See 33 U.S.C. 908.

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). 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. For periods of permanent total disability, petitioner was entitled to that same rate, "plus any increases required under Section 6 of the Longshore Act." *Id.* at 107.[3] The ALJ also ordered Sea-

[3] The ALJ was apparently referring to the statute's "currently receiving" clause, which applies a new fiscal year's national average wage

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.*[4]

b. Petitioner sought reconsideration, arguing, inter alia, that he was entitled to the FY 2007 maximum rate of $1,114.44 because the ALJ issued the compensation order in that year. Pet. 6. In a supplemental memorandum, however, petitioner conceded that the ALJ's application of the FY 2002 maximum rate was correct under binding precedent of the Department of Labor's Benefits Review Board (Board), *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.

In *Reposky*, the Board 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, benefits are initially limited to the maximum rate in effect on the date the claimant became disabled, rather than the rate in effect when a compensation order is issued. *Id.* at 74-76. Basing the pertinent maximum

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to claimants "currently receiving compensation for permanent total disability or death benefits during such period." 33 U.S.C. 906(c).

[4] District directors are officials of the Office of Workers' Compensation Programs responsible for the day-to-day administration of the Act, including attempts to informally resolve disputes. Because ALJ awards 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 compensation amounts 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) (2006); see also 55 Fed. Reg. 28,606 (1990) (original promulgation).

rate on the date the worker's disability commences, the Board held, "maintains consistency in the statute and yields rational results." *Id.* at 76.

The ALJ agreed that *Reposky* controlled, and consequently denied the motion for reconsideration. Pet. App. 28-32. He nonetheless found that the district director had erred in calculating the maximum rate payable to petitioner for his permanent total disability from October 1 to 9, 2005. He found that, for those nine days, petitioner was "currently receiving compensation for permanent total disability," and was thus entitled to the FY 2006 maximum rate of $1,073.64 per week, rather than the FY 2002 maximum rate of $966.08 per week. *Id.* at 31.

4. Both petitioner and Sea-Land 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 entitled to the FY 2007 maximum compensation rate because the ALJ's order was issued during that fiscal year.[5] *Id.* at 19-20.

5. The court of appeals affirmed in relevant part. Pet. App. 1-13. It held that an employee is "newly awarded" compensation when he first becomes disabled. Reading Section 906(c) "with a view to [its] place in the overall statutory scheme," the court of appeals concluded that its interpretation of that provision "accords with the structure of the [Longshore Act], which identi-

[5] Petitioner also argued that, even while receiving compensation for temporary total or permanent partial disability, he should have been subject to a new, higher maximum rate at the beginning of each fiscal year. The Board, noting that Section 906(c) provides for annual changes to the maximum rates payable only for permanent total disability or death, 33 U.S.C. 906(c), rejected that argument, and petitioner did not raise it before the court of appeals. See Pet. App. 20.

fies 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," and his residual earning capacity under Section 908(c)(21). *Id.* at 8 (internal citation omitted) (first set of brackets in original). "To apply the national average weekly wage with respect to a year other than the year the employee first becomes disabled," the court of appeals explained, "would be to depart from the Act's pattern of basing calculations on the time of injury." *Id.* at 8-9.

The court rejected petitioner's argument that the term "award" in Section 906(c) could mean only "compensation order," citing several other provisions of the Act in which that term "refer[s] to an employee's entitlement to compensation under the Act, even in the absence of a formal order." Pet. App. 6-8 (citing 33 U.S.C. 908(c)(22) (defining the "award" for loss of specified body parts), 908(c)(20) (requiring compensation to be "awarded" for disfigurement), 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 of appeals also rejected petitioner's argument that the Fifth Circuit's decision in *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (1997), should lead to a different interpretation of Section 906(c). The court of appeals acknowledged language in *Wilkerson* that appeared to support petitioner's interpretation of the Act, but pointed out that the Fifth Circuit "did not engage in any analysis of the text of the [Longshore Act]," and did not "explain how its interpretation accords with the overall statutory scheme." Pet. App. 9.

Given the absence of reasoning in *Wilkerson*, the court of appeals found "nothing in the opinion that persuade[d] [it] to abandon [its] holding here." *Ibid.*

The court of appeals interpreted Section 906(c)'s "currently receiving" clause consistently with its "newly awarded" clause. Pet. App. 10-12. Noting that "the Act expects employees entitled to compensation to receive payment during their period of disability," *id.* at 11, the court "construe[d] [Section 906(c)'s] reference to the period 'during' which an employee is 'currently receiving compensation for permanent total disability' to mean the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court. Although there is tension between the decision below and a prior decision of the Fifth Circuit, this Court's intervention is not warranted at this time. It is not clear that the Fifth Circuit would disagree with the court of appeals' reasoning here, and additional cases presenting this question are pending in the lower courts. Further percolation on the question is thus warranted.

1. a. Petitioner argues that the decision below conflicts with the language of Section 906(c)'s "newly awarded" clause. Specifically, he argues that the term "award" in the provision means "compensation order." Pet. 13-19. He thus contends that the phrase "newly awarded" in Section 906(c) must mean newly issued a compensation order. Since the first formal compensation order in this case—the ALJ's October 2006 decision—was issued in the 2007 fiscal year, petitioner ar-

gues that all compensation awarded should be paid at the FY 2007 maximum compensation rate. He is incorrect.

As the court of appeals noted, the Act does not define either "award" or "awarded." Pet. App. 6. Although the Act does, in places, use "award" to mean "compensation order," it does not do so uniformly. To the contrary, the court of appeals cited several examples from Sections 908 and 910 of the Act in which Congress "use[d] 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." *Id.* at 6-7 (citing 33 U.S.C. 908(c)(20) ("compensation not to exceed $7,500 shall be awarded for serious disfigurement of the face, head, or neck"), 908(c)(22) ("the award of compensation" for loss of multiple body parts "shall be for * * * each such member or part * * * which awards shall run consecutively"), 910(h)(1) (increasing the average weekly wage for claimants "awarded compensation as the result of death or permanent total disability [prior to the 1972 amendment] at less than the maximum rate that was provided in this [Act] at the time of the injury")). The court of appeals correctly concluded that, "[b]y use of the term 'awarded'" in these 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." *Id.* at 6; see 33 U.S.C. 914(a) ("Compensation under this [Act] shall be paid * * * without an award, except where liability to pay compensation is controverted by the employer.").

The court of appeals found further support for the proposition that the Longshore Act does not always use "award" to mean formal order in Section 933(b), which

provides 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." Pet. App. 8 (citing 33 U.S.C. 933(b) (emphasis added). The court correctly noted that Section 933(b)'s subsection-specific definition of "award" as a "formal order" would not be necessary "[u]nless 'award' is used in other sections to mean something broader than a formal compensation order." *Id.* at 8.

Petitioner contends that Section 919(e), which provides rules governing the filing and service of formal compensation orders, undermines the court of appeals' reasoning. Pet. 17. That provision states that "[t]he order rejecting the claim or making the award (referred to in this [Act] as a compensation order) shall be filed in the office of the [district director]" and mailed to the parties. 33 U.S.C. 919(e). That provision unsurprisingly equates an "*order* * * * making the award" with a "compensation order." *Ibid.* (emphasis added). Section 906(c), by contrast, does not use the word "order"; it instead addresses "newly awarded compensation." 33 U.S.C. 906(c).

As the court of appeals correctly held, determining whether a given provision's reference to "award" means "compensation order" or something else depends on the statutory context of that provision. The court accordingly read Section 906(c) "with a view to [its] place in the overall statutory scheme." Pet. App. 8 (citing *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)) (brackets in original). Section 906 should be read consistently with Sections 908 and 910 because those are the sections that govern an employee's compensation rate before it is capped by Section 906. And

those provisions clearly establish that it is the time of injury, not the time of the compensation order, that controls benefit levels. See 33 U.S.C. 908(a) (compensation for permanent total disability set at two-thirds of "the average weekly wages"); 33 U.S.C. 910 ("[T]he average weekly wage of the injured employee *at the time of the injury* shall be taken as the basis upon which to compute compensation.") (emphasis added). There is no reason to conclude that Congress would have wanted an employee's average weekly wage to be calculated at the time of the injury, but to have it capped based on a "national average weekly wage" from years later. See Pet. App. 8 ("[T]he structure of the [Longshore Act] * * * identifies the time of injury as the appropriate marker for other calculations relating to compensation.").[6]

[6] The Board reached the same result by focusing on Section 906(c)'s use of the term "during," rather than the term "awarded." The Board accepted the interpretation offered by the Director, Office of Workers' Compensation Programs, 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* v. *International Transp. Serv.*, 40 Ben. Rev. Bd. Serv. (MB) 65, 76 (Oct. 20, 2006), cited in Pet. App. 18-20. Because an employee's compensation, regardless of when formally ordered, is always paid for the period of disability, the maximum rate on the date of that disability should control. One need look no further than Section 908 for an example of Congress's use of "during" as a functional equivalent for "for." 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 clearly does not mean, however, that compensation must be paid, or may be paid only, *in* the actual period of disability. Rather, it means that compensation is payable *for* the period of disability. That the compensation may be formally ordered at some date after the period of disability does not change the rate at which it is paid.

Petitioner's interpretation of Section 906(c) would produce an array of impractical and inequitable results. Most obviously, it would render Section 906(c) impossible to apply in most Longshore Act cases, in which the employer voluntarily pays compensation, and no formal order is ever issued. See 33 U.S.C. 914(a) and (b). Under petitioner's reading of Section 906(c), such employees would *never* be "newly awarded compensation" (because they have no formal order of compensation), so the Act would be strangely silent on the question of which national average weekly wage would apply to them.

Petitioner's interpretation would also result in otherwise-identically situated claimants—workers who suffer the same injury on the same day, and incur the same disability that prevents them from earning the same wages during the same time period—being compensated at different rates based only on the happenstance of when, or if, each receives a formal compensation order. See Pet. App. 9 n.1. Petitioner argues that such varying benefit rates are necessary to compensate claimants for their delayed receipt of benefits. Pet. 23. But compensation can be delayed in any case, not just the relatively few involving the maximum rate, making Section 906(c) a poor vehicle to remedy that problem.[7]

[7] The statute, as interpreted by petitioner, would also provide an overly broad remedy for delay because it would apply even when there is no delay in payment. If Sea-Land had voluntarily paid petitioner at the FY 2002 maximum rate from the date of his injury through the date of the FY 2007 compensation order, with appropriate increases under the "currently receiving" clause for his three-month period of permanent total disability, petitioner would have experienced no delay in receiving compensation. But under petitioner's interpretation of Section 906(c), he would nevertheless be entitled to the FY 2007 maximum rate—not only going forward but also retroactively to the date he

The Act includes a more direct and traditional response to delay; it provides that all claimants shall be compensated through the payment of interest for the time during which they go without benefits. See, *e.g.*, *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 award); *Quick* v. *Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Indeed, petitioner was awarded interest here. Pet. App. 108.

b. Petitioner argues that the court of appeals also misconstrued Section 906(c)'s "currently receiving" clause, which applies a given fiscal year's maximum rate to employees "currently receiving compensation for permanent total disability * * * during such period." 33 U.S.C. 906(c); Pet. 21-22. The court of appeals held that petitioner is entitled to the FY 2005 maximum rate from July 12, 2005 through September 30, 2005, and the FY 2006 maximum rate from October 1, 2005 to October 9, 2005, because he was entitled to compensation for permanent total disability in that span. Pet. App. 10-13 & n.2. Petitioner argues that his benefits for both periods should be paid at the FY 2007 maximum rate because Sea-Land did not actually pay compensation for those periods until after the ALJ's October 2006 compensation order. Pet. 21-22.

This petition provides a poor vehicle to decide that question. As petitioner was permanently and totally disabled only from July 12, 2005 through October 9, 2005, the currently receiving clause is relevant only to his compensation for that three-month period. Pet. App. 10, 107. As a result, the Court's resolution of this ques-

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became disabled—because the ALJ's compensation order was issued in FY 2007.

tion would result in a total increase of only $830.98 in benefits for petitioner.[8]

In any event, the court of appeals' decision was correct, and petitioner's contrary interpretation is flawed for the same reasons as the interpretation he offers for the "newly awarded" clause: it divorces petitioner's maximum compensation rate from his basic compensation rate, which is directly based on his average weekly wage at the time he became disabled. See 33 U.S.C. 908, 910. As the court of appeals explained, because the Act requires employers to pay compensation during an employee's disability regardless of whether a claim is filed, "section [90]6(c)'s reference to the period 'during' which an employee is 'currently receiving compensation for permanent total disability' * * * mean[s] the period during which an employee is *entitled* to receive such compensation, regardless of whether his employer actually pays it." Pet. App. 11. This interpretation of Section 906(c)'s "currently receiving" clause is consistent with the neighboring "newly awarded" clause and with the Act's overall compensation scheme, which provides that compensation is paid for disability, 33 U.S.C. 908, 902(10), and that compensation for permanent total disability is payable "during the continuance of such total disability." 33 U.S.C. 908(a). Because every other element in the Act's compensation scheme turns on the

[8] The 2005 maximum rate was $1047.16, and it covered 11 and four-sevenths weeks of this period, for a total of $12,117.14. The 2006 maximum rate was $1073.64, and it covered 1 and two-sevenths weeks of this period, for a total of $1380.39. So the total, using those years' maximum rate, was $13,497.53 ($12,117.14 plus $1380.39). If the 2007 maximum rate of $1114.44 had applied to the entire period (12 and six-sevenths weeks), the total would have been $14,328.51. Finally, $14,328.51 minus $13,497.53, is $830.98.

time the employee is disabled, the court of appeals reasonably read both clauses of Section 906(c) the same way.

2. a. Contrary to petitioner's argument, the court of appeals' decision regarding when an employee is "newly awarded" compensation under Section 906(c) does not conflict with this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992) (*Cowart*).

In *Cowart*, the Court considered the meaning of the phrase "person entitled to compensation" in 33 U.S.C. 933(g). Section 933 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 question before the Court in *Cowart* was whether an injured employee could be a "person entitled to compensation" subject to the forfeiture provision if, at the time the employee entered into the third-party settlement, the employer had not yet paid any compensation voluntarily and was not subject to a compensation order. 505 U.S. at 471. The Court answered that question in the affirmative, holding that the worker 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. *Id.* at 477.

Petitioner argues that the Court's holding should be read as a pronouncement that the term "award" can

never mean entitlement. Pet. 21. But the Court in *Cowart* held only that receiving a formal compensation order is not the only way to become a "person entitled to compensation" for purposes of Section 933(g). In doing so, *Cowart* did not interpret Section 906, nor did it attempt to define the terms "award" or "compensation order," neither of which appears in Section 933(g). The court of appeals' interpretation of Section 906 and the phrase "newly awarded" cannot conflict with a decision that interprets neither.

b. Petitioner argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F.3d 904 (1997). While *Wilkerson* contains conclusory statements supporting petitioner's interpretation of Section 906(c)'s "newly awarded" clause, the decision provides little support for its conclusion. As the court of appeals explained here, the *Wilkerson* court "did not engage in any analysis of the text of the [Longshore Act]" or "explain how its interpretation [of Section 906(c)'s "newly awarded" clause] accords with the overall statutory scheme," but "resolved the issue summarily without expressing any reasoning." Pet. App. 9. In particular, the Fifth Circuit did not consider: whether "award" could mean something other than "compensation order"; the interplay between Section 906 and the unquestioned time-of-injury requirement in Sections 908 and 910; or the odd results that would flow from a time-of-compensation-order test.

In addition, the context in which the Fifth Circuit considered Section 906 was markedly different from the instant case. When the employee in *Wilkerson* was injured in 1972, the maximum compensation rate was $70 per week because the earlier, fixed-maximum version of

Section 906 was in effect. See 125 F.3d at 905. His disability was not discovered for 20 years, and a compensation order was consequently not entered until 1993, after the current maximum-rate provision became effective.[9] *Id*. at 905-906. Thus, while the only question below was how to interpret the current Section 906(c) (which unquestionably applied in this case), the issue in *Wilkerson* was whether to apply the current version of that provision or the pre-amendment, fixed-maximum version. See *Reposky*, 40 Ben. Rev. Bd. Serv. (MB) at 75 ("[T]he issue before the court [in *Wilkerson*] was the applicability of the maximum compensation rate under the pre-1972 Act as opposed to the compensation scheme provided by the 1972 Amendments.").

Finally, the Fifth Circuit decided *Wilkerson* without the benefit of the views of the Director of the Office of Workers' Compensation. That court provides *Skidmore* deference to the Director's interpretations of the Longshore Act, with "the amount of deference * * * depend-[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Carey* v. *Ormet Primary Aluminum Corp.*, 627 F.3d 979, 982 (5th Cir. 2010) (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)); see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997). With the benefit of the Director's views (and given the different context in which *Wilkerson* arose), it is possible that the Fifth

[9] The gap between those two events is explained by the fact that Wilkerson's injury was hearing loss. For hearing loss, the date of injury is the last day the worker was exposed to injurious noise—in Wilkerson's case, the day he retired in 1972. *Wilkerson*, 125 F.3d at 905 n.3; see 33 U.S.C. 908(c)(13)(D).

Circuit would agree with the court of appeals decision in this case. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (agency interpretation may supersede prior judicial interpretation of statute). The Fifth Circuit may, in fact, have the opportunity to do so in the near future because this question is presented in at least one district court case within its jurisdiction. See *Service Employees Int'l, Inc.* v. *Simons*, No. 4:11-cv-01065 (S.D. Tex. filed Mar. 22, 2011) (seeking review of, *inter alia*, No. 10-0576 (Dep't of Labor Ben. Rev. Bd.) (Jan. 26, 2011), http://www.dol.gov/brb/decisions/lngshore/unpublished/Jan11/10-0576.pdf).

The same question is also currently pending before the Eleventh Circuit in *Boroski* v. *DynCorp International*, No. 11-10033 (oral argument scheduled for July 28, 2011). As in this case, but unlike in *Wilkerson*, the Eleventh Circuit has the benefit of the Director's interpretation of Section 906. It would be appropriate to allow this question to percolate further in the courts of appeals, and intervention by the Court at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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