No. 11-107

In the Supreme Court of the United States

STEPHANIE H. WHEELER, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 22 of the Longshore and Harbor Workers' Compensation Act permits modification of a compensation order based on a change in condition "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim." 33 U.S.C. 922. The question presented is whether a voluntary payment by an employer to a claimant's medical provider is a "payment of compensation" under Section 922.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-25) is reported at 637 F.3d 280. The decision and order of the Benefits Review Board (Pet. App. 26-37) is reported at 43 Ben. Rev. Bd. Serv. 179. The decision and order of the administrative law judge (Pet. App. 38-60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2011. A petition for rehearing was denied on May 2, 2011 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 21, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides federal workers' compensation coverage for employees disabled or killed in the course of maritime employment on the navigable waters of the United States or certain adjoining areas. Covered employers are "liable for and shall secure payment to [their] employees of the compensation payable under sections 907, 908, and 909 of this title." 33 U.S.C. 904(a). Those sections govern the provision of medical services and supplies, 33 U.S.C. 907, compensation for disability, 33 U.S.C. 908, and compensation for death, 33 U.S.C. 909. The Act defines "[c]ompensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits." 33 U.S.C. 902(12).

Section 907 requires an employer to furnish "such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus" that the employee's injury or recovery requires. 33 U.S.C. 907(a). The employer's responsibility lasts as long as the "injury or the process of recovery may require." *Ibid.* The Act sets no time limit for requesting medical services and supplies.

In the normal course, an employee notifies his employer of a job-related injury, the employer authorizes the injured employee to seek medical care from a physician of the employee's choosing, and the employer's insurance carrier pays the physician directly for the medical care and services that are required. 20 C.F.R. 702.401–702.422. The employee is not entitled to recover any amount he or she expends for medical or other treatment unless the employer has refused or neglected

a request to furnish such services and the employee complies with certain requirements, or the nature of the injury required treatment and the employer had knowledge of the injury and neglected to provide or authorize the treatment. 33 U.S.C. 907(d)(1); 20 C.F.R. 702.421.

Sections 908 and 909 govern the employer's responsibility to provide compensation for disability or death. Claims under Sections 908 and 909 generally must be filed within one year after the employee's injury or death. 33 U.S.C. 913(a). But if payment of compensation has been made voluntarily on account of the disabling injury or death, "a claim may be filed within one year after the date of the last payment." *Ibid.* This Court has held "that the furnishing of medical aid [under 33 U.S.C. 907(a)] is not the 'payment of compensation' mentioned in [33 U.S.C. 913(a)]." *Marshall* v. *Pletz*, 317 U.S. 383, 390 (1943).

Section 922 authorizes an adjudicatory officer in the Department of Labor to "review a compensation case" based on a change in conditions or a mistake in a determination of fact.[1] 33 U.S.C. 922. The time limit for such review is "any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim." *Ibid.* After such a review, the officer may "issue a new compensation order which may terminate, continue, reinstate, increase,

[1] Section 922 states that a "deputy commissioner" may review claims, but the title "deputy commissioner" has been replaced by "district director" for administrative purposes. 20 C.F.R. 701.301(a)(7). Some of the adjudicatory duties of a deputy commissioner have also been transferred to administrative law judges (ALJs). 33 U.S.C. 919(d). Contested applications for modification are therefore adjudicated by ALJs.

or decrease such compensation, or award compensation." *Ibid*.

2. In 1992, petitioner Stephanie Wheeler injured both her knees while working for respondent Newport News Shipbuilding & Dry Dock Co. Pet. App. 5, 27, 40. Newport News voluntarily paid her permanent partial disability compensation for a 15% disability to her lower right extremity and a 25% disability to her lower left extremity, as well as temporary total disability compensation. *Id.* at 27, 40. Because the award was for a "scheduled" injury, *id.* at 5, 27, she was entitled to compensation for permanent partial disability only for a set period of weeks. See 33 U.S.C. 908(c)(2); *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 & n.8 (1980) (discussing differences between scheduled and unscheduled awards and different types of disability compensation).

Within one year of the last payment of compensation for her permanent partial disability, petitioner sought and obtained an award of permanent total disability compensation. Pet. App. 5, 27, 40. That award was payable during the continuance of the total disability. 33 U.S.C. 908(a). In 2002, however, Newport News requested modification of the award under Section 922. In response to the company's request, an administrative law judge (ALJ) denied petitioner permanent total disability compensation. Pet. App. 5, 27, 41. The Department of Labor's Benefits Review Board affirmed the ALJ's decision. *Id*. at 5, 27-28, 41. Petitioner did not seek judicial review of the Board's decision and received no further disability compensation after September 2003. See *id.* at 5, 28, 41.

In June 2006, petitioner had a total right knee arthroplasty. Newport News voluntarily paid for that sur-

gery as well as additional surgery in October 2006. Pet. App. 5, 28, 41-42; see 33 U.S.C. 907(a). In September 2007, petitioner filed a request under Section 922 to modify her award for permanent partial disability, based on a change in conditions. In particular, she sought compensation for temporary total disability from June 20, 2006, the date of her first right knee surgery, until June 13, 2007; temporary partial disability from June 14, 2007, until September 5, 2007; and temporary total disability beginning on September 6, 2007. Pet. App. 5, 28 & n.1, 39. In September 2008, she had a total left knee arthroplasty, which Newport News also paid for. *Id.* at 5, 28-29, 42.

Newport News opposed modification of her compensation award, arguing that the petition was not filed within one year of the last payment of compensation, as Section 922 requires. Pet. App. 44. In particular, Newport News argued that the term "compensation" in Section 922 refers to compensation for disability, not medical benefits. *Id.* at 44-45. Because the company's last payment for permanent partial disability was more than one year before petitioner's September 2007 request for modification, the company argued that the request was untimely. Petitioner argued that her request was timely because the term "compensation" in Section 922 includes payment for medical treatment, and her request for renewed disability compensation was made within one year of the company's last payment for her knee surgery. *Id.* at 44.

3. The ALJ denied petitioner's request for modification. Pet. App. 38-60. The ALJ recognized that the term "compensation" is sometimes used in the Act to include medical benefits under the LHWCA. *Id.* at 45-46. But the ALJ concluded that "compensation" as used

in Section 922 does not include medical benefits because the language of Section 922 is "strikingly similar" to the language of Section 913(a) at issue in *Marshall* v. *Pletz*, 317 U.S. 383 (1943). Pet. App. 56. Given the holding in *Pletz* that furnishing medical care does not constitute the payment of compensation under Section 913(a), the ALJ concluded that medical benefits were not "compensation" under Section 922. *Id.* at 56-57.

4. The Benefits Review Board affirmed the ALJ's decision. Pet. App. 26-37. Relying on *Pletz*, the Board reasoned that medical benefits generally are not considered compensation because "in the normal case, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care." *Id.* at 33-34. In the Board's view, *Pletz* therefore compels the conclusion that the medical benefits paid by respondent in this case are not "compensation" under Section 922. *Id.* at 36.

5. The court of appeals affirmed the Board's decision. Pet. App. 3-25. The court explained that whether the term "compensation" in Section 922 includes medical payments was an issue of first impression that could not be answered by the plain language of the LHWCA because the term has different meanings in different sections of the statute. *Id.* at 8-10. Unlike the Board and ALJ, the court of appeals concluded that *Pletz* was not controlling because it "addressed a separate statute with different language." *Id.* at 10. But after examining the scheme and general purposes of the Act, the court agreed that the term "compensation" in Section 922 does not include medical payments. *Id.* at 12. The court rejected the contrary position of the Director of the Office of Workers' Compensation Programs in the Department of Labor, as set forth in a brief in the court of appeals.

Pet. App. 20-23. We have been informed by the Department of Labor that the Director had not previously taken a position on the issue.

In particular, the court reasoned that although courts have broadly construed Section 922, it was necessary to give effect to congressional intent to limit the time period in which claims for modification could be brought. Pet. App. 13-16. Construing "compensation" to include payments for medical treatment would allow the one-year time limit in Section 922 to be extended indefinitely, the court reasoned, because "a claimant could seek follow-up medical treatment for an injury at any time, and by doing so, re-open the period for modification of monetary benefits." *Id.* at 16. The court also reasoned that treating medical payments as "compensation" in Section 922 would both place restrictions on medical benefits not envisioned by 33 U.S.C. 907 and conflict with this Court's conclusion in *Pletz* that the time limitations for bringing an initial claim for compensation do not apply to claims for medical benefits. Pet. App. 17-18.

ARGUMENT

Petitioner contends that the court of appeals erred by holding that the term "compensation" in Section 922 excludes medical benefits and that the decision conflicts with an opinion of this Court and decisions from the courts of appeals. The court of appeals' decision presents no such conflict. To the contrary, as the court of appeals observed, this case raised an issue of first impression in any court concerning the meaning of "compensation" under Section 922. Review by the Court is unwarranted.

1. a. Petitioner argues (Pet. 7-9) that the court of appeals decision conflicts with *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011). In *Henderson*, this Court held that the time period for a veteran to appeal a denial of benefits from the Board of Veterans Appeals to the United States Court for Veterans Claims is not jurisdictional. *Id.* at 1200. The Court based its holding on the language of 38 U.S.C. 7266(a), the provision's placement in the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, and Congress's special solicitude for veterans. *Henderson*, 131 S. Ct. at 1204-1206.

The court of appeals' decision in this case decided a different question under a different statute. It did not consider whether Section 922 posed a jurisdictional bar to modification of compensation awards under the LHWCA and did not discuss equitable tolling because petitioner did not raise the issue. The decision does not conflict with *Henderson*.

b. Petitioner contends (Pet. 9-17) that the court of appeals' decision conflicts with several decisions of the Fourth and Fifth Circuits. Even if it were true that the decision conflicted with previous decisions of the Fourth Circuit, this Court does not grant review to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, none of the decisions cited by petitioner addresses the meaning of "compensation" in Section 922, and none conflicts with the court of appeals' decision here.

In *Oilfield Safety & Machine Specialties, Inc.* v. *Harman Unlimited, Inc.*, an employer voluntarily paid disability compensation but refused to pay for a claimant's medical services. 625 F.2d 1248, 1256-1257 (5th Cir. 1980). The claimant obtained an award for the medical services and sought attorney's fees pursuant to 33

U.S.C. 928(a), a section requiring an employer to pay a claimant's attorney's fees if the employer "declines to pay any compensation" under certain circumstances. The employer argued that it had not declined to pay compensation because "medical services" and "compensation" were terms of art "with totally different meanings." *Oilfield Safety,* 625 F.2d at 1257.

The Fifth Circuit rejected the employer's argument. After examining legislative history, the court concluded that construing the term "compensation" in 33 U.S.C. 928(a) to include medical benefits furthered that section's purpose to "provide[] an incentive for employers to pay claims rather than contest them." *Oilfield Safety,* 625 F.2d at 1257. But it made no mention of Section 922 and specifically rejected the employer's argument that "compensation" is a term of art with a uniform meaning throughout the Act. *Ibid.*

The Fifth Circuit took a section-specific approach again in *Lazarus* v. *Chevron USA, Inc.*, when deciding whether "compensation" in 33 U.S.C. 918(a) includes medical benefits. 958 F.2d 1297, 1300-1303 (1992). Section 918(a) allows a person to whom compensation is payable to apply for a supplementary order, enforceable in district court, "[i]n case of default by the employer in the payment of compensation due under any award of compensation." The court held in *Lazarus* that when an employer "refuses or neglects to furnish medical services, and the employee incurs expense or debt in obtaining such services, an award of medical expenses obtained by the employee in a suit against the employer is 'compensation'" under Section 918. *Id.* at 1301.

In so holding, the Fifth Circuit confirmed that compensation does not have one meaning throughout the entire Act. *Lazarus*, 958 F.2d at 1302. And the court

made no mention of Section 922. Moreover, even if the Fifth Circuit took the same approach to defining "compensation" under Section 922 as it did in *Lazarus* under Section 918(a), it would not require a different result in this case. In *Lazarus*, the Fifth Circuit held only that awards of medical expenses were included in "compensation," explaining that "[i]f an employer furnishes medical services voluntarily, by paying a health care provider for its services, it does not pay 'compensation' within the meaning of the Act." 958 F.2d at 1301. That conclusion, if applied to 33 U.S.C. 922, would mean that petitioner's request for modification, filed within one year of her last receipt of employer-furnished medical services, was untimely.

The conclusion that the meaning the "payment of compensation" varies from section to section under the Act is also illustrated by this Court's decision in *Marshall* v. *Pletz*, in which this Court held that the furnishing of medical aid is "not the 'payment of compensation' mentioned in [Section 913(a)]," which imposes a limitations period for the initial filing of a claim. 317 U.S. 383, 390 (1943). The Fourth Circuit's reading of "compensation" in Section 922 likewise not to include medical benefits for purposes of the limitation period for modifying an order accordingly does not conflict with this Court's decision in *Pletz*. See Pet. App. 11.

The court of appeals' decision in this case thus does not conflict with any decision of this Court or any other court of appeals. This Court's review is unwarranted.

2. Nor did the decision below decide an important question of federal law that might warrant review in the absence of any conflict. The court of appeals acknowledged it was considering a question of first impression in the court (Pet. App. 8) in the more than 75 years since

Section 922 was amended in relevant respects, and the issue similarly has not arisen frequently at the administrative level even though Section 922 has permitted modification within one year of the "last payment of compensation" since 1934. See Act of May 26, 1934, ch. 354, § 5, 48 Stat. 807. Additionally, many claimants may obtain *de minimis* awards of disability compensation for unscheduled injuries and thereby extend the time for seeking modification of an award even under the court of appeals' view that "compensation" means only disability compensation under 33 U.S.C. 922. See *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 133 (1997); *id.* at 145 (O'Connor, J., dissenting); *e.g., Gillus* v. *Newport News Shipbuilding & Dry Dock Co.*, 37 Ben. Rev. Bd. Serv. 93 (2003), *aff'd*, 84 Fed. Appx. 333 (4th Cir. Jan. 5, 2004). The potential practical effect of the court of appeals' decision may therefore be limited to a relatively small number of cases involving a scheduled award of permanent partial disability compensation for which a *de minimis* award is not available. Especially in the absence of a circuit conflict, the Fourth Circuit's ruling on this narrow issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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