08-2515ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SERVICE EMPLOYERS INTERNATIONAL, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
Petitioners,
v.
JESSE BARRIOS and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from a claim filed by Jesse Barrios (Claimant) for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or LHWCA), as extended by the Defense Base Act, 42 U.S.C. § 1651 *et seq*. (DBA). The Administrative Law Judge (ALJ) had jurisdiction over the claim pursuant to sections 19(c) and (d) of the LHWCA.[1] The ALJ awarded benefits to Barrios in an order dated March 13, 2007, and an amended order dated March 27, 2007, *see* Exhibit B to Petition for Review, both of which became effective when filed and served by the district director on March 29, 2007. 33 U.S.C. § 921(a).

Service Employers International, Inc. and its insurance carrier, the Insurance Company of the State of Pennsylvania (collectively, Employer) filed a Notice of Appeal with the Benefits Review Board (Board) on April 3, 2007, within the thirty-day period provided by section 21(a) of the Longshore Act. That appeal invoked the Board's review jurisdiction pursuant to section 21(b)(3) of the Act.

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[1] Unless otherwise noted, statutory references to the Longshore Act are abbreviated, with section xx, for example, referring to 33 U.S.C. § 9xx.

On December 19, 2007, the Board issued a Decision and Order affirming the ALJ's decisions. Exhibit A to Petition.

On February 15, 2008, the Employer petitioned the United States Court of Appeals for the Ninth Circuit for review of the Board's final decision under section 21(c) of the Longshore Act. The petition was filed within the 60-day period prescribed by section 21(c). The Director, however, moved the Ninth Circuit to transfer the petition to this Court, where he believed territorial jurisdiction was proper.[2] The Ninth Circuit granted that motion and transferred the case to this Court by order dated May 13, 2008.

One jurisdictional issue remains: whether initial judicial review jurisdiction over final Board orders in DBA claims lies with this Court or a United States District Court. This Court has never directly addressed this question. But because the question has been a subject of some controversy among the Court's sister

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[2] The Director moved for transfer on the basis that, pursuant to 42 U.S.C. § 1653(b), the reviewing court's jurisdiction over a DBA claim is determined by the location of the office of the district director who served the compensation order, rather than the office of the ALJ who issued the order. *Hice v. Director, OWCP*, 156 F.3d 214, 217- 218 (D.C. Cir. 1998); *see Pearce v. Director, OWCP*, 603 F.2d 763, 765 (9th Cir. 1979) (Ninth Circuit without geographic jurisdiction because the district director whose order was involved was located in Chicago). Because the office of the district director who served the orders in this case is located in New York, the Ninth Circuit transferred the case to this Court.

circuits, the Director believes it is important to draw the Court's attention to the issue so that the Court may make an informed decision regarding its own jurisdiction. In the Director's view, this Court has jurisdiction to review the Board's decision. We address the question fully in Argument I below.

STATEMENT OF THE ISSUES [3]

I. Whether the Longshore Act's amended review provisions, which provide for direct review of Benefits Review Board decisions by the courts of appeals, apply to DBA claims where the DBA generally provides for application of the Longshore Act "as amended" and there is no evidence that Congress intended to prescribe different judicial review procedures for claims under the two statutes.

II. Whether the ALJ and Board correctly applied the maximum compensation rate for fiscal year 2006 when all events relevant to the claim – including when the Claimant was last exposed to the injurious stimuli, sought medical attention, and became unable to continue working in Iraq – occurred in that year.

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[3] The Director takes no position with regard to the other issues raised by the Employer.

STATEMENT OF THE CASE

The Claimant filed a claim for disability compensation under the DBA, which extends the Longshore Act's workers' compensation scheme to employees working outside the United States under a contract: (1) with the United States or any executive department or agency thereof; or (2) approved or financed by the United States or any executive department or agency. 42 U.S.C. § 1651(a)(4), (5).[4] The Department of Labor's Office of Workers' Compensation, Division of Longshore and Harbor Workers' Compensation, opened a file in order to process the claim in its New York District Office, District Number 2. *See* 20 C.F.R. § 704.101(e) (assigning to District 2 the administration of claims arising from injuries in specified areas of the world, including Iraq). The district director for that office subsequently referred the case to the Office of Administrative Law Judges (OALJ) for a hearing pursuant to 33 U.S.C. § 919(d).

In a Decision and Order dated March 13, 2007, the ALJ found that the Claimant's eye condition was causally related to his employment, and awarded

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[4] The parties agree that the Claimant's employment in Iraq under a contract between the Employer and the United States was covered by the DBA and that the provisions of the Longshore Act apply with respect to compensating his injury. *See* Exhibit B to Petition, March 13, 2007 ALJ Decision and Order (ALJ Decision) at 2.

him disability compensation and medical benefits. ALJ Decision at 5-7, 9. The decision and order was filed and served by the district director in New York pursuant to 33 U.S.C. § 919(e), see Exhibit B to Petition for Review, making the order effective. 33 U.S.C. § 921(a). The Employer filed a timely notice of appeal with the Board, which affirmed the ALJ's decision. 33 U.S.C. § 921(b).

The Employer then filed a timely petition for review of the Board's decision in the United States Court of Appeals for the Ninth Circuit, presumably because the office of the ALJ who heard the case is in San Francisco, within that court's jurisdiction. The Director moved to transfer the case to this Court, and the Ninth Circuit granted that motion.

STATEMENT OF THE FACTS

I. CLAIMANT'S EMPLOYMENT AND INJURY

On October 24, 2004, the Claimant began working as a tank truck driver for the Employer, delivering fuel throughout Iraq. ALJ Decision at 3. On November 28, 2005, he sought medical care at the Employer's medical clinic for dry, itchy eyes. *Id*. He was diagnosed with bilateral pterygia, an eye condition resulting in fibrovascular growth in the eyes. *Id*. An ophthalmologist prescribed eye drops and protective sunglasses, and recommended excision of the right eye pterygiam. *Id*. The Claimant resumed work until December 14, 2005, when he returned to the Employer's medical clinic and indicated that he wished to undergo the excision

recommended by the ophthalmologist. On December 19, 2005, the Claimant left Iraq to return to the United States for treatment. *Id*. Although the Claimant was originally sent home on a twenty-eight day medical leave, the Employer later terminated his employment. *Id*. On May 22, 2006, the Claimant obtained work as a gas tanker driver in Colorado. *Id*. at 3-4.

II. DECISIONS BELOW

The ALJ found that the Claimant's pterygia was linked to his employment in Iraq, and that he was entitled to compensation for temporary total disability from December 20, 2005 to May 21, 2006, and to compensation for temporary partial disability thereafter. *Id*. at 5-9. The ALJ found that the Claimant's average weekly wage was $1,717.61. *Id*. at 8. Pursuant to Longshore Act section 8(b), the ALJ calculated the Claimant's compensation rate for his period of temporary total disability at $1,143.92 per week ($1,717.61 x 2/3). *Id*. at 9; *see* 33 U.S.C. § 908(b) (compensation rate is 2/3 of average weekly wage). Because that compensation rate was higher than the maximum rate allowed under Longshore Act section 6(b) for fiscal year (FY) 2006[5] – the period during which the Claimant

[5] FY 2006 began October 1, 2005 and ended September 30, 2006. *See* 33 U.S.C. § 906(b)(3).

became disabled – the ALJ found that the Claimant was limited to the maximum rate in effect for FY 2006 for his period of temporary total disability. ALJ Order Amending Decision and Order (ALJ Amended Decision) at 1; *see* 33 U.S.C. § 906(b) (limiting compensation to 200% of the national average weekly wage for the applicable period). Thus, from December 20, 2005 to May 21, 2006, the ALJ awarded the Claimant compensation at the FY 2006 maximum rate of $1,073.64 per week. *Id*.[6]

The Employer appealed, arguing that the Claimant's condition was neither work-related nor disabling, and that the ALJ had awarded the Claimant compensation based on the wrong fiscal year's maximum compensation rate. The Board rejected these arguments, and affirmed the ALJ's decision. Board Decision and Order (Bd. Order), Exhibit A to Petition for Review. It held that substantial evidence supported the ALJ's determination that Claimant's pterygia was both disabling and work-related. *Id*. at 4-5. It further determined that the ALJ had

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[6] For the period after he returned to work in Colorado, the ALJ found that the Claimant had recovered an earning capacity, and was entitled to compensation of $740.59 per week for his temporary partial disability. ALJ Decision at 8-9. That compensation rate is sufficiently low that it does not exceed any potentially applicable maximum rate.

applied the correct fiscal year's maximum rate – 2006 – because that was the year in which the Claimant became disabled by his condition. *Id*. at 5-6.

SUMMARY OF THE ARGUMENT

I. JURISDICTION

The court of appeals, rather than the district court, is the proper court to hear this appeal. As a general reference statute, the DBA adopts the provisions of the Longshore Act as amended, and except as modified. The DBA specifically adopts Longshore Act sections 18 and 21, which govern judicial review of compensation orders. Section 21(c), as amended in 1972, provides for initial judicial review of Benefits Review Board decisions in the courts of appeals. That amendment applies to the DBA. Congress never intended the DBA review provision – before or after the 1972 amendments to the Longshore Act – to modify the Longshore Act's specification of the court vested with initial review jurisdiction. Instead, the DBA only modifies the Longshore Act review scheme to accommodate the difference between the geographic reach of the two statutes: because DBA injuries would not occur within the territorial jurisdiction of a United States court, the DBA necessarily modifies the Longshore Act's grant of jurisdiction to the court where the "injury occurred" by using the location of the responsible district director instead.

II. APPLICABLE MAXIMUM RATE

The ALJ and Board properly concluded that the maximum compensation rate applicable to the Clamant was the FY 2006 rate. The Claimant experienced his last exposure to injurious stimuli, sought medical attention, was diagnosed with pterygia, and experienced a loss of wage-earning capacity within FY 2006. Although the Employer contends that the Claimant was injured in FY 2005, it offers nothing to support that contention, and the ALJ made no factual findings that would support it. Further, it is the date of a Claimant's disability – in other words, the date on which he experiences a loss of wage-earning capacity – that controls the applicable compensation rate in occupational disease cases. Because the onset of the Claimant's disability was in FY 2006, the maximum applicable compensation rate is that in effect during FY 2006.

STANDARD OF REVIEW

This Court's "review of the Board's decision is limited to whether the [Board] made any errors of law and whether [an] ALJ's findings of fact, in light of the entire record, are supported by substantial evidence." *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 142 (2d Cir. 2005). With regard to pure questions of law, the Court's review is *de novo*. *Id., citing United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005).

A court's first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case, and if it does, to apply that language. *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997). If courts have reached conflicting interpretations of the relevant language, that conflict is an indication of ambiguity. *See Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 739 (1996).

Where the language of a statute is ambiguous, courts look to the legislative history, the broader context provided by other sections of the statute, and the primary purpose of the statute. *Castellano v. City of New York*, 142 F.3d 58, 67 (2d Cir. 1998), *citing Robinson*, 519 U.S. at 345-46. This Court also defers to the Director's interpretation of the statutes he administers if his interpretation is reasonable and consistent with the statutes.[7] *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 411 (2d Cir. 2005). Thus, where the Longshore Act or DBA is ambiguous, this Court defers to the Director's reasonable interpretation. *See Universal Maritime Serv. Corp. v. Spitalieri*, 226 F.3d 167, 172 (2d Cir. 2000) (addressing the Longshore Act). Interpretations of these Acts presented by the

[7] The Director is the administrator of both the LHWCA and the DBA. 33 U.S.C. § 939(a); 20 C.F.R. § 701.201.

Director in litigation are entitled to deference if they reflect the agency's fair and considered judgment and are not post hoc rationalizations of past agency actions. *Morganti*, 412 F.3d at 411, *citing Auer v. Robbins*, 519 U.S. 452, 462 (1997).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL BECAUSE INITIAL JUDICIAL REVIEW JURISDICTION OVER DBA CASES LIES IN THE UNITED STATES COURT OF APPEALS IN WHOSE JURISDICTION IS LOCATED THE OFFICE OF THE DISTRICT DIRECTOR ADMINISTERING THE CASE.

A. Relationship Between the Longshore Act and the DBA.

The jurisdictional issue here arises from two seemingly conflicting judicial review provisions in the Longshore Act and the DBA. In actuality, however, these statutory provisions work in tandem to confer initial judicial review jurisdiction over this appeal on this Court.

The Longshore Act was enacted in 1927 to provide comprehensive workers' compensation benefits to longshore and harbor workers in the United States. Claims are filed with local district directors in the Office of Workers' Compensation Programs.[8] Until 1972, district directors possessed exclusive

[8] The statute uses the term "deputy commissioner" rather than "district director." *See, e.g.*, 33 U.S.C. § 919. The Secretary changed the name of the official by regulation in 1990, but clarified that "[t]he substitution is for administrative

authority to investigate, administer, hear and adjudicate Longshore Act claims and to facilitate enforcement of compensation orders. Judicial review of a district director's decision could be "instituted in the Federal district court for the judicial district *in which the injury occurred*." 33 U.S.C. § 921(d) (1970) (emphasis added); *see Pearce v. Director, OWCP*, 603 F.2d 763, 766 (9th Cir. 1979). The district court's decision was then reviewable in the court of appeals, as was (and still is) any decision of a district court. 28 U.S.C. § 1291.

The DBA was enacted in 1941 to extend the Longshore Act's compensation benefits to workers outside of the United States who are employed on United States military bases or pursuant to United States government contracts. As originally enacted, the DBA provided that, "except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' . . . *as amended, And as the same may be amended hereafter*, shall apply in respect to the injury or death" of any employee covered by the DBA.

(. . . continued)

purposes only and in no way affects the power or authority of the position as established by the statute." 20 C.F.R. § 701.301(a)(7) (2006); *see also* 55 Fed. Reg. 28606 (July 12, 1990) (original promulgation). For clarity, we will use the term "district director" throughout this brief.

55 Stat. 622 (1941) (emphasis added).[9] Apart from the provisions necessary to define coverage and accommodate certain geographic concerns, the DBA comprehensively incorporates the provisions of the Longshore Act.

Among the provisions designed to accommodate the geographic limitations of the Longshore Act, Congress included in the DBA special provisions regarding district directors and judicial review. First, Congress gave the Secretary of Labor authority to extend existing Longshore Act compensation districts or establish new ones "to include any area to which this Act applies; and to assign to each such district one or more [district directors] as the Secretary may deem necessary." 42 U.S.C. § 1653(a).[10] Second, in prescribing territorial jurisdiction for judicial review, Congress adopted a geographic alternative to Longshore Act section 21(c)'s place-of-injury rule because injuries sustained by DBA-covered employees would never occur within the United States. Congress instead linked judicial

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[9] In 1942, Congress deleted the phrase "And as the same may be amended hereafter" in order "to afford a clearer presentation." *See* Senate Report No. 1448, 77th Cong. 2d Sess. at 35-36; *see generally* House Report No. 2581, 77th Cong. 2d Sess. at 18-20.

[10] The Secretary implemented this provision by regulation, assigning responsibilities for specific DBA claims to various district directors in 20 C.F.R. § 704.101.

review of DBA claims to the place "*wherein is located the office of the [district director] whose compensation order is involved*." 42 U.S.C. § 1653(b) (emphasis added). Otherwise, the review scheme remained the same: both the Longshore Act and the DBA provided for initial judicial review of district director decisions in United States district court. 33 U.S.C. § 921(b) (1970); 42 U.S.C. § 1653(b).

Thus, claims under both the Longshore Act and the DBA, as originally enacted, plainly followed the same procedural path: the district director held hearings and adjudicated claims, and appeals were initially heard by the United States District Courts. The Acts' paths diverged only when determining territorial jurisdiction for judicial review, as was necessary given the different geographic areas covered by the Acts.

In 1972, Congress amended the Longshore Act. Among other changes, it created the Benefits Review Board to hear administrative appeals from ALJ decisions, and removed the district courts from the review scheme. 33 U.S.C. § 921(b). Congress then provided for initial judicial review of Board decisions "in the United States court of appeals for the circuit *in which the injury occurred*." 33 U.S.C. § 921(c) (emphasis added); *see Pearce*, 603 F.2d at 766, *citing* Pub. Law 92-576, § 15(a), 96 Stat. 1251, 1261-62 (1972).

With the 1972 amendments, Congress eliminated the district court's role in reviewing Longshore Act compensation orders. Although Congress did not

amend the DBA's judicial review provision, the DBA adopts the Longshore Act *as amended*, and *except as modified*. 42 U.S.C. § 1651(a). Courts have consequently grappled with the question whether the DBA adopts the Longshore Act's amended review provisions, providing for circuit court review, or whether the DBA's review provisions – which were previously consistent with those of the Longshore Act – lead to district court review.

B. Initial Jurisdiction to Review DBA Appeals Lies With the Circuit Courts of Appeals.

The DBA's review provision states:

> Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

42 U.S.C. § 1653(b) (hereinafter DBA section 3(b)).

DBA section 3(b)'s primary directive is that DBA compensation orders be judicially reviewed in the manner prescribed by sections 18 and 21 of the Longshore Act. Each of these Longshore Act provisions grants a specific level of initial court jurisdiction to review orders; the particular court varies depending on the type of order involved. For orders relating to defaulted payments, section 18 specifies proceedings in the "Federal district court for the judicial district in which

the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred." 33 U.S.C. § 918(a).

For Benefits Review Board orders, like the one at issue here, section 21(c) specifies court of appeals review: "Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred[.]" 33 U.S.C. § 921(c). It is these provisions, and not DBA section 3(b), that confer jurisdiction on the courts to review DBA compensation orders. To read section 3(b) as an independent grant of jurisdiction – a reading that would lead to district court review – would render meaningless the main thrust of the section, which is to provide for the same review of both Longshore Act and DBA compensation orders.[11]

Thus, section 3(b) modifies the Longshore Act, but only to the extent that modification is necessary. With respect to judicial review, that modification pertains solely to the geographic jurisdiction of the reviewing court. Because

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[11] Construing section 3(b) in any other manner leads to a nonsensical reading of the section. Literally, the section would read: "Judicial proceedings provided under section[]. . . 21 of the Longshoremen's and Harbor Workers' Compensation Act [for initial review by the courts of appeals] shall be instituted in the United States district court. . ."

sections 18 and 21 link jurisdiction to the location of the employer or the employee's injury – and in the DBA context, the location of injury will never be in the United States – the DBA necessarily modifies those portions of the Longshore Act to accommodate the DBA's geographic reach beyond the United States.

The Ninth and Seventh Circuits have held that the DBA's judicial review provision modifies only the geographic jurisdiction of the court, and that Longshore Act section 21 determines the level of court to perform initial judicial review. In *Pearce*, the Ninth Circuit noted that "[u]nder long established canons of statutory construction, statutes which incorporate other statutes by reference are considered either 'statutes of specific reference' or 'statutes of general reference." 603 F.2d at 767. "When a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption statute." 603 F.2d at 767, *quoting Director, OWCP v. Peabody Coal Co*., 554 F.2d 310, 322 (7th Cir. 1977). The court held that Congress' intent to make the DBA a statute of general reference was revealed in its "original language," which "expressly incorporated

later enacted amendments to the Longshoremen's Act." 603 F.2d at 767.[12] It found, therefore, that the DBA is a statute of general reference, to be read at any given time with all amendments made to the Longshore Act as of that reading. *Id.*

The Ninth Circuit acknowledged the DBA review provision's reference to the district court, but concluded that judicial review is governed by Longshore Act section 21 modified, by necessity, to accommodate the geographic reach of the DBA:

> [Section 3(b) of the DBA] is not a provision conferring jurisdiction on the United States district courts. As the provision itself shows, that jurisdiction is provided for by section 21 (33 U.S.C. § 921) of the Longshoremen's Act. The phrase "in the United States [d]istrict [c]ourt" is a specific reference to section 21 of the Longshoremen's Act, and is lifted from it. If it stood alone in section 3(b) of the Defense Base Act, it would be redundant, having been adopted [from

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[12] As noted *supra* at 13, the original language of the DBA applied the provisions of the Longshore Act "as amended, And as the same may be amended hereafter." *Pearce*, 603 F.2d at 767, *quoting* 55 Stat. 622 (1941). In 1942, "to afford a clearer presentation," Congress deleted the phrase "And as the same may be amended hereafter." *See* Senate Report No. 1448, 77th Cong. 2d Sess. at 35-36; *see generally* House Report No. 2581, 77th Cong. 2d Sess. at 18-20. Noting Congress' indication that the changes were merely for a clearer presentation, the Ninth Circuit concluded that the change was made simply to eliminate redundancy with the phrase "as amended," which already followed the name of the Longshore Act. *See also AIFA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 1113 n.3 (concluding that the DBA is a statute of general reference, and that Congress intended all current and future amendments to the Longshore Act to apply to the DBA unless inconsistent with a modifying DBA provision).

> Longshore Act section 21] by section 1(a) of the Defense Base Act . . . . The language immediately following: "of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved" is the modifying language. It is the only reason for the enactment of section 3(b) of the Defense Base Act. It was needed because the provision of § 21 of the Longshoremen's Act limiting jurisdiction to the court of the district where the injury occurred could not apply.

Id. at 770.

The court further reasoned that, because the DBA was a general reference statute, the amendment to the Longshore Act that provided for judicial review in the circuit courts automatically applied to the DBA.

> When the 1972 Amendments to the Longshoremen's Act abolished the jurisdiction of the district courts . . ., that change was adopted by the Defense Base Act, as a general reference statute, and the phrase "in the United States District Court" in § 3(b) of the Defense Base Act became inoperative; in effect, it was repealed. The language immediately following, however, still had a role to perform.

Id.

That role was to apply Longshore Act section 21(c)'s provision for review "in the United States court of appeals for the circuit" with the DBA's language "wherein is located the office of the [district director] whose compensation order is involved." *Id*. Thus, the Ninth Circuit held that jurisdiction over an appeal from the Board lay with the court of appeals within whose jurisdiction the district

director's office was located. Its reasoning was subsequently adopted by the Seventh Circuit.[13]

Other courts have not adopted that reasoning. The first court to consider the issue was the Sixth Circuit, which concluded that the entire provision constituted a modification of the Longshore Act, that it was unambiguous, and that it required review in the relevant district court. *Home Indem. Co. v. Stillwell*, 597 F.2d 87, 89 (6th Cir. 1979).[14] Other courts have agreed with the Sixth Circuit. *Felkner*, 930 F.2d at 1115 (5th Cir. 1991); *Lee v. Boeing Co., Inc*., 123 F.3d 801, 804-05 (4th Cir. 1997); *ITT Base Serv. v. Hickson*, 155 F.3d 1272 (11th Cir. 1998); *see also Hice*, 156 F.3d at 218 (without deciding the issue, stating inclination to find jurisdiction was in the district court).

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[13] Although finding jurisdiction in the courts of appeals, the Ninth Circuit noted that the office of the district director who administered the case was in Chicago, within the Seventh Circuit's jurisdiction rather than its own. Consequently, it transferred the case to the Seventh Circuit. *Id*. at 771. The Seventh Circuit approved the Ninth Circuit's holding that jurisdiction lay in the court of appeals, and decided the case. *Pearce v. Director, OWCP*, 647 F.2d 716 (7th Cir. 1981).

[14] The Ninth Circuit acknowledged the *Home Indemnity* decision but reached a different conclusion after comprehensively considering the proper construction of the statutory provisions. *See Pearce*, 603 F.2d at 765.

For several reasons, the interpretation adopted by the Ninth and Seventh Circuits should also be adopted by this Court. First, as demonstrated by the disagreement among the courts that have addressed the issue, the 1972 amendments to the Longshore Act rendered the DBA review provision ambiguous. *See Smiley*, 517 U.S. at 739. Accordingly, this Court should defer to the Director's interpretations, if they are reasonable and consistent with the statute, because the Director is the administrator of both Acts. *Morganti*, 412 F.3d at 411; *Spitalieri*, 226 F.3d at 172.

The Director's interpretation, which is the same as that adopted by the Ninth Circuit, is at least as textually sound as the approach taken by the Sixth Circuit and its followers. Indeed, the critical difference between the two is that the Sixth Circuit determined that the DBA's entire review provision amounted to a modification of the Longshore Act, while the Ninth Circuit concluded that only the portion of the DBA's review provisions that modified the pre-1972 Longshore Act – by providing for review where the deputy commissioner's office is located, rather than where the injury occurred – continued to modify the Longshore Act after its 1972 amendments.

Second, there are fundamental problems with the Sixth Circuit's approach. Despite the fact that Congress expressed its intent to have the DBA adopt the Longshore Act "*as amended, And as the same may be amended hereafter,*" 55

Stat. 622 (1941) (emphasis added), the Sixth Circuit's approach fails to apply the Longshore Act's judicial review amendment to the DBA. Instead, the Sixth Circuit's approach inappropriately inverts the modification scheme, using the DBA judicial review provision to modify the amended Longshore Act provision that it was supposed to adopt. This turns Congress' intent on its head.

Thus, only the Ninth Circuit's approach comports with Congress' original intent. That intent is revealed by the fact that Congress – when it originally passed the DBA – unequivocally expressed its desire to have the DBA review provisions mirror those of the Longshore Act. Just as the Longshore Act originally provided for decisions of the deputy commissioner to be reviewed by a federal district court, so too did the DBA. By virtue of 28 U.S.C. § 1291, any further review under either statute would have been in a federal court of appeals. *See Pearce*, 603 F.2d at 766. There is no evidence that Congress believed it was eliminating the historic consistency between the two Act's review provisions when it amended the Longshore Act in 1972. Indeed, the fact that Congress did not amend the DBA is "not evidence of an intent to preserve the old procedure in Defense Base Act cases. Rather, it is evidence that Congress assumed that, under § 1 of the Defense Base Act [42 U.S.C. § 1651], the new procedures would apply. . . ." *Id*. at 769.

The Ninth Circuit's conclusion is echoed in the dissent of Judge Hall in the Fourth Circuit's *Lee* case.

> Prior to 1972, claims made pursuant to the DBA were reviewed in the same manner as those arising under the LHWCA or the various other workers' compensation schemes; why would Congress have suddenly decided to treat these similar types of claims in a radically different manner?
>
> The answer, of course, is that Congress did not so decide. It expected, and rightly so, that an amendment of the LHWCA would be, in essence, an amendment of all the compensation statutes . . . .

123 F.3d at 808 (Hall, J., dissenting).

Third, the *Pearce* interpretation also ensures that all claimants and employers who are subject to the Longshore Act's compensation provisions – including those involved in claims under the DBA – are subject to the same review procedures. The competing interpretation requires DBA claimants and employers to endure an additional level of review. *See Lee*, 123 F.3d at 808 (Hall, J., dissenting) ("I do not believe that Congress intended that workers unfortunate enough to have been injured in a foreign land have the final resolution of their claims take months or years longer than those filed by workers in this country who suffer identical injuries. That is however, precisely the fate that awaits DBA claimants, who alone will be compelled to rehearse their arguments before the district court prior to the inevitable appeal.")

Adding district court review leads to practical difficulties as well. A claimant whose claim is initially denied may go without compensation for a longer period before final resolution of the case in his favor. This runs counter to one of

the main purposes of the Longshore Act: providing prompt compensation to injured employees. 33 U.S.C. § 914(a); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 145 (2d cir. 1997), citing *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir.1983). Likewise, an employer initially found liable for compensation must continue paying the ordered compensation for a longer time before any final resolution in its favor. Notably, if the employer is determined on appeal not to be liable for compensation, it cannot recoup the benefits it has already paid unless there are other ongoing compensation payments from which it can be reimbursed. 33 U.S.C. § 914(j); *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552, 556 (9th Cir. 1992); *Lennon v. Waterfront Transport*, 20 F.3d 658, 661 (5th Cir. 1994).

The addition of the district court step in the review process – and the time it adds before final resolution – is particularly unnecessary given that the Board "performs a review function identical to that which the District Courts performed prior to the 1972 amendments." *Kalaris v. Donovan*, 697 F.2d 376, 382 (D.C. Cir. 1983); *cf. Florida Power & Light Co. v. U.S. Nuclear Regulatory Comm'n*. 470 U.S. 729, 744 (1985) (noting the "negative effect" of duplicating review in the district court and court of appeals under the Hobbs Act, thus defeating "[o]ne crucial purpose of . . . jurisdictional provisions that place initial review in the courts of appeals, [which] is to avoid the waste attendant upon this duplication of

effort.”). Specifically, Congress gave the Board authority to review the hearing record and determine if the factual findings are supported by substantial evidence. 33 U.S.C. § 21(b)(3). This was precisely the review undertaken by district courts prior to 1972. *Kalaris*, 697 F.2d at 382 n.10, 383 n.17, 386-387.

In addition to eliminating redundancy of review where there is no evidence Congress intended it, application of the same review procedures under both Acts ensures that the courts that have developed expertise in applying the provisions of the Longshore Act – the courts of appeals – apply that expertise to those same provisions in DBA cases. The district courts, which do not hear appeals under the Longshore Act, have no expertise applying it.

In sum, this Court has jurisdiction under section 21(c) of the Longshore Act, as extended to the DBA, to review the Employer’s petition for review from the final Benefits Review Board decision affirming the award of compensation to the Claimant. *See also* Clare Been, Note, *Bypassing Redundancy: Resolving the Jurisdictional Dilemma Under the Defense Base Act*, 83 Wash. L. Rev. 219, 248 (2008) (concluding that “[c]areful review of the statutory text, canons of construction, legislative history, and public policy supports the finding that judicial review under the DBA begins in the courts of appeals.”).

II. THE BOARD AND ALJ CORRECTLY APPLIED THE FY 2006 MAXIMUM RATE BECAUSE THE CLAIMANT'S DISABILITY – HIS INABILITY TO EARN THE WAGES HE WAS EARNING WHILE WORKING FOR THE EMPLOYER – BEGAN IN FY 2006.

In the last paragraph of its brief, the Employer summarily states that the Claimant was injured in FY 2005, and that, as a result, he should be subject to the maximum compensation rate in effect during FY 2005, rather than the higher FY 2006 maximum applied by the ALJ and Board. Petitioner's Brief at 26. *See generally* 33 U.S.C. §§ 906(b), (c). There are two problems with this argument.

First, the Employer offers nothing to support its assertion that the Claimant was injured in FY 2005. Indeed, that assertion is contrary to the ALJ's factual findings that all of the events relevant to the claim occurred between November 28, 2005 and December 19, 2005, dates that fall within FY 2006. During this time period, the Claimant sought medical attention for his eyes, was diagnosed with bilateral pterygia, returned to work and thus continued his exposure to the stimuli that caused his injury, and decided to undergo excision of his right-eye pterygium.

Second, even if the Employer could establish that the Claimant was injured in FY 2005, the FY 2006 maximum rate would still apply because the determinative date is when the Claimant became disabled. The Longshore Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury[.]" 33 U.S.C. § 902(10). The

Claimant's incapacity to earn wages did not occur until FY 2006, when he ceased working to return to the United States for treatment in December 2005.

As the Board properly recognized, it is the date of disability onset, not of injury, that determines the applicable compensation rate in occupational disease cases. Bd. Order at 5- 6, *citing Reposky v. Int'l Transp. Servs.*, 40 BRBS 65 (2006). *See Todd Shipyards v. Black*, 717 F.2d 1280, 1291 (9th Cir 1983) (it is the time at which a claimant's disability due to occupational disease manifests itself through a loss of wage-earning capacity that controls his compensation rate); *cf. Bechtel Assocs, PC v. Sweeney*, 834 F.2d 1029, 1033 (D.C. Cir. 1987) (statute of limitations does not begin to run until occupational disease causes disability, *i.e.*, impairment of wage-earning capacity); *Marathon Oil v. Lunsford*, 733 F.2d 1139, 1141 (5th Cir. 1984) (same).

The Employer's reliance on *LeBlanc v. Cooper/ T. Smith Stevedoring, Inc*., 130 F.3d 157, 161 (5th Cir. 1997) is misplaced, because although it bases a claimant's compensation rate on the time of injury, rather than the onset of disability, it does so only in the context of traumatic injury claims, rather than those arising from occupational disease. *LeBlanc* is also in conflict with *Johnson v. Director, OWCP*, 911 F.2d 247, 249-50 (9th Cir. 1990), in which the Ninth Circuit held that, even in traumatic injury cases where the onset of disability is later than the accident that caused the injury, the worker's wages on the date of

disability provide the basis for his compensation rate. Regardless of whether *Johnson* or *LeBlanc* is correct with regard to traumatic injuries, there is no dispute that, in the case of occupational disease, the employee's wages at the time of disability control his compensation rate.

CONCLUSION

For the foregoing reasons, the Court should find that it has jurisdiction over the Employer's petition for review and affirm the ALJ's and Board's determination that the Claimant is subject to the maximum compensation rate in effect in fiscal year 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2008, the appropriate number of copies of the foregoing document were served by mail, postage prepaid, on each of the following:

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ANTI-VIRUS CERTIFICATION

I hereby certify, pursuant to Interim Local Rule 25(a)(6), that I have scanned for viruses the PDF version of the document that was submitted in this case as an e-mail attachment to agencycases@ca2.uscourts.gov, and that no viruses were detected. Name and version of anti virus detector used: McAfee Virus Enterprise 8.0.0

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