No. 03-312

In the Supreme Court of the United States

MAHER TERMINALS, INC., PETITIONER

v.

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

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that an employee listed on a shipping employer's permanent hire list and who regularly performed both covered and non–covered maritime work for that employer was covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, even though on the day of his injury he was performing non-covered maritime work.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 330 F.3d 162. The decisions and orders of the Benefits Review Board (Pet. App. 14a-32a, 37a-44a) are reported at 35 Ben. Rev. Bd. Serv. (MB) 104 and 31 Ben. Rev. Bd. Serv. (MB) 58. The decisions and orders of the administrative law judges (Pet. App. 33a-36a, 45a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. The petition for a writ of certiorari was filed on August 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation for work-related injuries that cause the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered by the LHWCA, an injured employee must meet two requirements. The first, known as the status requirement, is that the employee must be engaged in maritime employment. The second, known as the situs requirement, is that the injury must have occurred on a maritime site. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the status requirement, which is set out in the LHWCA's definition of a covered "employee" as:

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include—
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work * * *.

33 U.S.C. 902(3).[1]

2. Respondent Vincent Riggio (respondent) had worked for petitioner Maher Terminals, Inc. for two or

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[1] Section 3(a) of the Act, setting out the situs requirement, specifies that a disability or death is compensable only if it "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. 903(a). Petitioner has conceded that the situs requirement was satisfied. Pet. App. 46a.

three years at its marine terminal before he fell off a chair in an office and injured his arm. Pet. App. 2a, 17a. Respondent had worked for petitioner as both a checker and a delivery clerk and evenly split his time between the two activities, although he was working as a delivery clerk when the injury occurred. *Id.* at 3a. Checkers are covered under the LHWCA because they work in the shipping lanes, whereas delivery clerks are not covered because they work exclusively in an office. Pet. 5-6; Pet. App. 3a, 9a. Both jobs involve handling paperwork for incoming and outgoing cargo. Pet. App. 3a.

Respondent, who belonged to the International Longshoremen's Association (ILA) local for clerks and checkers, was on petitioner's permanent hire list, but he was not assigned to a specific job. Pet. 5; Pet. App. 3a. Thus, on any given day, he could be assigned work as a checker or as a delivery clerk. Pet. App. 3a.[2] When petitioner had no work available, respondent was permitted to obtain work through the union hall with other waterfront employers covered by the ILA/New

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[2] The record is unclear whether respondent was subject to reassignment from one position to the other during the course of a particular workday, although petitioner asserts that he could not be reassigned on a given day. Pet. 6 (relying on statement from court of appeals that "*the company argues* that [respondent] is not covered by the Act because on the day of his injury he was working as a delivery clerk and was not subject to reassignment") (quoting Pet. App. 2a) (emphasis added); but cf. Pet. App. 12a (describing respondent's employment with petitioner as "actually subject to reassignment as a checker"). The Benefits Review Board found no evidence in the record indicating whether respondent could be reassigned during the course of a workday. Pet. App. 21a n.6. Amici National Association of Waterfront Employers *et al.* contend that same-day reassignment would violate the terms of the collective bargaining agreement. Amici Br. 5 n.4.

York Shipping Association collective bargaining agreement. Pet. 5.

3. Respondent filed a claim for disability benefits under the LHWCA as a result of his injured left arm. After a hearing, an administrative law judge (ALJ) ruled in petitioner's favor. In determining status, the ALJ found not credible respondent's testimony that he worked 50% of his time as a checker, and ruled that respondent's occasional employment in the shipping lanes as a checker did not transform his clerical work as a delivery clerk into covered activity. Pet. App. 47a.

The Benefits Review Board vacated and remanded. Pet. App. 37a-44a. Because the ALJ had found that respondent occasionally worked as a checker, it ruled that respondent could not have been working "exclusively" as a delivery clerk, as the Section 902(3)(A) clerical employee exclusion requires. In the Board's opinion, the ALJ had incorrectly required that the employee must be working in covered activity at the "moment of injury" or that a "substantial portion" of his work must be covered maritime activity. Pet. App. 43a. Consequently, it remanded to determine whether respondent was "subject to reassignment as a checker and/or occasionally worked as a checker," in which case his employment would be covered. *Ibid.*

On remand to a different ALJ, petitioner "conceded that claimant is subject to assignment as a checker and that he occasionally worked as a checker." Pet. App. 18a. The ALJ ruled, however, that respondent had failed to meet the status test. *Id.* at 35a. While recognizing that respondent was subject to reassignment as a checker on other days, he nonetheless determined that a delivery clerk could be covered only if he were subject to reassignment to covered work during the course of a single workday. *Id.* at 35a-36a. Because respondent

had failed to establish that he was subject to same-day reassignment, the ALJ denied coverage. *Ibid.*

The Board again reversed and remanded. Pet. App. 14a-32a. It reaffirmed its prior ruling that because respondent regularly worked for petitioner as a checker, he had "spent 'some of his time'" in covered longshoring activities, and therefore was a covered employee. *Id.* at 20a (quoting *Caputo*, 432 U.S. at 273). The Board explained that, "[p]rovided the employee is required to perform some maritime work as a part of his regular duties, it is his overall occupation, and not his specific daily activities, which brings him within the Act's coverage." *Id.* at 28a. In addition, the Board distinguished *Sea-Land Serv. Inc.* v. *Rock*, 953 F.2d 56 (3d Cir. 1992), because there was only a "slim possibility" that the claimant in that case (a van driver) could be reassigned to maritime work. Pet. App. 29a. It likewise distinguished *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548 (1997), and *McGray Construction Co.* v. *Director, OWCP*, 181 F.3d 1008 (9th Cir. 1999), primarily on the grounds that those cases held that an employee may not establish the requisite status by reference to his work history with other employers; instead, status turns primarily on the duties applicable to a worker's present employment. See Pet. App. 29a-31a. The Board therefore reversed and remanded "for consideration of any remaining issues," *id.* at 32a, and petitioner appealed to the court of appeals.

4. The court of appeals affirmed.[3] The court observed that this Court in *Caputo* rejected the "moment

[3] The Director moved to dismiss the appeal for lack of jurisdiction because the Board order remanded the case for further proceedings, and thus was not "final" within the meaning of 33 U.S.C. 921(c). In denying the motion, the court below ruled that the

of injury" status test, which bases coverage on the employee's duties at the time of injury, and instead found coverage for those persons "whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activity." Pet. App. 8a. In deciding whether a worker spends "some of his time" in longshoring work, the court below looked at "the regular portion of the overall tasks to which [the claimant] could have been assigned as matter of course." *Id.* at 13a (quoting *Levins* v. *Benefits Review Bd.*, 724 F.2d 4, 9 (1st Cir. 1984)); see *id.* at 10a-11a (relying on First and Fifth Circuit precedents). The court thus held that because respondent spent half his time as a checker and his overall duties included such work, he was covered under the Act even though he was working in non-covered work as a delivery clerk on the day of his injury. *Ibid.*

In so holding, the court of appeals distinguished its prior decision in *Sea-Land Serv. Inc.* v. *Rock*, *supra*, because there the claimant at the time of injury had worked for two years exclusively in non-covered employment and was only "nominally subject to reassignment" to a covered job. Pet. App. 12a (citation omitted). Therefore, there was no real possibility of his working in a covered job or moving in and out of coverage. *Ibid.*

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parties' stipulation on extent of injury and appropriate compensation, which was entered into after petitioner filed its petition for review in that court, Pet. App. 4a-5a, left no issues for the ALJ to decide, making the Board order "for all purposes final by the time the court was called upon to consider the petition." *Id.* at 5a-6a n.3 (quoting *Sea-Land Serv., Inc.* v. *Director, OWCP*, 540 F.2d 629, 631 n.1 (3d Cir. 1976)).

Similarly, the court below "easily distinguished" *McGray Construction Co.* v. *Director, OWCP*, *supra*, because the employee there, although having worked in maritime employment in the past, primarily for other employers, had been hired by McGray to perform exclusively non-maritime work. The court explained that the concerns motivating the Ninth Circuit's decision—namely, that it would be unfair to subject an unknowing employer to coverage under the Act and to treat differently non-maritime employees based on a prior, unrelated work history—were not present here, since petitioner routinely hired respondent for maritime employment. Pet. App. 13a.

ARGUMENT

The decision of the court of appeals is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the court below may have lacked jurisdiction because the order of the Benefits Review Board under review was non-final. Accordingly, further review of the decision below is not warranted.

1. Contrary to petitioner's assertions (Pet. 8-18), the court of appeals did not adopt a standard for determining the status of an employee under the LHWCA that is different from the standard adopted by this Court or other courts of appeals. As the court below recognized, the status test, as set forth in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), covers those workers "whose employment is such that they spend at least some of their time in indisputably longshoring operations." Pet. App. 8a (citing *Caputo*, 432 U.S. at 273). Applying that test to respondent's employment with petitioner, the court considered the "regular portion of the overall tasks to which [respon-

dent] could have been assigned as a matter of course." *Id.* at 11a, 13a (citation omitted). This approach, the court observed, has been used by other courts of appeals, *id.* at 11a, and comports with the intent of the statute by protecting those workers who walk in and out of coverage on a frequent basis, *id.* at 12a. Because respondent was listed on petitioner's permanent hire list and regularly performed work as a checker (which is unquestionably covered longshoring work) as well as work as a clerk, the court concluded that he satisfied the *Caputo* status test.

Contrary to petitioner's contention, the court below did not base its holding on an "undefined period of prior work history." Pet. 10; see also Pet. 11-13. Rather, the court restricted its analysis of respondent's duties to the time when he was on petitioner's permanent hire list and regularly worked for petitioner. See Pet. App. 2a ("[W]e believe that we must look at the claimant's regular duties to determine whether he is engaged on a regular basis in maritime employment."); *id.* at 13a ("We believe that the proper analysis requires us to look at the 'regular portion of the overall tasks to which [the claimant] could have been assigned as a matter of course.'") (citation omitted); *ibid.* ("Because [respondent] spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he is covered under the Act even though he worked as a delivery clerk on the day of his injury.").

Petitioner's criticism of the court of appeals' decision appears to turn on the relevance of the fact that respondent was working as a clerk on the day of the injury. The court of appeals considered the entire period of respondent's work as an employee on petitioner's permanent hire list in determining his status, including

his work for petitioner as a checker, whereas petitioner argues that only respondent's work on the day of his injury should be relevant. It is undisputed, however—and this Court's *Caputo* decision makes clear—that if respondent had been hired to a permanent position and assigned to work some days as a checker and some days as a clerk, he would be covered by the LHWCA. See Pet. App. 10a-11a (discussing cases). The court of appeals evidently concluded that respondent's placement on petitioner's permanent hire list had the same practical effect as a permanent hire. *Id.* at 12a-13a.

Accordingly, the dispute in this case turns not on the legal standard applied by the court of appeals, but rather on the precise impact of the fact that an employee was listed on a shipping employer's permanent hire list. That fact-intensive issue does not warrant this Court's review. Indeed, that is particularly true in this case, because the record contains little if any information about the meaning and significance of an individual's inclusion on petitioner's permanent hire list.

2. Petitioner's contention that the decision below conflicts with the Ninth Circuit's decision in *McGray Construction Co.* v. *Director, OWCP*, 181 F.3d 1008 (1999), is mistaken. According to petitioner, the Ninth Circuit rejected "an overall employment history test," and instead "looked at the essential duties of the job for which the employee was hired when he was injured." Pet. 9. The court of appeals below, however, did not disagree with the legal standard applied by the Ninth Circuit in *McGray*, but rather found that the facts of *McGray* were "easily distinguished from th[is] case." Pet. App. 13a.

The claimant in *McGray* was working in non-maritime work exclusively when a crane load fell and seriously injured him. Relying on *Harbor Tug & Barge*

Co. v. *Papai*, 520 U.S. 548 (1997), the Ninth Circuit rejected a "common employer" theory, whereby the claimant's past maritime work with *other* employers and his hiring out of a maritime union hall determined maritime employment status. *McGray*, 181 F.3d at 1014-1015. Such a theory, the court stated, would go well beyond Congress's concern about maritime workers "walking in and out of coverage" and would lead to the conclusion that "once a person is a maritime worker for long enough, he remains one, even on a non-maritime job for a non-maritime employer." *Id.* at 1015. That approach would promote "striking unfairness" in the treatment of similarly-injured workers based on the fortuity of different employment histories and would "create a trap for the unwary employer who does not explore the work history of someone he hires." *Id.* at 1016. Accordingly, the court in *McGray* held instead that an employee's status turns on the "particular contract of employment" for which the worker was hired. *Id.* at 1015.

Nothing in *McGray* addressed the question presented in this case—namely, whether the same employer's regular employment of a worker in both covered and non-covered maritime work pursuant to the worker's placement on the employer's permanent hire list constitutes covered longshore activity, even when the work on the day of the injury was non-covered. Indeed, that is clear from the Ninth Circuit's statement that "the case at bar does not raise a question of one engaged to perform both maritime and non-covered work." *McGray*, 181 F.3d at 1015; see *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982) (holding that worker's "regular performance of maritime operations, even though it constituted less than a 'substantial portion' of his *overall working time*,

was sufficient to satisfy the status requirement") (emphasis added), cert. denied, 459 U.S. 1170 (1983). In essence, the court of appeals below treated the entire period of respondent's placement on petitioner's permanent hire list as the relevant employment engagement for purposes of determining status. Nothing in *McGray* is inconsistent with that fact-bound determination.[4]

3. Petitioner is also incorrect in asserting that the decision below is inconsistent with this Court's decision in *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548 (1997). *Harbor Tug* primarily concerned the question whether independent employers hiring out of a union hall could be treated as a common owner of a vessel or vessel fleet for Jones Act purposes. See *id.* at 556-557. In deciding that the "requisite link [of common ownership or control] is not established by the mere use of the same hiring hall which draws from the same pool of employees," the Court stressed that it would be difficult to predict Jones Act (or "perhaps" LWHCA) coverage when "prior employment with independent employers" was considered, and there would be "no principled basis for limiting which prior employments" were considered. *Id.* at 557-558.

Again, however, the court below did not consider respondent's employment history with all of the employers that used the same union hall to satisfy their daily employment needs. Rather, it considered only respondent's employment with petitioner during the period he was on petitioner's permanent hire list. The

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[4] Moreover, since the worker in *McGray* was a construction worker, the Ninth Circuit did not even consider the specific statutory exclusion at issue in this case: the Section 902(3)(A) exclusion for employees "exclusively" engaged as clerical workers.

court of appeals found the fact that respondent was regularly employed by petitioner in both covered and uncovered positions pursuant to his placement on the employer's permanent hire list to be determinative of status. Nothing in *Harbor Tug*, or any other decision of this Court, precludes such a factual determination.

4. Finally, the Court should deny the petition for a writ of certiorari because the court of appeals may have lacked jurisdiction to hear the case. Section 21(c) of the Act, 33 U.S.C. 921(c), gives the courts of appeals jurisdiction to review a "final order of the Board." This provision is jurisdictional, not subject to equitable tolling, and follows the contours of finality established under 28 U.S.C. 1291. See, *e.g.*, *Shendock* v. *Director, OWCP*, 893 F.2d 1458, 1464 (3d Cir.) (en banc), cert. denied, 498 U.S. 826 (1990); *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399, 406 (5th Cir.) (en banc), cert. denied, 469 U.S. 818 (1984). Accordingly, to be final, the Board order must have "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 521-522 (1988) (citation omitted).

The Board order at issue here finally resolved *only* the issue of coverage, and it remanded the case to the ALJ to resolve the question of compensation. Pet. App. 32a. Among the issues that remained to be determined were the extent (and perhaps the existence) of respondent's injury-related disability and the amount recoverable.[5]

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[5] A determination of the existence and amount of damages does not fall within any exception to the final judgment rule for purely ministerial functions. See *Sun Shipbuilding & Dry Dock Co.* v. *Benefits Review Bd.*, 535 F.2d 758 (3d Cir. 1976).

The court below nonetheless assumed jurisdiction based on a stipulation by petitioner and respondent as to those issues, even though the parties entered into that stipulation *after* petitioner filed the petition for review in the court below. Pet. App. 5a n.3. Generally, such a stipulation would not cure the initial defect of appealing a nonfinal Board order, nor would it render timely petitioner's otherwise premature petition for review. Cf. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (holding, prior to the adoption of Fed. R. Civ. P. 4(a)(4), that a premature notice of appeal is a "nullity" and "is as if no notice of appeal [is] filed at all"); *id.* at 59 (observing "theoretical inconsistency" of conferring jurisdiction on court of appeals by filing a notice of appeal while retaining district court jurisdiction to consider motion to amend or alter judgment under Rule 59 motion); *Stone* v. *INS*, 514 U.S. 386, 396 (1995) (district court order becomes final if notice of appeal is filed one day before motion under Rule 59).[6] Because the court below may have erred in exercising jurisdiction over the case, granting the writ of certiorari would be improvident. *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976) (refusing to decide merits question where district court order was unappealable).

[6] Petitioner could have avoided this jurisdictional problem by allowing the ALJ to issue, and the Board to affirm, a final order based on the stipulation, and then filing a petition for review in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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