No. 11-10033-I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BERNARD D. BOROSKI,

Petitioner/Appellant,
v.
DYNCORP INTERNATIONAL
and
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents/Appellees.

On Petition for Review of a Final Order of the United States District Court
For the Middle District of Florida
(Hon. Harvey E. Schlesinger, United States District Judge)

BRIEF FOR THE FEDERAL RESPONDENT ON REMAND FROM THE SUPREME COURT

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No. 11-10033-I, Bernard Boroski v. DynCorp International

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that I believe the Certificates of Interested Persons contained in the earlier-filed briefs are complete pursuant to 11th Cir. R. 26.1-1 and Fed. R. App. P. 26.1.

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STATEMENT REGARDING ORAL ARGUMENT

The Director, Office of Workers' Compensation Programs, believes oral argument would assist the Court.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from a claim filed by Bernard D. Boroski, the Petitioner in this appeal, for benefits under the Longshore and Harbor

Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2000) ("Longshore Act" or "Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*. ("DBA"). The claim was administered by the District Director in Jacksonville, Florida. When the parties could not reach agreement on payment of the claim, the District Director referred the case to the Office of Administrative Law Judges for a formal evidentiary hearing pursuant to Longshore Act Sections 19(c) and (d), 33 U.S.C. § 919(c), (d).[1]

On February 15, 2008, the administrative law judge ("ALJ") issued a decision and order awarding Boroski compensation, payable by his former employer, DynCorp, and its insurer, the Insurance Company of the State of Pennsylvania (collectively "Employer").[2] Boroski applied to the District Director for a supplementary order declaring default under Section 18(a) of

[1] The DBA incorporates the Longshore Act's claims procedures. *See* 42 U.S.C. § 1651(a); 20 C.F.R. § 704.001.

[2] The Employer timely appealed that award to the Benefits Review Board ("Board"), challenging the ALJ's rulings that Boroski's injury was work-related and that it was not entitled to relief under 33 U.S.C. § 908(f) ("Section 8(f)"), which limits an employer's liability for claims by certain previously-disabled workers. The Board affirmed the ALJ's ruling on work-relatedness, but remanded the Employer's request for Section 8(f) relief for further consideration. The Section 8(f) issue was ultimately decided against the Employer. BRB No. 11-0660 (April 16, 2012, *recon. denied* August 21, 2012). Neither issue is presented in this appeal.

the Longshore Act, 33 U.S.C. § 918(a).[3] He contended that the amount the Employer paid under the ALJ's order was less than he was entitled to under Sections 6(b) and (c) of the Longshore Act, 33 U.S.C. § 906(b), (c).[4] On September 16, 2008, the District Director concluded that the Employer had paid the correct amount, and denied the application for an order declaring default. R-1a at 4, 8; DX 1.

Boroski timely appealed that denial to the Board on September 19, 2008, which invoked the Board's jurisdiction under Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3). *See Bray v. Director, OWCP*, 664 F.2d 1045, 1048 (5th Cir. 1981) (denial of a supplementary order is reviewable by the Board under Section 21(b)(3)). On January 30, 2009, the Board issued a

[3] The statute uses the term "deputy commissioner" rather than "district director." The Secretary changed the name of the official to "district director" by regulation in 1990, but clarified that "[t]he substitution is for administrative purposes only and in no way affects the power or authority of the position as established by the statute." 20 C.F.R. § 702.105; *see* 20 C.F.R. § 701.301(a)(7); *see also* 55 Fed. Reg. 28606 (July 12, 1990) (original promulgation). For clarity, we will use the term "district director" throughout this brief.

[4] Employers in Longshore Act claims are generally required to pay benefits owed under an effective ALJ award even if the employer appeals that award to the Board or the courts of appeals. *See* 33 U.S.C. § 921(a).

decision affirming the District Director's finding that the Employer had not underpaid Boroski. R-1a.

On March 13, 2009, within the sixty days allowed by Section 21(c) of the Longshore Act, Boroski appealed the Board's order to the United States District Court for the Middle District of Florida. Because the order denying default was issued by the District Director in Jacksonville, Florida, the district court had jurisdiction under 42 U.S.C. § 1653(b), as interpreted by this Court in *ITT Base Services v. Hickson*, 155 F.3d 1272, 1275-76 (11th Cir. 1998).[5] On December 3, 2010, the district court affirmed the Board's decision upholding the District Director's denial of Boroski's application for a Section 18(a) default order. R-26.

Boroski timely appealed the district court's decision on December 29, 2010. 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1); 33 U.S.C. § 921(c). This Court had jurisdiction over the appeal under 28 U.S.C. § 1291 and Section 21(c) of the Longshore Act, as incorporated by 42 U.S.C. § 1653. In a

[5] The Director recognizes *Hickson* as controlling authority in this Court. He agrees, however, with those courts holding that initial judicial review of Board decisions involving the DBA lies in the courts of appeals rather than the district courts. *See, e.g., Service Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 452 (2d Cir. 2010).

decision dated October 27, 2011, and amended November 16, 2011, this Court reversed the decision of the district court. *Boroski v. DynCorp Int'l* (*Boroski I*), 662 F.3d 1197 (11th Cir. 2011).

The Director and the Employer each filed a petition for a writ of certiorari in the United States Supreme Court. On May 21, 2012, the Court granted those petitions, vacated this Court's decision, and remanded the case for further consideration in light of *Roberts v. Sea-Land Services, Inc*., 566 U.S. ____, 132 S.Ct. 1350 (2012). *Director, OWCP v. Boroski*, 2012 WL 1810217 (U.S. May 21, 2012) (No. 11-926).

STATEMENT OF THE ISSUE

Longshore Act compensation is subject to a maximum rate that changes each fiscal year to reflect increases in the national average weekly wage. 33 U.S.C. § 906. In 2008, an administrative law judge found that Boroski was entitled to compensation for permanent total disability benefits from 2002 onward, which his employer paid at each intervening year's maxim rate (*i.e.* at the 2002 maximum for his period of disability in 2002, at the 2003 maximum for his period of disability in 2003, and so on). The question presented is whether benefits for the period from 2002-2007 should have instead been paid at the 2008 maximum rate.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

The Longshore Act establishes a federal workers' compensation system for an employee's injury or death arising in the course of covered maritime employment. 33 U.S.C. §§ 903(a), 908, 909. Under the Act, disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. § 902(10), is "in essence an economic, not a medical concept." *Metro. Stevedores v. Rambo*, 515 U.S. 291, 297,115 S.Ct. 2144, 2148 (1995). From its inception in 1927, the Act has provided that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation[.]" 33 U.S.C. § 910; 33 U.S.C. § 910 (Supp. I 1928) (same). Thus, "[a]n employee's compensation depends on the severity of his disability and his preinjury pay." *Roberts*, 132 S.Ct. at 1354. For example, the compensation rate for a totally disabled worker, such as Boroski, is generally two-thirds of his average weekly wage at

the time of injury. 33 U.S.C. § 908; *see* 33 U.S.C. § 908(a) (Supp. I 1928) (same).[6]

But the Act has always placed upper and lower limits on compensation rates. These maximum and minimum rates are applied after the calculation of two-thirds of the worker's average weekly wage at the time of injury. The floor and ceiling levels were, from 1927 to 1972, fixed dollar amounts, although Congress periodically raised those amounts. 33 U.S.C. § 906(b) (Supp. I 1928) (maximum of $25, minimum of $8); Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602 (increasing maximum weekly benefit level to $35 and minimum level to $12); Act of July 26, 1956, ch. 735, § 1, 70 Stat. 655 (maximum to $54 and minimum to $18); Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203 (maximum to $70).

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[6] There are four basic categories of disability divided by two axes. In general, an injury is "total" if the worker is unable to work after the injury, and "partial" if the worker is able to work at a diminished wage. In addition to this total/partial axis, 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); *see also Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 273-74, 101 S.Ct. 509, 512 (1980).

Throughout this period, Congress was aware that "economic changes . . . affect[ing] the levels of wages and living costs" made periodic increases in the maximum and minimum benefit levels necessary because the Act lacked a "self-adjustment feature." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 1-2 (1956); *see* S. Rep. No. 481, 87th Cong., 1st Sess. 2 (1961). Without such a feature, the value of the fixed maximum and minimum benefit levels "gradually lost real value as inflation exacted its annual toll," *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 32, 99 S.Ct. 903, 905 (1979), and the only remedy was for Congress to raise the upper and lower limits by amending the Act.

Congress added the missing self-adjustment feature by overhauling Section 6 in 1972.[7] As a result, the maximum rate is now set at 200% of the "applicable national average weekly wage" rather than a static dollar figure. 33 U.S.C. § 906(b)(1).[8] The national average

[7] Pub. L. No. 92-576 § 5, 86 Stat. 1252-53 (Oct. 27, 1972).

[8] As initially enacted in 1972, the maximum rate gradually increased from 125% to 200% of the national average weekly wage over a three-year period ending on October 1, 1975. *See* 33 U.S.C. § 906(b)(1) (1976). The 1984 amendments to the Act eliminated this phase-in provision, which had become vestigial. *See* 33 U.S.C. § 906(b)(1) (1988).

weekly wage is determined by the Secretary of Labor each year, and is "applicable" for the "period," or fiscal year (FY), from October 1 of that year until September 30 of the next. 33 U.S.C. § 906(b)(3).[9]

The national average weekly wage for a given year "appl[ies] to employees or survivors [1] *currently receiving* compensation for permanent total disability or death during such period as well as [2] those *newly awarded* compensation during such period." 33 U.S.C. § 906(c) (emphases added). Under the currently receiving clause, the maximum rate for claimants receiving permanent total disability or death benefits is "adjusted each fiscal year – and typically increases, in step with the usual inflation-driven rise in the national average weekly wage." *Roberts*, 132 S.Ct. at 1354 n.2.[10]

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[9] For the convenience of the Court, an OWCP chart showing the national average weekly wage, maximum rate, and minimum rate for each fiscal year from FY 1973 to FY 2011 is appended to this brief as Attachment A. This chart is available on the Internet at http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

[10] *See also* S. Rep. No. 1125, 92d Cong., 2d Sess. 5-6 (1972) (stating that amended Section 6 "requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act.").

The 1972 amendments provided another benefit to claimants in these two favored categories in the form of Section 10(f), which provides annual increases in "benefits payable for permanent total disability or death" every October 1. 33 U.S.C. § 910(f). In general, Section 10(f) increases are, like the increases to the maximum rate under 6(b), tied to increases in the national average weekly wage.[11] As Congress recognized, Sections 6 and 10(f) are similar. H.R. Rep. No. 1441, 570, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 5-6 (1972) (describing Section 10(f) as "[a] similar provision [to Section 6(c)] for upgrading benefits in future years for cases of permanent total disability or death"). Like Section 6(c)'s "currently receiving" clause, Section 10(f) provides for "annual increases based on percentage increases in the national average weekly wage." *Id*. The primary difference is that Section 10(f) applies to all claimants

[11] As originally enacted, Section 10(f) provided for an annual increase "equal to the percentage (if any) by which the applicable national average weekly wage . . . as determined under Section 906(b) [has increased from the previous fiscal year.]" 33 U.S.C. § 910(f) (1976). In 1984, Congress capped the maximum possible Section 10(f) increase at 5%, which remains in the statute today. 33 U.S.C. § 910(f)(2). The 5% cap has come into play only once, in 1985. *See* Attachment A. In every other year, the Section 10(f) increase for claimants receiving total permanent disability or death benefits has been identical to the increase in the maximum compensation rate for those same categories of claimants under Section 6(c). *Id.*

receiving total disability or death benefits, while Section 6(c) benefits only those affected by the maximum rate.

II. PROCEDURAL HISTORY

A. The 2008 ALJ Award

On February 15, 2008, the ALJ found that Boroski was entitled to permanent total disability compensation from "April 20, 2002 and continuing at the maximum compensation rate," subject to adjustments under Section 10(f) of the Act each October 1. DX 3 at 30; *see* 33 U.S.C. § 910(f).[12] The ALJ also awarded Boroski interest on all accrued benefits computed from the date each payment was originally due to be paid. DX 3 at 31. The ALJ did not specify the precise dollar amount of the award. Instead, he ordered that "all monetary computations made pursuant to this Decision and Order are subject to verification by the District Director." DX 3 at 30.[13]

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[12] For the fiscal year in which Boroski was injured, FY 2002 (which ran from October 1, 2001, to September 30, 2002), the maximum weekly compensation rate was $966.08. *See* Attachment A.

[13] Since 1972, disputed claims under the Longshore Act have been resolved by hearings before ALJs. Previously, OWCP district directors performed this function. District directors are now responsible for the day-to-day administration of the Act, including attempts to informally resolve claims

B. The District Director's 2008 Supplemental Order

Boroski disagreed with the Employer's calculation of his compensation rate. He requested a supplementary compensation order from the District Director pursuant to Section 18(a) of the Act declaring that the Employer was in default because it initially paid compensation at the maximum compensation rate in effect on the date of injury, with increases to that rate each fiscal year. Boroski argued that Section 6(c)'s "newly awarded" clause entitled him, for all periods from the date of injury in 2002 through the issuance of the ALJ's order in 2008, to the higher maximum rate in effect on the date the ALJ issued his compensation order.

The District Director rejected Boroski's argument in an amended supplemental order dated September 16, 2008. DX 1. The District Director found that the Employer had properly compensated Boroski at the initial maximum compensation rate in effect when he was injured (fiscal year 2002, $966.08 per week) with appropriate annual adjustments. He therefore

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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. *See, e.g., Keen v. Exxon Corp.*, 35 F.3d 226, 227 (5th Cir. 1994).

declared that the Employer was not in default under Section 18(a). DX 1 at 2.

As a result, Boroski's weekly permanent total disability benefits were paid at the maximum rate applicable for each fiscal year that he was permanently totally disabled:

- $966.08 from April 20, 2002 through September 30, 2002;
- $996.54 from October 1, 2002 through September 30, 2003;
- $1,030.78 from October 1, 2003 through September 30, 2004;
- $1,047.00 from October 1, 2004 through September 30, 2005;
- $1,073.00 from October 1, 2005 through September 30, 2006;
- $1,114.00 from October 1, 2006 through September 30, 2007;
- $1,160.00 from October 1, 2007 through September 30, 2008;
- $1,200.00 from October 1, 2008 through September 30, 2009; and
- $1,224.00 from October 1, 2009 through September 30, 2010.

DX 5.[14]

[14] While it is not reflected in the record, Boroski has presumably continued to receive disability benefits for later years at the applicable maximum rates because 2/3 of his average weekly wage at the time of the injury continues to exceed twice the national average weekly wage. *Boroski I*, 662 F.3d at 1198; Attachment A.

C. The Benefits Review Board's Decision

On appeal to the Board, Boroski conceded that the District Director's maximum-rate calculations were consistent with the Board's interpretation of Section 6(c) in *Reposky v. International Transportation Services*, 40 BRBS 65 (2006), R-1a at 9-10. He nonetheless argued that he was entitled to a higher maximum rate under Section 6(c)'s "newly awarded" clause. The Board, relying on *Reposky*, affirmed the District Director's determination that the Employer had paid the correct compensation. R-1a at 9-10.

D. The District Court's Decision

On December 3, 2010, the district court affirmed the Board's decision, concluding that the District Director's denial of a Section 18(a) order declaring default was correct. R-25. The court rejected Boroski's argument that, under the "newly awarded clause," the date of the ALJ's order controls which fiscal year's maximum rate to apply. It also rejected Boroski's reliance on *Wilkerson v. Ingalls Shipbuilding, Inc*., 125 F.3d 904, 906 (5th Cir. 1997), as support for that argument. *Id*. at 4. The court concluded that the maximum rate applicable to a given claimant is

determined by the date his disability commences, at which point he becomes entitled to compensation. *Id*. at 5-6.

The court held that Section 6 was "not ambiguous when viewed against the structure of the entire statute." *Id*. at 4. It cited to the Ninth Circuit's recent decision in *Roberts v. Director, OWCP*, 625 F.3d 1204 (9th Cir. 2010), in which that court addressed, and rejected, many of the same arguments made by Boroski. *Id*. at 5-6. The district court, like the Ninth Circuit, held that the language of Section 6(c) must be considered in light of "the language and design of the statute as a whole[,]" *id*. at 6 (quoting *United States v. Baxter International, Inc*., 345 F.3d 886, 887 (11th Cir. 2003)), and thus agreed with the Ninth Circuit's conclusion "that an employee is 'newly awarded' compensation when he first becomes disabled[.] *Id*. at 6 (quoting *Roberts*, 625 F.3d at 1207). It consequently found that the District Director and Board had correctly determined the maximum compensation rate applicable to Boroski.

E. <u>This Court's Decision</u>

This Court reversed the decision of the district court. It held that a claimant is "newly awarded" compensation when an ALJ issues a compensation order in his case, and that Boroski was thus entitled to the FY

2008 maximum rate for all periods of disability from the date he became disabled in 2002 through the end of FY 2008. *Boroski I*, 662 F.3d at 1207, 1214-15. It did not address Section 6(c)'s "currently receiving" clause, which was unnecessary to the decision.

F. Supreme Court Proceedings in *Roberts*

Before this Court issued its decision, the Supreme Court issued a writ of certiorari to the Ninth Circuit in *Roberts*. *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 71 (Mem.) (Sept. 27, 2011). Because the issue on which the Court granted certiorari in *Roberts* was the same as that addressed by this Court in *Boroski I* – whether a claimant is "newly awarded" compensation for purposes of Section 6(c) when he becomes disabled or when a formal compensation order is issued – the Employer moved this Court to stay the issuance of its mandate, which it did on December 14, 2011.[15] Subsequently, the Employer and the Director each filed a petition for a writ

[15] In addition to the "newly awarded" clause, the Ninth Circuit also addressed the Section 6(c)'s "currently receiving" clause, holding that a claimant is "currently receiving" compensation for permanent total disability when he is "entitled to receive such compensation . . . regardless of whether his employer actually paid it." *Roberts*, 625 F.3d at 1209. Although Roberts sought review of the Ninth Circuit's decision as to both clauses of Section 6(c), the Court issued a writ of certiorari only as to the "newly awarded" clause.

of certiorari to this Court. Both asked the Supreme Court to hold the petition pending the Court's decision in *Roberts*.

On March 20, 2012, the Supreme Court issued its decision in *Roberts*. Affirming the Ninth Circuit, the Court held that "an employee is 'newly awarded compensation' when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf." *Roberts*, 132 S.Ct. at 1354.

The Court acknowledged that, "[a]t first blush," Roberts' contrary view was "appealing" because "[i]n ordinary usage, 'award' most often means 'give by judicial decree' or 'assign after careful judgment.'" *Id.* at 1356 (quoting Webster's Third New International Dictionary 152 (2002)). It recognized, however, that the term "award" can also mean "grant" or "confer or bestow upon," and later pointed to other sections of the Act where the word was interpreted to have just that meaning. *Id.* at 1356, 1360-61.

Concluding that "the text of § 906(c), in isolation, is indeterminate[,]" the Court construed the "newly awarded" clause in the context of the Longshore Act's "comprehensive, reticulated regime for worker benefits." *Id.* at 157. In light of that context, the Court held that "'awarded compensation' is much more sensibly interpreted to mean 'statutorily

entitled to compensation because of disability[,]'" *id.* at 1357, than "awarded benefits in a formal order." First, it noted that Roberts' construction of the clause would be impossible to apply in the many cases where benefits are paid voluntarily and a formal compensation order is never issued. *Id.* This would be contrary to the purpose of Section 6(c), which is designed to "work together [with Sections 6(b)(1) and 6(b)(3)] to cap disability benefits" in all disability claims. *Id.* at 1357-58.

Second, reading Section 6(c) in the context of the Act's comprehensive scheme, the Court explained that "applying the national average weekly wage for the fiscal year in which an employee becomes disabled advances the [Longshore Act's] purpose to compensate disability," which focuses on wages at the time of the injury as the basis to compute compensation. *Id*. at 1359 (*citing* 33 U.S.C. § 910).

Third, the Court considered the ramifications of the conflicting interpretations suggested by the parties. It found that applying the date-of-disability maximum rate as suggested by the Director and Employer "avoids disparate treatment of similarly situated employees . . . who earn the same salary and suffer the same injury on the same day." *Id*. at 1359. By contrast, Roberts' approach could subject such employees to different rates

based solely on the year during which compensation orders are issued in their respective claims. *Id*. at 1359-60 ("We can imagine no reason why Congress would have intended, by choosing the words 'newly awarded compensation,' to differentiate between employees based on such an arbitrary criterion."). It could also encourage gamesmanship. *Id.* at 1360.

The Court also rejected Roberts' argument that "award" must always mean "formal order" because "several provisions of the Act would make no sense if "award" were read as Roberts proposes." *Id*. at 1360 (citing Sections 8(c)(20), 8(d)(1), and 10(h)(1)). It similarly rejected Roberts' argument that his interpretation would encourage employers to pay compensation promptly by requiring them to pay a higher maximum rate if they failed to do so. *Id.* at 1362-63. It noted that Roberts' remedy would punish employers who paid promptly without an order (because they would be retroactively liable for the higher maximum rates if the employee sought a formal order in a later year), and offer no relief to claimants entitled to compensation at less than a maximum rate. *Id.* at 1363. Instead, the Court explained that "[t]he more measured approach to employer tardiness is interest that accrues from the date a benefit came due, rather than from the date of an ALJ's award." *Id*. at 1363 (internal quotation marks omitted).

G. Current status of this case

Following the *Roberts* decision, the Supreme Court ordered Boroski to respond to the Employer's and Director's petitions for certiorari, which he did on April 18, 2012. In his response, Boroski conceded that *Roberts* invalidated this Court's *Boroski I* decision, which held that a claimant is "newly awarded" compensation when an ALJ issues the order in his case. He argued, however, that application of Section 6(c)'s "currently receiving" clause – which this Court had not addressed in *Boroski I* – would compel the same result: application of the FY 2008 maximum rate retroactive to the date of his disability. The Director replied that remand for this Court to address that issue was appropriate. On May 21, 2012, the Supreme Court vacated *Boroski I* and remanded the case to this Court "for further consideration in light of *Roberts v. Sea-Land Services, Inc*., 566 U.S. _____ (2012)." *DynCorp Internat'l v. Boroski*, 132 S.Ct. 2430 (Mem.) (2012).

III. STATEMENT OF FACTS

From January 2000 to April 2002, Boroski worked for the Employer as a sheet metal mechanic repairing rotor blades in Tusla, Bosnia. DX3 at

4.[16] The work required the use of chemicals in a poorly ventilated tent enclosure. *Id.* According to Boroski, his eyes watered frequently from exposure to chemical vapors. *Id.* On April 19, 2002, Boroski was in an airport terminal on his way home from Bosnia when he became aware that his vision was limited to seeing only light and dark. *Id.*

Boroski became legally blind and stopped working after April 19, 2002. The private parties stipulated that he has been permanently and totally disabled since then. *Id.* at 2, 5. Boroski's average weekly wage at the time of his injury was high enough that he would be entitled to any maximum rate applicable between 2002 and 2012. *See Boroski I*, 662 F.3d at 1198.

IV. STANDARD OF REVIEW

This Court exercises *de novo* review over the Benefits Review Board's decision, which addresses only questions of law regarding the proper interpretation of the Longshore Act. *Potomac Electric Power Co.,* 449 U.S. at 279 n.18, 101 S.Ct. at 515 n. 18 (1980) ("the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is

[16] References to the Petitioner's brief and supplemental brief are designated "Pet. Br." and "Supp. Br." respectively. References to the Director's exhibits admitted below are designated "DX." Record Excerpt references are designated "R."

not entitled to any special deference from the courts"). Because the Director is the administrator of the Act, his reasonable interpretations of the Act are entitled to deference. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136, 117 S.Ct. 1953, 1962, (1997) (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S.Ct. 161, 164 (1944)); *Boroski I*, 662 F.3d at 1204.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether Boroski was "currently receiving compensation" for purposes of Section 6(c) from 2002-2007. As the ALJ determined in 2008, Boroski was entitled to permanent total disability benefits during that period. But the employer did not actually pay those benefits to Boroski until the ALJ's award. The Director – in agreement with the employer and the Ninth Circuit – believes that Boroski was nevertheless "currently receiving compensation" during that period. Contrary to Boroski's argument, the Director's construction is a permissible interpretation of a facially ambiguous provision. While Boroski's contrary interpretation is also consistent with the statutory text, the Director's view should be accepted for many of the same reasons the Supreme Court adopted his view of the "newly awarded" clause in *Roberts*.

First, Boroski's interpretation creates an intractable conflict within Section 6(c). Under *Roberts*, the FY 2002 maximum rate governs his benefits for that year because he was "newly awarded" compensation during that period. But under Boroski's interpretation of the "currently receiving" clause, the FY 2008 maximum rate governs that same period, and yields a different applicable maximum rate. The Director's view leads to no such conflict. The Director's view also renders Section 6(c) consistent with Section 10(f), which similarly provides annual adjustments for totally disabled workers based on increases in the national average weekly wage, maintains the close link between Boroski's compensation rate and his pre-injury earnings, and treats similarly-situated claimants similarly. Boroski's interpretation, which has none of these benefits, should be rejected, and the Board's decision affirmed.

ARGUMENT

I. THE DIRECTOR'S CONSTRUCTION OF THE "CURRENTLY RECEIVING" CLAUSE IS A PERMISSIBLE INTERPRETATION OF THE PROVISION'S TEXT.

As was the case in *Roberts*, Boroski's position has considerable appeal at first blush. While the Act does not define "receiving," the word "receive" is most often used to mean "to take into one's possession

(something offered or delivered)." Random House Webster's Unabridged Dictionary 1610 (2d ed. 2001). But, as *Roberts* teaches, the inquiry does not end there. The word "receive" can also mean to "have bestowed or conferred on one." The New Shorter Oxford English Dictionary 2499 (Thumb Index Ed. 1993); *see* Random House Webster's Unabridged Dictionary 1610 (2d ed. 2001) ("to have (something) bestowed, conferred, etc."); Dictionary.com (same). Notably, the Supreme Court relied on a very similar definition of "award" – to "'grant' or 'confer or bestow upon'" – to conclude that "newly awarded" means "newly entitled to." *Roberts*, 132 S.Ct. at 1356. Thus, just as "newly awarded compensation" can mean "newly entitled to compensation," "currently receiving compensation" can mean "currently entitled to compensation."

Boroski argues that the Director's interpretation should be rejected because he knows of no court decision that has used "any form of the word 'receiving' to mean 'entitled to.'" Pet. Supp. Br. at 8. He makes this argument, however, only four pages after acknowledging that the Ninth Circuit applied just such a construction to Section 6(c)'s "currently receiving" clause. Pet. Supp. Br. at 4; *see Roberts*, 625 F.3d at 1209 ("The 'currently receiving' clause of section 6(c) unambiguously refers to the

period during which an employee was entitled to receive compensation for total disability, regardless of whether his employer actually paid it.").[17]

Nor is that court's analysis of Section 6(c) the only instance where the term "receiving compensation" in the Longshore Act has been interpreted to mean "entitled to compensation." In *Abercrumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), the Board interpreted former section 8(d)(3) of the Act, which provided that, "[i]f an employee who is *receiving compensation* for permanent partial disability pursuant to Section 8(c)(21). . . dies from causes other than the injury, his survivors shall receive death benefits" under section 9 of the Act. 33 U.S.C. § 908(d)(3) (1982) (emphasis added).[18] The employee in *Abercrumbia* was permanently partially disabled at the time of his death, but because he had settled his disability claim with his employer,

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[17] The Ninth Circuit is the only court of appeals that has addressed Section 6(c)'s "currently receiving" clause." While out-of-circuit decisions have no precedential value, this Court has noted that it "do[es] not create intercircuit splits lightly." *Public Health Trust of Dade County v. Lake Aircraft*, 992 F.2d 291, 295 n.4 (11th Cir. 1993) ("When another circuit has ruled on a point, we often follow it (even if we have some doubt about its correctness) unless we believe the decision to be plainly wrong.").

[18] This version of Section 8(d)(3) was repealed in 1984, and former Section 8(d)(4) was renumbered as current Section 8(d)(3). Act of September 28, 1984, Pub. L. No. 98-426, § 8, 98 Stat. 1639.

he was not receiving compensation payments for that disability when he died. 22 BRBS at 18.1. The Board nonetheless found his widow entitled to death benefits, holding that "[a]n employee need not be *actually receiving* permanent partial disability benefits at the time of death for purposes of Section 8(d)(3) so long as he is ultimately found to have been *entitled to* such compensation." *Abercrumbia*, 22 BRBS at 18.3 (emphasis added).

The Board applied the same interpretation of former Section 8(d)(3) in *Acuri v. Cataneo Lines Service Co*., 8 BRBS 102, 110-11 (1978). There, the employee filed claims for compensation before his death. At the time of his death, his employer was making voluntary payments for temporary total disability. *Acuri*, 8 BRBS at 104. His claims were adjudicated after his death, and he was found to have been entitled to compensation for both temporary total disability and permanent partial disability. *Id*. The Board held that the employee's entitlement to permanent partial disability at the time of his death was sufficient to allow death benefits to his widow. "We think that to construe 'was receiving' permanent partial disability narrowly would penalize employees like the decedent who die while awaiting disposal of a permanent partial claim, and would likewise penalize their survivors." *Id*. at 110.

The Board and D.C. Circuit applied the same reasoning under section 8(d)(1). *Henry v. George Hyman Constr. Co.*, 15 BRBS 475 (1983), *rev'd on other grounds, Henry v. George Hyman Constr. Co.*, 749 F.2d 65 (D.C. Cir. 1984). Section 8(d)(1) provides that "[i]f an employee who is receiving compensation for a [scheduled] permanent partial disability . . . dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors." 33 U.S.C. § 908(d)(1); *see Roberts*, 132 S.Ct. at 1361. At the time of the employee's death in *Henry*, the employee was not receiving compensation for permanent partial disability, but for temporary total disability. The Board nonetheless concluded that, if the employee had lived, he "would have retained a permanent partial disability," and was thus "an employee . . . receiving compensation for permanent partial disability" under Section 8(d)(1). *Henry*, 15 BRBS at 479.[19]

[19] The court did not disturb the Board's finding that "Mr. Henry's underlying permanent partial disability entitled him to a scheduled award," *Henry*, 749 F.2d at 69, and that he was thus "receiving compensation" at the time of his death under Section 8(d)(1). And although the Board denied the widow's claim to the balance of the employee's unpaid permanent partial disability compensation, the court reversed, finding her entitlement to that balance supported by Section 8(d)(2). . *Henry*, 749 F.2d at 69, 75-77.

This comports with the Supreme Court's reading of Section 8(d)(1) "to mean that 'an employee has a vested interest in benefits which *accrue* during his lifetime, and, after he dies, his estate is entitled to those benefits, regardless of when an award is made." *Roberts*, 132 S.Ct. at 1361 (emphasis added) (*quoting Wood v. Ingalls Shipbuilding, Inc*., 28 BRBS 27, 36 (1994)(per curiam)). Because it is the accrual of benefits – that is, the employee's entitlement to them, rather than his actual receipt[20] – that controls in Section 8(d)(1), "receiving compensation" is properly read, as it was in former Section 8(d)(3), to mean "entitled to compensation."

The fact that Section 8 uses "receiving compensation" to mean "entitled to compensation" is strong evidence that the same term may have the same meaning in Section 6(c). It is, of course, not proof that Boroski's interpretation of Section 6(c) is impermissible. It shows only that the bare text of Section 6(c)'s "currently receiving" clause is, like the neighboring "newly awarded" clause, indeterminate. *Roberts*, 132 S.Ct. at 1356 ("In short, the text of §906(c), in isolation, is indeterminate."). Accordingly, its

[20] "Accrue" is defined as "[t]o come into existence as an enforceable claim or right; to arise." Black's Law Dictionary 21 (7th ed. 1999).

words must be read "in their context and with a view to their place in the overall statutory scheme." *Id.* at 1357.[21]

II. IN THE CONTEXT OF THE LONGSHORE ACT'S STATUTORY SCHEME, "CURRENTLY RECEIVING COMPENSATION FOR PERMANENT TOTAL DISABILITY" IS MOST SENSIBLY INTERPRETED TO MEAN "CURRENTLY ENTITLED TO COMPENSATION FOR PERMANENT TOTAL DISABILITY."

To discern the meaning of an ambiguous provision, its words must be read "in their context and with a view to their place in the overall statutory scheme." *Roberts*, 132 S.Ct. at 1357. Thus Section 6(c)'s "currently receiving" clause must, like the "newly awarded" clause, be interpreted "[i]n the context of the [Longshore Act's] comprehensive, reticulated regime

[21] Interpreting "currently receiving" to mean "currently entitled to" is not, as Boroski suggests, foreclosed by the Supreme Court's dicta in *Roberts*, 132 S.Ct. at 1354 n.5, for two reasons. First, and most obviously, the Court construed only the meaning of "awarded compensation"; the meaning of "receiving compensation" was neither at issue nor decided. *Roberts*, 132 S.Ct. at 1354 n.2 ("Section 906(c)'s 'currently receiving compensation' clause is not at issue here."). Second, although the Court stated that "awarded compensation" could not be construed to mean "receiving compensation," *id*. at 1357 n.5, it is apparent that the Court simply assumed that the statute gave "receive" its more common meaning – "to take into one's possession." It did not consider other possible meanings because it was not interpreting "currently receiving." Thus, the Court merely found that "awarded compensation" does not mean "taken possession of compensation." It did not hold that "receiving compensation" must mean "taking possession of compensation."

for worker benefits." *Roberts*, 132 S.Ct. at 1357. In that context, "receiving compensation for permanent total disability" is most sensibly interpreted to mean "entitled to compensation for permanent total disability." Such a reading, unlike Boroski's interpretation, gives effect to the Supreme Court's interpretation of the "newly awarded" clause; harmonizes the two clauses of Section 6(c); "coheres with the [Longshore Act's] administrative structure," *id*. at 1358; "advances the [Act's] purpose to compensate disability," *id*. at 1359; and "avoids disparate treatment of similarly situated employees[.]" *id*.

A. The Director's interpretation of the "currently receiving" clause is consistent with Section 6(c)'s "newly awarded" clause, while Boroski's contrary reading is not.

Statutory interpretation always begins with an examination of the statute's text. *U.S. v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999). It is, however, "a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988). Put another way, "[s]tatutory language . . . cannot be construed in a vacuum. It is a fundamental canon of statutory construction

that the words of a statute must be read *in their context* and *with a view to their place in the overall statutory scheme*." *Roberts*, 132 S.Ct. at 1357 (emphasis added). With regard to Section 6 specifically, the Court held in *Roberts* that Sections 6(b)(1), 6(b)(3), and 6(c) "work together to cap disability benefits." *Roberts*, 132 S.Ct. at 1358. The two clauses of Section 6(c) must also "work together."

In order for the two clauses of Section 6(c) to "work together," they obviously cannot conflict. But under Boroski's interpretation, that is precisely what they do. Under *Roberts*, Boroski was "newly awarded compensation during" FY 2002, when he first became disabled and entitled to benefits. 132 S.Ct. at 1354. As a result, his FY 2002 benefits are subject to the FY 2002 maximum rate ($966.08) under the "newly awarded" clause. Attachment A. But, because his disability is permanent and total, the "currently receiving" clause also applies to him. And, under Boroski's interpretation of that clause, his benefits for FY 2002 should be paid at the FY 2008 maximum rate ($1,160.36) because the Employer did not actually pay those benefits until that year. The statute should not be interpreted to lead to such an absurd result. *See generally*, *Durr v. Shinseki*, 638 F.3d 1342, 1349 (11th Cir. 2011). Just as the *Roberts* Court rejected the

claimant's construction of the "newly awarded" clause because it led to *no* maximum rate being calculable in many cases, 132 S.Ct. at 1358, this Court should reject Boroski's interpretation of Section 6(c) because it results in two conflicting maximum rates for the same benefit payments.

The Director's interpretation, by contrast, harmonizes the "currently receiving" clause with the Supreme Court's interpretation of the "newly awarded" clause. During the one year when both clauses apply to Boroski, the "currently receiving" clause sensibly imposes the same FY 2002 maximum rate that the Supreme Court's interpretation of the "newly awarded" clause does. For each subsequent year during which Boroski's entitlement to compensation for permanent total disability continues, he is entitled to a new maximum rate, increased by the same percentage as the national average weekly wage. These increases create no conflict with *Roberts*, because only the "currently receiving" clause applies.

Boroski attempts to preemptively rebut this problem by arguing that the "newly awarded" clause of Section 6(c) has no application to his claim. Because his disability was permanent and total from onset, he argues, the "newly awarded" clause need not be considered. Pet. Supp. Br. at 3. But this argument flies in the face of the statute's plain text and common sense.

Every claimant must be "newly awarded" compensation at some point. And as the Court made clear in *Roberts*, that point is "when he first becomes disabled and thereby becomes statutorily entitled to benefits under the Act." *Roberts*, 132 S.Ct. at 1356. It is not, as Boroski's interpretation would require, when he first becomes disabled *unless* his first disability is permanent and total.[22] There is simply no dispute that Boroski was newly entitled to compensation in FY 2002.

Boroski suggests that the Supreme Court implicitly carved out an exception from the "newly awarded" clause for permanent total disability cases in *Roberts*. Pet. Supp. Br. at 6. It did not. Boroski relies on the opening paragraph of the *Roberts* opinion, in which the Court says that "benefits for most types of disability" are capped at "twice the national

[22] That compensation for all claimants subject to a maximum rate begins with the national average weekly wage in effect when the claimant first becomes entitled to compensation is confirmed by Congress' treatment of death benefits. When it imposed a maximum rate on death benefits, Congress made clear not only that it was applying "the same maximum applicable to disability cases," but that the relevant initial maximum rate was that in effect "on the date of death," when statutory entitlement to death benefits begins. H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 28-29 (1984); *see also* H.R. Rep. No. 570, 98th Cong., 1st Sess. 8-9 (1983) ("[C]ompensation payments for death shall be limited to a maximum of 200% of the National Average Weekly wage applicable on the date of death."); *id*. at 26 (same).

average weekly wage for the fiscal year in which an injured employee is 'newly awarded compensation.'" *Id*. (quoting *Roberts*, 132 S.Ct. at 1354). But, the Court clarified its thought two paragraphs later: "*For most types of disability*, the 'applicable' national average weekly wage is the figure for the fiscal year in which a beneficiary is 'newly awarded compensation,' and *the cap remains constant as long as benefits continue*." 132 S.Ct. at 1354 (emphasis added). The Court contrasted this with the cap for permanent total disability, which does not remain fixed. "For those 'currently receiving compensation for permanent total disability or death benefits,' § 906(c), *the cap is adjusted each fiscal year* – and typically increases, in step with the usual inflation-driven rise in the national average weekly wage." *Id*. at 1354 n.2 (emphasis added). Thus, the distinction between permanent total disability and other types of disability is that the "currently receiving" clause of Section 6(c) allows the cap for permanent total disability to increase each year in step with the national average weekly wage, while the cap for other types of disability, which are not covered by the "currently receiving" clause, is fixed at the date-of-disability maximum rate for the life of the claim.

Boroski has simply failed to demonstrate that an employee newly awarded permanent total disability compensation is not covered by the "newly awarded" clause as well as the "currently receiving" clause during the first year of entitlement. We know from *Roberts* that the "newly awarded" clause imposes the maximum rate in effect during the year in which the employee is newly entitled to benefits. Any interpretation of the "currently receiving" clause producing a different result for this same year – such as Boroski's – must be rejected as contrary to *Roberts*.

Boroski counters that the Director's interpretation of Section 6(c) impermissibly gives no effect to the textual difference between the "newly awarded" and "currently receiving" clauses. Supp. Br. 9-10. At the phrase level, of course, there are two obvious differences between "newly awarded" and "currently receiving." "Currently receiving" means that claimants receiving permanent total disability compensation get the benefit of a new national average wage each year to counteract inflation. *See generally Landrum v. Air America, Inc.*, 534 F.2d 67, 68-69 (5th Cir. 1976). It also means that the new maximum rate system adopted in 1972 applied to permanently totally disabled workers, whose entitlement to benefits arose *before* the 1972 amendments, and who were thus "currently receiving

compensation for permanent total disability" when the amendments became effective. *Id.* Neither is true of claimants in other disability categories.

To the extent that Boroski is referring solely to the words "awarded" and "receiving," he is correct that the Director and the Ninth Circuit interpret both to mean "entitled to" in Section 6. But, in light of the Supreme Court's interpretation of the "newly awarded" clause, this is not surprising. As the Supreme Court explained, Congress used "newly awarded" in Section 6(c) to describe claimants who are newly entitled to benefits. *Roberts*, 132 S.Ct. at 1356. In Boroski's view, the only way Congress could have permissibly described claimants who are currently entitled to benefits would have been to enact a "currently awarded" clause. But Congress was surely not required to adopt such an awkward construction.[23]

In an ideal world, perhaps Congress would have been better off drafting "currently entitled to" and "newly entitled to" clauses instead of

[23] It is no rejoinder to say that Congress could have used the term "currently entitled to." That, under Boroski's preferred canon of construction, would raise the inference that Congress meant something other than "newly entitled to" in the "newly awarded" clause. But we know that Congress meant exactly that. *Roberts*, 132 S.Ct. at 1354.

"newly awarded" and "currently receiving" clauses. But it did not. While the Director's view gives little meaning to the distinction between the words "awarded" and "receiving," Boroski's interpretation of Section 6(c) has the more serious defect of producing two different maximum rates for the same benefit payments. For this reason, and because it is more consistent with the Act as a whole, the Director's interpretation of the "currently receiving" clause should be adopted.

B. The Director's interpretation of the "currently receiving" clause is more consistent with the Longshore Act as a whole than Boroski's contrary reading.

1. The Director's interpretation maintains consistency between Section 6(c) and Section 10(f).

"A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme." *Roberts*, 132 S.Ct. at 1358 (quoting *FDA v. Brown & Williamson*, 529 U.S. at 133). The Court ensured such coherence in *Roberts* by treating all claims similarly, whether they involved a maximum rate or not. It concluded that, because section 10 "takes 'the average weekly wage of the injured employee at the time of the injury' as 'the basis on which to compute compensation,' § 910, it is logical to apply the national average

weekly wage [under section 6] for the same point in time." *Roberts*, 132 S.Ct. at 1359.

It is also logical for sections 10 and 6 to apply the same rate-increase scheme to all employees receiving compensation for permanent total disability because such an interpretation "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Texas*, 484 U.S. at 371, 108 S.Ct. at 630. Under section 10, employees with a permanent total disability – like all other employees – are initially compensated at the rate derived from their average weekly wage at the time they become disabled. *Id.*; 33 U.S.C. § 910. But, unlike claimants for other types of disability, their compensation rate is increased each October 1 by the same percentage as the increase to the national average weekly wage. 33 U.S.C. § 910(f)(1).

The Director's interpretation of the "currently receiving" clause simply applies this same rate-increase scheme – already applicable to all other permanently totally disabled employees – to those who are subject to a maximum rate.[24] Such employees are initially compensated at the rate

[24] Indeed, the ALJ and District Director characterized Boroski's annual compensation increases as being made pursuant to Section 10(f).

derived from the national average weekly wage in effect when they become disabled, *Roberts*, 132 S.Ct. at 1356, and have their compensation rate increased each October 1 by the same percentage as the increase to the national average weekly wage.

Such consistent treatment seems to be contemplated by the language of Section 10(f), which provides for no exceptions to its rate-increase scheme for permanent total disability. It states that "the compensation . . . payable for permanent total disability . . . arising out of injuries subject to this Act" shall be increased each year. 33 U.S.C. § 910(f). That it does not exclude those subject to a maximum rate from the annual-increase scheme indicates that Congress believed that Sections 6(c) and 10(f) – originally enacted as part of the same statute – provided for the comparable treatment of all permanently totally disabled employees.[25] Section 6(c)'s "currently receiving" clause is therefore necessary to make it clear that permanently totally disabled employees subject to a maximum rate are entitled to the same annual increases provided for in Section 10(f).

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[25] Longshore and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 5(a), 86 Stat. 1252 (Section 6(c)); Pub. L. 92-576, § 11, 86 Stat. 1259 (Section 10(f)).

Indeed, "the legislative history of the 1972 Amendments indicates that Congress was fully aware of the similarities between §§ 6[(c)] and 10(f)," *Rasmussen*, 440 U.S. at 44 n.16 , and treated the two provisions as comparable. Addressing section 6, Congress provided for an increase of the maximum rate under section 6 to twice the national average weekly wage, and stated that "[a] similar provision for upgrading benefits in future years for cases of permanent total disability or death benefits is contained in Section 10 of the Act. . . . These employees will receive annual increases based on percentage increases in the national average weekly wage." H.R. Rep. No. 1441, 570, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 1125, 92d Cong., 2d Sess. 5-6 (1972). Congress also stated that amended section 6 "requires an *annual* redetermination by the Secretary which will allow any increase in the national average weekly wage to be *reflected* by an appropriate increase in compensation payable under the Act." S. Rep. No. 1125, 92d Cong., 2d Sess. 5-6 (1972) (emphasis added).

In other words, just as the national average weekly wage increases each year by a specific percentage, so too does the relevant maximum compensation rate payable for permanent total disability. *See Roberts*, 132 S.Ct. at 1354 n.2 (for permanently totally disabled employees, the

maximum rate "cap is adjusted *each fiscal year* – and typically increases, in step with the usual inflation-driven rise in the national average weekly wage."). In this way, the compensation payable to an employee each year increases by the same amount as wage-inflation generally, ensuring that the value of the worker's compensation is not eroded. And avoiding a loss of value in benefits relative to increased industry wages was the reason Congress enacted the mechanism through which maximum rates would self-adjust annually. *See* H. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972) (noting that since the maximum was fixed at $70 in 1961, the average wage in some ports had risen to $200 per week); S. Rep. No. 1125, 92d Cong., 2d Sess. 5 (bill "raises benefits to a level commensurate with present day salaries.").

Boroski's interpretation, rather than providing for annual increases from that initial compensation rate – as is done with all other permanently totally disabled employees – sets the initial rate at that in effect when the employer begins making payments, and applies that retroactively as a fixed rate for all fiscal years prior to payment. But nowhere else in the Act is any claimant's compensation rate dependent on when an employer starts paying him compensation. And nowhere else in the Act is the compensation rate

for any other worker who is permanently totally disabled from the outset fixed over a period of years. *See* 33 U.S.C. § 910(f). Put simply, because Boroski's theory of how the Act should be applied to him is at odds with the way Congress applied to the Act to all other employees, it should be rejected.

2. The Director's interpretation advances the Act's purpose of compensating for disability

In *Roberts*, the Supreme Court found that using the employee's date of disability to determine his initial maximum compensation rate "advances the [Longshore Act's] purpose to compensate disability, defined as 'incapacity because of injury to earn the wages which the employee was receiving *at the time of injury*.'" *Roberts*, 132 S.Ct. at 1359 (italics in original, underline added). In other words, because the Act is designed to compensate claimants for disability, it makes sense to begin with the maximum rate in effect when the claimant's disability began. The same logic applies to claimants who are permanently totally disabled: because they are being compensated *for disability*, it makes sense to compensate them, during their continuing disability, at the maximum rate in effect for each year of that disability.

That is precisely what the Director's interpretation does. Such an approach is consistent with the Supreme Court's understanding that, "[f]or those 'currently receiving compensation for permanent total disability . . .' the [maximum-rate] cap is adjusted each year – and typically increases, in step with the usual inflation-driven rise in the national average weekly wage." *Roberts*, 132 S.Ct. at 1354 n.2. Thus, Boroski's FY 2002 benefits are paid at the FY 2002 maximum rate, his FY 2003 benefits are the FY 2003 rate, and so on.

Boroski's interpretation would not follow such a logical path. His approach would not only ignore the *Roberts* requirement that the initial maximum rate be that in effect for the fiscal year in which the disability started (FY 2002), *see supra* at 31-35, but would also pay an employee for the portion of an ongoing disability that occurs during one fiscal year at a higher maximum rate that was not even determined until a later fiscal year. For example, under Boroski's theory, he would be paid for the portion of his disability that occurred in FYs 2003-2007 at the FY 2008 maximum rate. Because the "inflation-driven rise" to the FY 2008 rate would not occur until five years later, Boroski would effectively be given the benefit of inflation

that had not yet occurred in FY 2003 (in addition to interest, to which he is clearly entitled, *see* DX 3 at 30; *Roberts*, 132 S.Ct. at 1363).

Boroski argues that the "currently receiving" clause "unmistakably departs" from the Act's pattern of tying a worker's compensation rate to the time of the disabling injury. Pet. Supp. br. at 8. But this is not so. To be sure, Sections 6 and 10(f) give permanently totally disabled workers annual compensation increases. But neither provision severs the connection between an employee's initial compensation rate and his date of disability. And as discussed above, there is no question that this connection applies to all employees, including those receiving compensation for permanent total disability. 33 U.S.C. § 910; *see Roberts*, 132 S.Ct. at 1358.

3. The Director's interpretation treats similarly situated claimants consistently.

In *Roberts*, the Supreme Court accepted the Director's reading of the "newly awarded" clause in part because it "avoid[ed] disparate treatment of similarly situated employees." *Roberts*, 132 S.Ct. at 1359. It likewise rejected the employee's reading because it could result in "two employees who earn the same salary and suffer the same injury on the same day" receiving different compensation rates. *Id*.

As in *Roberts*, the Director's interpretation here avoids disparate treatment of similarly situated employees. Boroski's, by contrast, assigns similarly situated employees different compensation rates for the same periods of the same disability. Boroski would receive compensation for his FY 2003-2007 period of disability at the FY 2008 rate, while an otherwise identically situated worker who received benefits under an order (or voluntarily) during that period would receive compensation at each intervening year's maximum rate. This is precisely the type of "disparate treatment of similarly situated employees" that the Supreme Court rejected in *Roberts*, 132 S.Ct. at 1359.

To be sure, the two workers are not identically situated in one respect: Boroski's actual receipt of benefits is delayed by several years. The Director recognizes that delayed receipt of compensation can be a serious practical hardship for a disabled worker, and fully expects employers to comply with the Act's command to pay benefits voluntarily, without formal administrative proceedings. 33 U.S.C. § 914(a). Section 6(c) would be an odd mechanism to address this issue, however, because this hardship applies equally to the majority of claimants, who are unaffected by the maximum compensation rate. *See Roberts*, 132 S.Ct. at 1363. Instead, "[t]he more

measured deterrent to employer tardiness is interest that accrues from the date a benefit came due, rather from the date of the ALJ's award." *Id.* Boroski was awarded such interest here. DX 3 at 30.

Further, Congress has clearly identified situations where it believes additional incentives are necessary. *See* 33 U.S.C. § 914(e) (requiring payment of 10% additional compensation where an employer fails to controvert its liability for compensation and fails to pay that compensation); 33 U.S.C. § 914(f) (requiring payment 20% additional compensation where the employer fails to pay compensation it is ordered to pay). Boroski's interpretation of Section 6(c), would have the effect of increasing an employer's liability where it timely controverts the claim and pays compensation when due under an effective ALJ award.[26] There is no indication in the Act or its legislative history that Congress intended to impose additional liability in this situation, or – even more unlikely – to do so only the small subset of cases in which the employee is not only permanently totally disabled, but also subject to a maximum rate.

[26] Boroski does not suggest that the Employer's defense of this claim was in bad faith.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's determinations regarding the maximum compensation rates applicable to Boroski under the Longshore Act, as well as the District Director's denial of Boroski's application for an order declaring default of payment.

Respectfully submitted,

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COMBINED CERTIFICATES

I hereby certify with regard to the Director's Brief that:

(1) any required privacy redactions have been made;

(2) the electronic brief is an exact copy of the paper document;

(3) the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses;

(4) pursuant to Fed. R. App. Proc. 32(a)(7)(B) and (C), the brief has been prepared using Microsoft Word, fourteen-point proportionally spaced Times New Roman type, and that, exclusive of the certificates of compliance and service, the brief contains 9774 words; and

(5) on September 17, 2012, a copy was served through the Court's electronic filing system on the following registered users:

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ATTACHMENT A

Division of Longshore and Harbor Workers' Compensation (DLHWC)

NAWW Information

National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))

PERIOD	NAWW	MAX	MIN	PERCENT INCREASE
10/01/2012 - 09/30/2013	$662.59	$1,325.18	$331.30	2.31%
10/01/2011 - 09/30/2012	$647.60	$1,295.20	$323.80	3.05%
10/01/2010 - 09/30/2011	$628.42	$1,256.84	$314.21	2.63%
10/01/2009 - 09/30/2010	$612.33	$1,224.66	$306.17	2.00%
10/01/2008 - 09/30/2009	$600.31	$1,200.62	$300.16	3.47%
10/01/2007 - 09/30/2008	$580.18	$1,160.36	$290.09	4.12%
10/01/2006 - 09/30/2007	$557.22	$1114.44	$278.61	3.80%
10/01/2005 - 09/30/2006	$536.82	$1073.64	$268.41	2.53%
10/01/2004 - 09/30/2005	$523.58	$1,047.16	$261.79	1.59%
10/01/2003 - 09/30/2004	$515.39	$1,030.78	$257.70	3.44%
10/01/2002 - 09/30/2003	$498.27	$996.54	$249.14	3.15%
10/01/2001 - 09/30/2002	$483.04	$966.08	$241.52	3.45%
10/01/2000 - 09/30/2001	$466.91	$933.82	$233.46	3.61%
10/01/1999 - 09/30/2000	$450.64	$901.28	$225.32	3.39%
10/01/1998 - 09/30/1999	$435.88	$871.76	$217.94	4.31%
10/01/1997 - 09/30/1998	$417.87	$835.74	$208.94	4.33%
10/01/1996 - 09/30/1997	$400.53	$801.06	$200.27	2.38%
10/01/1995 - 09/30/1996	$391.22	$782.44	$195.61	2.83%
10/01/1994 - 09/30/1995	$380.46	$760.92	$190.23	3.06%

10/01/1993 - 09/30/1994	$369.15	$738.30	$184.58	2.38%
10/01/1992 - 09/30/1993	$360.57	$721.14	$180.29	3.03%
10/01/1991 - 09/30/1992	$349.98	$699.96	$174.99	2.61%
10/01/1990 - 09/30/1991	$341.07	$682.14	$170.54	3.26%
10/01/1989 - 09/30/1990	$330.31	$660.62	$165.16	3.83%
10/01/1988 - 09/30/1989	$318.12	$636.24	$159.06	3.13%
10/01/1987 - 09/30/1988	$308.48	$616.96	$154.24	1.92%
10/01/1986 - 09/30/1987	$302.66	$605.32	$151.33	1.69%
10/01/1985 - 09/30/1986	$297.62	$595.24	$148.81	2.69%
10/01/1984 - 09/30/1985	$289.83	$579.66	$144.92	[5.71%][2]
10/01/1983 - 09/30/1984	$274.17	$548.34[1]	$137.09	4.51%
10/01/1982 - 09/30/1983	$262.35	$524.70	$131.18	5.64%
10/01/1981 - 09/30/1982	$248.35	$496.70	$124.18	8.87%
10/01/1980 - 09/30/1981	$228.12	$456.24	$114.06	7.03%
10/01/1979 - 09/30/1980	$213.13	$426.26	$106.57	7.43%
10/01/1978 - 09/30/1979	$198.39	$396.78	$ 99.20	8.05%
10/01/1977 - 09/30/1978	$183.61	$367.22	$ 91.81	7.21%
10/01/1976 - 09/30/1977	$171.27	$342.54	$ 85.64	7.59%
10/01/1975 - 09/30/1976	$159.19	$318.38	$ 79.60	6.74%
10/01/1974 - 09/30/1975	$149.14	$261.00	$ 74.57	6.26%
10/01/1973 - 09/30/1974	$140.36	$210.54	$ 70.18	6.49%
11/26/1972 - 09/30/1973	$131.80	$167.00	$ 65.90	

[1]Maximum became applicable in death cases (for any death after September 28, 1984) pursuant to LHWCA Amendments of 1984. Section 9(e)(1) provides that the total weekly death benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased would have been eligible to receive under Section 6(b)(1). The maximum death benefit provision took effect on the day after the 1984 amendments were enacted. Therefore, for the two day period of September 29 and 30, 1984, the maximum rate of $548.34 is applicable, provided it is less than the average weekly wage of the deceased.

[2]Limited to a maximum of 5 percent under the provisions of Section 10(f) as amended by the LHWCA Amendments of 1984.