No. 09-72979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner

v.

MATSON TERMINALS, INCORPORATED,
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED,
and
GEORGE K. KUNIHIRO,

Respondents

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50, to protect employees from injury and compensate those who are injured. *See*, *e.g.*, *Temporary Employment Servs. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 458-59 (5th Cir. 2001) (citations omitted). Matson Terminals,

Incorporated, exposed George K. Kunihiro to injurious noise throughout his nearly 40-year career. Beginning in 1978, Matson administered the first of more than twenty annual audiograms to Mr. Kunihiro. Despite the fact that these tests showed a continuous worsening of his hearing (from a 19.1% binaural hearing loss in 1978 to a 48.4% loss in 2002), Matson never revealed the results of those tests to Mr. Kunihiro. Yet when he sought compensation for his hearing loss after he retired, Matson used those same tests to claim relief from the great majority of its compensation liability under LHWCA Section 8(f), 33 U.S.C. § 908(f).[1] It now argues that the Benefits Review Board's decision granting such relief furthers the purposes of the LHWCA.

Allowing Matson Section 8(f) relief affords it an unwarranted financial windfall while rewarding conduct that contravenes the

[1] Section 8(f) is the LHWCA's "second injury" provision. It grants an employer partial relief from compensation liability when "an employee having an existing permanent partial disability suffers injury" and the employee's resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone . . . ." 33 U.S.C. § 908(f)(1). In a hearing-loss case, the employer's liability is limited to either the compensation for the disability attributable to the second injury that caused additional hearing loss, or 104 weeks of compensation, whichever is *less*. 33 U.S.C. § 908(f)(1).

primary purposes of the LHWCA. Moreover, its argument ignores the plain language of the applicable regulations (20 C.F.R. §§ 702.321 and 702.441), and is contrary to the Director's interpretation of his own regulations. The Court should reject Matson's view.

ARGUMENT

The Court should reject Matson's arguments, and reverse the Board's award of Section 8 (f) relief.

A. The Director's regulatory interpretation does not lead to "absurd" results.

Section 702.321 conditions Section 8(f) relief in hearing-loss cases on a pre-existing hearing loss "documented by an audiogram that complies with the requirements of Section 702.441." 20 C.F.R. § 702.321(a)(1). Section 702.441, in turn, mandates that the employee be "provided with the audiogram and report thereon at the time it was administered or within thirty (30) days thereafter." 20 C.F.R. § 702.441(b)(2). These provisions plainly and unambiguously preclude Matson from obtaining 8(f) relief here based on audiograms that were never provided to Mr. Kunihiro. *See Siskiyou Reg'l Education Project v. U.S. Forest Serv.*, 565 F.3d 545, 555 (9th Cir. 2009) (where regulation plain and unambiguous, Court applies the regulatory language); *Bassiri*

v. Xerox Corp., 463 F.3d 927, 930-31 (9th Cir. 2006) (where formal regulation promulgated, agency interpretation of regulation controlling unless unreasonable or inconsistent with regulation).

Matson does not contest that the plain language of the regulations forbids an employer from obtaining 8(f) relief based on test results that were withheld from an employee. Indeed, the employer does not engage with the regulatory language at all. This is not surprising, as the language does not admit of any other reading. Similarly, Matson cites no other provision of the LHWCA or the regulations which would preclude application of the plain language of Sections 702.321 and 702.441.

Applying the plain language does not lead to the "absurd" results that Matson suggests. Its argument is based on the following hypothetical: Employer A administers an audiogram which shows a hearing loss, but does not divulge the results of this test to the employee. The employee later goes to work for Employer B, and sustains a work-related hearing loss. Employer B learns of the test administered by Employer A, and seeks to use that test as proof of a pre-existing hearing loss in a claim for Section 8(f) relief. Under the

plain language of the regulations, Employer B cannot rely on the test because Employer A did not provide the results to the employee. According to Matson, this result would be "absurd" because Employer B had no control over the actions of Employer A.[2]

Matson's hypothetical assumes that other employers follow its *modus operandi*—testing an employee, discovering he has a hearing loss, and then not telling him. Many employers, in fact, will inform an employee if they discover he has suffered a hearing loss while in their employ. And application of the plain language of the regulations will provide all LHWCA employers an incentive to promptly provide the results of audiograms to employees, as Congress intended. *See Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 210 (4th Cir. 1990). Thus, far from leading to an absurd result, application of the plain regulatory language will directly serve the interests Congress most sought to further in the LHWCA—protection of workers from further injury and prompt compensation of those who have been injured. *See Temporary Employment Servs.*, 261 F.3d at 458-59.

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[2] Statutory and regulatory provisions, of course, should not be interpreted in a manner that leads to absurd or anomalous results. *See Gallarde v. I.N.S.*, 486 F.3d 1136, 1143 n.7 (9th Cir. 2007).

Indeed, if there is any absurdity, it lies in Matson receiving a windfall under Section 8(f) because it never disclosed the audiogram results to Mr. Kunihiro.

Employer B in Matson's hypothetical can easily protect itself from the failure of prior employers to divulge audiogram test results to an employee. When an employee will work in a position that exposes him to injurious noise, like Mr. Kunihiro, the employer can administer an audiogram at the beginning of his employment (*and provide the results to the employee*) to ascertain the level of any pre-existing hearing loss. *Cf. Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 165 (1993) (cautious employer can administer audiogram when employee retires to "freeze" level of hearing loss at that time, and avoid risk of being responsible for any additional post-retirement hearing loss). Administering such a test would inform the employee of any hearing loss he already has, allow him to protect himself from further injury, and possibly permit him to file a claim against his prior employer. It would also establish the amount of pre-existing hearing loss should the employee later suffer further injury and the employer seek Section 8(f) relief.

Of course, the situation posited by Matson's hypothetical is far-removed from the facts of this case.[3] Matson relied on tests it administered itself; there is no suggestion that any other employer exposed Mr. Kunihiro to harmful noise, or tested his hearing. Because Matson failed to provide the reports of its audiograms to Mr. Kunihiro, Matson may not, under the plain language of the regulations, use the tests to support its claim for Section 8(f) relief.

B. Silence in the legislative and regulatory history does not support an interpretation of the regulations at odds with their plain language.

Contrary to Matson's argument, neither the legislative history of the 1984 Amendments to the LHWCA nor the regulatory history of Sections 702.321 and 702.441 preclude application of the plain language of the regulations. Indeed, consideration of this legislative and regulatory history is not necessary because the regulatory language at issue is plain and unambiguous. *See Christensen v. Harris County*, 529

[3] Matson suggests that the Director's arguments focus too much on the facts of the instant case. It is, perhaps, not surprising that Matson tries to deemphasize those facts. The company administered annual hearing tests to Mr. Kunihiro for over 20 years—tests which showed a steady deterioration in his hearing. Matson, though, never informed Mr. Kunihiro about his condition, and did not reveal the test results until it sought to avoid liability for the majority of Mr. Kunihiro's compensation.

U.S. 576, 588 (2000); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Siskiyou Reg'l Education Project*, 565 F.3d at 555.

Even if considered, Matson's contention that the legislative and regulatory histories establish that the Department of Labor (DOL) promulgated Sections 702.321 and 702.441 solely to address the time limitations for filing hearing-loss claims and to establish certain technical standards for audiograms does not withstand close scrutiny. While time limitations and technical standards were certainly concerns for both Congress and DOL, *see*, *e.g.*, *Port of Portland v. Director, OWCP*, 932 F.2d 836, 841 (9th Cir. 1991), a statutory or regulatory provision may serve multiple purposes. *See*, *e.g.*, *Bartels Trust v. U.S.*, 209 F.3d 147, 152-53 (2d Cir. 2000). That the legislative and regulatory histories refer to the time-limitation and technical-standards issues does not preclude Sections 702.321 and 702.441 from also governing the use of non-disclosed audiograms in an employer's claim for Section 8(f) relief.

Matson concedes that the LHWCA itself is silent with regard to use of non-disclosed audiograms for Section 8(f) purposes. Matson Br. at 21; *see* 33 U.S.C. §§ 908(c)(13), (f). And the legislative history does

not address the use of non-disclosed audiograms in a claim for 8(f) relief.[4] Hence, there is a statutory "gap" that DOL is empowered to fill by regulation. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007) (internal quotations and citations omitted); *accord U.S. v. Dang*, 488 F.3d 1135, 1140 (9th Cir. 2007); *see also* 33 U.S.C. § 939(a) (authorizing DOL to promulgate regulations to implement the LHWCA). As for the regulatory history, it is—beyond the plain language of the regulations—silent regarding the use of non-disclosed audiograms to establish a pre-existing hearing loss under Section 8(f).[5]

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[4] Matson cites nothing from the legislative history indicating that Congress *approved* the use of non-disclosed audiogram results for 8(f) purposes, or that it wished to preclude DOL from addressing the issue by regulation.

[5] In this regard, *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009), cited by Matson, is inapposite. In *Crickon*, the issue was whether the regulations at issue were validly promulgated under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). 579 F.3d at 980. Here, neither the substantive nor procedural validity of Sections 702.321 and 702.441 is at issue. As for the interpretation of the regulations, courts "must defer to [an agency's] interpretation [of its own regulation] unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). Moreover, *Crickon* focused on the Bureau of Prisons' failure to address certain comments submitted after the agency promulgated an (cont'd . . .)

Thus, the Director's interpretation of the regulations does not conflict with DOL's expressed intent in promulgating them.

C. The Director's regulatory interpretation advanced in litigation is entitled to deference.

Likewise, Matson's argument that the Director's interpretation of Sections 702.321 and 702.441 is not controlling because it was advanced in litigation, and has not been consistent, is without merit.[6] The fact that the Director advanced his arguments before the Board and this Court in litigating this case does not detract from the weight owed to

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(. . . cont'd)
interim early-release regulation. 579 F.3d at 982-87. Here, by contrast, DOL received no comments regarding Section 702.321's incorporation of Section 702.441 after issuing an Interim Final Rule, 50 Fed. Reg. 384 (Jan. 3, 1985). *See* 51 Fed. Reg. 4270 (Feb. 3, 1986).

[6] Matson defends the Board's view that the Director's interpretation of his own regulations is entitled to only *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency's non-regulatory interpretation of *statute* is not controlling, but may be persuasive). This limited deference does not apply when an agency embodies its interpretation of a statute in a formal rule. *See U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001). Rather, where regulations adopted after full notice-and-comment rulemaking (Sections 702.321 and 702.441, in this case) apply, the Director's interpretation of those provisions is entitled to *Auer* deference (controlling unless unreasonable or inconsistent with the regulation), not *Skidmore* deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930-31 (9th Cir. 2006).

his interpretation. *See Long Island Care at Home*, 551 U.S. 158, 171 (2007). Because the Director advanced his view in the administrative proceedings below, the Court will defer to his views. *Gilliland v. E.J. Bartells Co.*, 270 F. 3d 1259, 1262 (9th Cir. 2001).

Further, contrary to Matson's assertion, the Director has consistently argued that an employer should not be allowed to use non-disclosed audiogram results to establish a pre-existing hearing loss for purposes of Section 8(f). As early as 1993, the Director argued that the employer could not obtain relief based on audiogram results that it did not provide to the employee. The Board (which did not cite the regulations) rejected this argument on the ground that the Director failed to prove that the employer did not disclose the results to the employee. *Skelton v Bath Iron Works*, 27 BRBS 28, 31-32 (1993). The Director took the same position in the instant case and in *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008). The Director's consistently advocated position is entitled to deference.

D. Matson's argument is contrary to the purposes of the LHWCA.

Although Matson asserts that the Board's decision furthers the purposes of Section 8(f)—specifically, to provide employers an incentive

to hire and retain disabled workers—its argument is untenable because, like the Board decision it echoes, it improperly elevates an employer's interest in obtaining Section 8(f) relief over the fundamental purposes of the LHWCA. Section 8(f) was intended to ameliorate any unfairness resulting from an employer being held liable for an employee's overall disability where part of that disability arose from a pre-employment condition. *See Director, OWCP v. Sun Ship, Inc. (Ehrentraut)*, 150 F.3d 288, 293 (3d Cir. 1998). But Section 8(f) does not stand alone. Instead, it is part and parcel of a statute whose primary purpose is to protect employees from injury and promptly compensate those who are injured. *Temporary Employment Servs.*, 261 F.3d at 458-59. Thus, Section 8(f) cannot be read to give an employer a unilateral benefit at the expense of the employee. *See generally Ehrentraut*, 150 F.3d at 297-98.

That, however, is precisely the consequence of the position taken by the Board and defended by Matson. Matson was rewarded for not giving Mr. Kunihiro the very audiograms that would have afforded him the opportunity to promptly seek compensation and to protect himself

against additional hearing loss. That plainly was not Congress' intent in enacting Section 8(f).

CONCLUSION

Matson's argument is contrary to the primary purposes of the LHWCA and the plain text of its implementing regulations. The Court should reject these arguments and reverse the decisions below.

Respectfully submitted,

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I certify that on March 22, 2010, an electronic copy of this brief was served through the CM/ECF system on the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 1) the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains fourteen (14) pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and 2) the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in fourteen-point Century font.

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