

No. 10-1399

IN THE
Supreme Court of the United States

DANA ROBERTS,
Petitioner,

v.

SEA-LAND SERVICES, INC., AND KEMPER INSURANCE CO.,
AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

**On a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**AMICUS CURIAE BRIEF OF THE
AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE LHWCA PROTECTS A SUBSTANTIAL NUMBER OF AMERICAN WORKERS..... 4

II. THE PLAIN MEANING OF 33 U.S.C. § 906(C) REQUIRES THAT THE CAP ON PERMANENT DISABILITY BENEFITS BE BASED ON THE NATIONAL AVERAGE WEEKLY WAGE CURRENT AT THE TIME OF AN ACTUAL AWARD OR COMPENSATION ORDER, NOT THE TIME OF THE INJURY. 7

A. The LHWCA Defines “Award” As a Compensation Order. 7

B. The Usual and Common Usage of “Award” In a Legal Context Refers To a Formal Determination. 10

C. The Legislative History Confirms That Congress Intended the Maximum Benefit Limitation to

Be Calculated As of the Time of
the Actual Award, Not When a
Worker Is Injured..... 11

III. THE POLICY AND PURPOSE
UNDERLYING THE LHWCA
REQUIRE THAT THE STATUTORY
MAXIMUM BE MEASURED AS OF
THE DATE OF THE COMPENSATION
ORDER, NOT THE DATE OF INJURY. 13

A. The LHWCA Is To Be Construed
Liberally To Achieve Its
Purposes..... 13

B. Measuring the Benefits Cap as of
the Date Benefits are Awarded
Furthers the Act's Purpose,
Which Is To Provide Sufficient
Support To Workers Who Have
Lost Earning Capacity, Rather
Than Making the Worker Whole. 14

C. Basing the Maximum Benefit On
the Date of Injury Provides a
Financial Incentive for
Employers/Carriers To Contest
and Delay Payment, Contrary to
the Purpose of the LHWCA..... 17

1. Speedy and Certain
Payment of Benefits Is An
Essential Feature of the
LHWCA. 17

2. Fixing the maximum
benefit to the date of injury
provides a financial

incentive	for
employer/carriers	to
contest liability and delay	
compensation.	20
CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

Alabama Dry Dock & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs, 804 F.2d 1558 (11th Cir. 1986) 21

Americana Dutch Hotel v. McWilliams, 733 So. 2d 536 (Fla. Dist. Ct. App. 1999) 16

Astrue v. Ratliff, --- U.S. ---, 130 S. Ct. 2521 (2010) 10, 11

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408 (1932)..... 13

Boroski v. DynCorp International, No. 11-10033 (11th Cir. Oct. 27, 2011)..... 5, 7

Crowell v. Benson, 285 U.S. 22 (1932) 4

Delahoussaye v. Live Oak Gardens, Ltd., 21 So. 3d 1060 (La. Ct. App. 2009) 15

Department of Rehabilitation v. Workers' Compensation Appeals Board, 70 P.3d 1076 (2003) 15

Director, Office of Workers' Compensation Programs v. Boughman, 545 F.2d 210 (D.C. Cir. 1976) 16

Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994)..... 10

<i>Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.</i> , 514 U.S. 122 (1995)	19
<i>Director, Office of Workers' Compensation Programs v. Perini North River Associates</i> , 459 U.S. 297 (1983)	14
<i>Director, Office of Workers' Compensation Programs v. Rasmussen</i> , 440 U.S. 29 (1979)	12
<i>Dunbar v. Tammelleo</i> , 673 A.2d 1063 (R.I. 1996)	17
<i>HDV Construction Systems, Inc. v. Aragon</i> , 66 So. 3d 331 (Fla. Ct. App. 2011)	15
<i>Hughes Aircraft Co. v. Jacobson</i> , 525 U.S. 432 (1999)	7
<i>Jimenez v. Quarterman</i> , 555 U.S. 113 (2009)	7
<i>Langfitt v. Federal Marine Terminals, Inc.</i> , 647 F.3d 1116 (11th Cir. 2011)	19
<i>Lockheed Aircraft Corp. v. United States</i> , 460 U.S. 190 (1983)	20
<i>Metropolitan Stevedore Co. v. Rambo</i> , 521 U.S. 121 (1997)	15
<i>Middleton v. Texas Power & Light Co.</i> , 249 U.S. 152 (1919)	19
<i>Morrison-Knudsen Construction Co. v. Director, Office of Workers'</i>	

<i>Compensation Programs</i> , 461 U.S. 624 (1983)	17
<i>Nielson v. State, Industries Special Indemnity Fund</i> , 684 P.2d 280 (Idaho 1984)	17
<i>Northeast Marine Terminal Co., Inc. v. Caputo</i> , 432 U.S. 249 (1977)	4, 14
<i>Pallas Shipping Agency, Ltd. v. Duris</i> , 461 U.S. 529 (1983)	9, 17
<i>Pennsylvania Railroad Co. v. O'Rourke</i> , 344 U.S. 334 (1953)	19
<i>Pillsbury v. United Engineering Co.</i> , 342 U.S. 197 (1952)	13
<i>Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs</i> , 449 U.S. 268 (1980)	17, 20
<i>Reed v. Steamship Yaka</i> , 373 U.S. 410 (1963)	14
<i>Roberts v. Director, Office of Workers' Compensation Programs</i> , 625 F.3d 1204 (9th Cir. 2010)	6, 7, 8, 9
<i>Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.</i> , 350 U.S. 124 (1956)	20
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205 (1917)	19
<i>Valladolid v. Pacific Operations Offshore, LLP</i> , 604 F.3d 1126 (9th Cir. 2010), <i>cert. granted</i> , 131 S. Ct. 1472 (2011)	5
<i>Voris v. Eikel</i> , 346 U.S. 328 (1953)	14

<i>Washington Metropolitan Area Transit Authority v. Johnson</i> , 467 U.S. 925 (1984).....	20
<i>Wilder v. United States</i> , 873 F.2d 285 (11th Cir. 1989).....	5
<i>Wilkerson v. Ingalls Shipbuilding, Inc.</i> , 125 F.3d 904 (5th Cir. 1997).....	6
Statutes	
5 U.S.C. §§ 8171-93.....	1, 5
29 U.S.C. § 676(a)(2).....	16
33 U.S.C. § 14(d) & (e).....	21
33 U.S.C. §§ 901-950.....	<i>passim</i>
33 U.S.C. § 902(2).....	4
33 U.S.C. § 904(b).....	4
33 U.S.C. § 905(a).....	4
33 U.S.C. § 906(b)(1).....	5
33 U.S.C. § 906(c).....	<i>passim</i>
33 U.S.C. § 908.....	5, 9
33 U.S.C. § 910.....	5
33 U.S.C. § 914(a).....	8, 20
33 U.S.C. § 919(c).....	9
33 U.S.C. § 919(e).....	2, 8, 10

42 U.S.C. §§ 1651–55	1, 4
43 U.S.C. § 1333(c).....	1, 5
46 U.S.C. § 688.....	15

Other Authorities

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H.R. Rep. No. 92-1441 (1972)	12
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Larson, Arthur, <i>The Nature and Origins of Workmen’s Compensation</i> , 37 Cornell L.Q. 206 (1952).....	18
McCluskey, Martha T., <i>The Illusion of Efficiency In Workers Compensation “Reform,”</i> 50 Rutgers. L. Rev. 657 (1998).....	19
National Average Wage Index, <i>available at</i> http://www.ssa.gov/oact/cola/AWI.html	20

Prosser, William, <i>Handbook of the Law of Torts</i> (4th ed. 1971)	18
Report of the National Commission on State Workmen's Compensation Laws (July 1972)	16
S. Rep. No. 92-1125 (1972)	12
Schoenbaum, Thomas J., <i>Admiralty and Maritime Law</i> (3d ed.2001).....	20
Rules	
Sup. Ct. R. 37.6	1
Regulations	
20 C.F.R. § 702.231	8

**IDENTITY AND INTEREST OF
*AMICUS CURIAE***

The American Association for Justice (“AAJ”) respectfully submits this brief as *amicus curiae* in support of the Petitioner. Letters from the parties giving consent to the filing of this amicus brief accompany this filing.¹

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Many AAJ attorneys represent injured workers entitled to pursue their legal remedies under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 44 Stat. 1424, as amended, 33 U.S.C. §§ 901-950. They also represent injured workers under the Defense Base Act, 42 U.S.C. §§ 1651–55, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c), and Federal Employees Compensation Act, 5 U.S.C. §§ 8171-93, to whom Congress has extended LHWCA benefits.

AAJ believes that the lower court erred in its construction of the maximum disability benefit payable to Petitioner in this case. The interpretation rendered by the court below is not only at odds with the plain text of the LHWCA, it undermines the Act’s purpose of providing prompt and certain compensation to injured workers.

¹ Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

The question presented, interpreting the statutory ceiling on disability benefits provided by the Longshore and Harbor Workers' Compensation Act, is a matter of great importance to workers covered by the Act, including not only maritime workers within the federal admiralty jurisdiction, but also many workers to whom Congress has extended Longshore benefits.

The lower court erred in stating that Congress did not define the statutory term "awarded." In fact, § 19(e) expressly states that an award is referred to in the Act as a "compensation order." Moreover, the lower court's definition—"entitled to"—cannot logically be substituted in other provisions where "awarded" appears. It also required the court to equate "receiving compensation" with "entitled to, even if not receiving compensation." The provisions relied upon by the lower court do not use the term definitionally and do not equate "award" with the mere fact of injury.

This Court has held that the plain meaning of the term "award" in a legal context denotes a judicial determination.

The legislative history of the provision clearly indicates that Congress equated "newly awarded compensation" with "receiving compensation for the first time."

The lower court's interpretation also undermines the policy and purpose of the LHWCA. This Court has consistently instructed that the Act be liberally construed to achieve its compensatory purpose.

The purpose of tort actions is to make the wrongfully injured person whole again, insofar as a monetary judgment can do so. The date of injury is, therefore, the reference point for damages. The purpose of workers' compensation, including the LHWCA, is not to restore the status quo pre-injury. It is to provide limited support during recovery. The date of injury has no logical connection to that determination. The proper baseline consistent with the purpose of the statute is the date of the actual award.

In addition, the lower court's interpretation undermines the goal of providing prompt and certain compensation to covered workers. The assurance of prompt and certain compensation was an essential part of the workers' compensation "bargain" which justified eliminating the worker's common-law tort remedy.

Under the lower court's interpretation, an employer/carrier, presented with a disability claim by an employee earning twice the national average wage, would be assured that its liability had already been capped as of the date of injury. The employer/carrier would have a financial incentive to controvert liability and delay payment in the hope that the injured worker, unable to work and facing mounting bills, will agree to a small settlement. Congress could not have intended such a harsh result.

ARGUMENT

I. THE LHWCA PROTECTS A SUBSTANTIAL NUMBER OF AMERICAN WORKERS.

The Court is here presented with interpreting a statute of great importance to American workers. Congress enacted the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901-950 ["LHWCA" or "the Act"] in 1927 to provide nonseaman maritime workers with medical benefits and compensation for temporary or permanent loss of earning capacity due to accidental injury, death, or occupational disease "arising out of and in the course of employment." *Id.* at § 902(2). Covered workers are entitled to these benefits irrespective of fault on the part of the employer. *Id.* at § 904(b). In return, the employer's liability under the Act is "exclusive and in place of all other liability." *Id.* at § 905(a).

In short, Congress under its admiralty power enacted the LHWCA to accomplish for nonseaman maritime workers "the same general purpose as the Workmen's Compensation Laws of the states." *Crowell v. Benson*, 285 U.S. 22, 40 (1932). *See also Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 257 (1977) (Congress enacted the LHWCA as "the only way to provide workmen's compensation for longshoremen and harborworkers.").

This Court's interpretation of the LHWCA also affects many other workers. For example, the Defense Base Act, 42 U.S.C. §§ 1651-55, extends coverage under the LHWCA to private civilians performing work for the United States in other

countries. *See, e.g., Boroski v. DynCorp Int'l*, No. 11-10033, 2011 WL 5555686, at *1 n.1 (11th Cir. Nov. 16, 2011). Among those workers are contractors working on U.S. military installations and projects in Iraq and Afghanistan.

In addition, the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(c), extends Longshore benefits to employees working on the outer continental shelf of the United States, often at off-shore drilling facilities. *See, e.g., Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 1472 (2011). The Nonappropriated Fund Instrumentalities Act, codified as subchapter II of Federal Employees Compensation Act, 5 U.S.C. §§ 8171-93, extends LHWCA coverage to civilian employees in post exchanges, service clubs, and similar facilities of the Armed Forces. *See, e.g., Wilder v. United States*, 873 F.2d 285, 287-88 (11th Cir. 1989).

The interpretative question in this case can be briefly stated. Roberts was injured while working for Sea-Land Services at its Alaska marine terminal in 2002. He filed an LHWCA claim for disability benefits. After making some initial payments, the carrier contested coverage. An Administrative Law Judge ruled in Roberts' favor in October 2006 and issued a compensation order.

The LHWCA disability benefit is based on the claimant's weekly wage at the time of injury, 33 U.S.C. §§ 908 & 910, but may not exceed 200 percent of the national average weekly wage as determined by the Department of Labor. § 906(b)(1). At issue in this case is whether that ceiling is based on the

national average as of the date of injury or the date of the award.

Section 906(c) addresses this issue and states that the Secretary of Labor's determination of the average wage for the current fiscal year,

shall apply to employees or survivors *currently receiving compensation* for permanent total disability or death benefits during such period, as well as those *newly awarded compensation* during such period.

33 U.S.C. § 906(c) (emphasis added).

The Ninth Circuit Court of Appeals held that, as a matter of statutory construction of § 906(c), "awarded compensation" did not refer to the ALJ's compensation order. According to the court below, "Congress apparently used 'awarded compensation' and 'entitled to compensation' to mean the same thing." *Roberts v. Dir., Office of Workers' Comp. Programs*, 625 F.3d 1204, 1207 (9th Cir. 2010). Roberts became entitled to compensation when he was injured. The court therefore concluded that Roberts' compensation was capped at 200 percent of the national average weekly wage as computed by the Secretary of Labor for FY 2002. *Id.* at 1208.

The court acknowledged, but declined to follow, *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 906 (5th Cir. 1997), which held that the date of the ALJ's compensation order was determinative under § 906(c). 625 F.3d at 1207-08. The Eleventh Circuit has since held that the date of a formal award or compensation order is the operative date for calculating the cap. *Boroski v.*

DynCorp Intern., No. 11-10033, 2011 WL 5555686, at *1 n.1 (11th Cir. Nov. 16, 2011). The Eleventh Circuit explicitly rejected the Director’s argument “that it is the date of onset of the disability, and not the date on which a permanently totally disabled worker is awarded compensation, that determines the worker’s applicable maximum compensation, adjusted annually thereafter.” *Id.* at *7.

AAJ respectfully submits that the court below erred. Both the plain text of § 906(c) and the underlying purposes of the Act require that the maximum benefit be set at twice the national average weekly wage at the time the compensation order actually awards benefits.

II. THE PLAIN MEANING OF 33 U.S.C. § 906(C) REQUIRES THAT THE CAP ON PERMANENT DISABILITY BENEFITS BE BASED ON THE NATIONAL AVERAGE WEEKLY WAGE CURRENT AT THE TIME OF AN ACTUAL AWARD OR COMPENSATION ORDER, NOT THE TIME OF THE INJURY.

A. The LHWCA Defines “Award” As a Compensation Order.

Matters of statutory construction, of course, “begin[] with the plain language of the statute.” *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). Where the text provides a clear answer, interpretation “ends there as well.” *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

The court below incorrectly stated that the LHWCA “does not expressly define the terms ‘award’ or ‘awarded.’” 625 F.3d at 1206. The court then

fashioned its own definition which equates “newly awarded” to “newly entitled to.” *Id.* at 1207.

Congress did, in fact, define “award.” Section 19(e) of the Act makes provision for an “order rejecting the claim or making the award (*referred to in this Act as a compensation order*).” 33 U.S.C. § 919(e) (emphasis added).

Moreover, in other provisions of the LHWCA, the phrase “entitled to” cannot logically be substituted for “awarded.” For example, the Act requires that compensation “be paid periodically, promptly, and directly to the person entitled thereto, *without an award*, except where liability to pay compensation is controverted by the employer.” 33 U.S.C. § 914(a) (emphasis added). The implementing regulations promulgated by the Department of Labor similarly provide for “payment of compensation without an award.” 20 C.F.R. § 702.231. Under the Ninth Circuit’s definition, such provisions would require payment of compensation without entitlement to compensation.

In addition, to make the first part of § 906(c) consistent with its interpretation of “award,” the lower court declared Roberts to be “currently receiving compensation for permanent total disability” in 2002 for purposes of § 906(c), even though Sea-Land Services never paid Roberts any such compensation. In the court’s view, “[t]he ‘currently receiving’ clause of section 6(c) unambiguously refers to the period during which an employee was *entitled* to receive compensation for permanent total disability, *regardless of whether his employer actually paid it.*” 625 F.3d at 1209 (emphasis added). The fact that the court’s

interpretation of “award” forced it into a zen-like reading of the rest of the sentence strongly indicates that the court’s reading of the plain text simply went astray. “Awarded” means actually awarded; “receiving” means actually receiving.

The lower court, however, attached significance to two subsections of § 908 that use “award” and “awarded” “to refer to an employee’s entitlement to compensation under the Act generally, separate and apart from any formal order of compensation.” 625 F.3d at 1206-07 (citing § 908(c)(22) (defining the “award” for loss of certain body parts) and § 8(c)(20) (referring to amount awarded for serious disfigurement of the face, head, or neck)).

Those subsections are simply part of a schedule of benefits for specific injuries. Congress’ use of the term “award” there is not definitional. Nor do the provisions support the proposition that an “award” occurs at the time of injury. Indeed, the text suggests that some decision with respect to entitlement must follow the fact of injury.

In addition, it is not the case that there is no compensation order where the employer/carrier has not contested a claim. This Court has noted that “[e]mployers are not required to contest their liability in order to obtain a formal compensation award.” *See Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 539 (1983). The Act provides that after a claim has been filed, notice has been given to the employer and no hearing has been ordered within 20 days, “the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.” 33 U.S.C. § 919(c). The provisions cited by the lower

court which appear to require payment to a claimant without a formal compensation order do not mean that no order will be entered. They simply mean that the employer, if not contesting the claim, shall not delay payments while awaiting the entry of such an order.

B. The Usual and Common Usage of “Award” In a Legal Context Refers To a Formal Determination.

Even setting aside Congress’ definition of “award” as “compensation order” in 33 U.S.C. § 919(e), the ordinary meaning of “award” denotes some formal determination of entitlement. It does not simply mean “entitled to.”

This Court has stated that legal terms used by Congress in the LHWCA are to be interpreted “to have the meaning generally accepted in the legal community at the time of enactment.” *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (construing “burden of proof”). The verb “award,” this Court recently pointed out, has a settled meaning in the litigation context:

It means “[t]o give or assign *by* sentence or judicial determination.” *Black’s Law Dictionary* 125 (5th ed.1979) (emphasis added); *see also Webster’s Third New International Dictionary* 152 (1993) (“to give *by* judicial decree” (emphasis added)).

Astrue v. Ratliff, --- U.S. ----, 130 S. Ct. 2521, 2526 (2010) (construing the Equal Access to Justice Act).

The plain meaning of the word “award” . . . is thus that the court shall “give or assign by . . . judicial determination” to the “prevailing party.”

Id. There is no indication that in § 906(c) Congress intended anything other than the word’s plain meaning.

C. The Legislative History Confirms That Congress Intended the Maximum Benefit Limitation to Be Calculated As of the Time of the Actual Award, Not When a Worker Is Injured.

33 U.S.C. § 906(c) originated in the the 1972 amendments to the LHWCA, which replaced a fixed dollar cap on disability benefits with the current cap based on the national average weekly wage.

The legislative history indicates that Congress did not intend to base this cap on the national average weekly wage in place on the date of injury. Such an interpretation would set a different ceiling for different claimants depending upon their year of injury. Instead, as the House Report accompanying the legislation explains, the maximum for all recipients would rise with increases in the national average. After describing the phase-in of the maximum from 125 percent by steps to 200 percent of the national average weekly wage, the House Report states:

The bill also 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. . . . These employees will receive annual increases based on percentage increases in the national average weekly wage.

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, H.R. Rep. No. 92-1441, at 2 (1972), 1972 U.S. Code Cong. & Admin. News, 4698, 4700.

Similarly, the Senate Committee on Labor and Public Welfare, in its section-by-section analysis, indicated that “newly awarded compensation” refers to those who are not only entitled to compensation but who actually begin receiving it.

Subsection (d)[§ 906(c) of the Act] states that determinations of national average weekly wage made with respect to a period apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as those *who begin receiving compensation for the first time* during the period.

S. Rep. No. 92-1125, at 18 (1972) (emphasis added). *See also Dir., Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 43 (1979). Clearly Congress did not intend “newly awarded compensation” to mean “newly injured” or “newly entitled to compensation.” The Senate report explicitly states that “newly awarded compensation” means “receiving compensation for the first time.”

III. THE POLICY AND PURPOSE UNDERLYING THE LHWCA REQUIRE THAT THE STATUTORY MAXIMUM BE MEASURED AS OF THE DATE OF THE COMPENSATION ORDER, NOT THE DATE OF INJURY.

A. The LHWCA Is To Be Construed Liberally To Achieve Its Purposes.

This Court has long made clear that the Act is to be construed with a view toward achieving its compensatory purposes:

The measure before us, like recent similar legislation in many states, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be *construed liberally in furtherance of the purpose for which they were enacted* and, if possible, so as to avoid incongruous or harsh results.

Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932) (emphasis added). *See also Pillsbury v. United Eng'g Co.*, 342 U.S. 197, 200 (1952) (The LHWCA “is a humanitarian act, and . . .

should be construed liberally to effectuate its purposes.”). Over the course of decades, this Court has repeatedly and consistently restated this rule of construction. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Reed v. S.S. Yaka*, 373 U.S. 410, 415 (1963); *Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977); *Dir., Office of Workers’ Comp. Programs v. Perini N. River Assoc.*, 459 U.S. 297, 316 (1983).

B. Measuring the Benefits Cap as of the Date Benefits are Awarded Furthers the Act’s Purpose, Which Is To Provide Sufficient Support To Workers Who Have Lost Earning Capacity, Rather Than Making the Worker Whole.

It is a “cardinal principle of damages” in the law of torts that compensatory damages are awarded for the purpose of “repairing plaintiff’s injury or . . . making him whole as nearly as that may be done by an award of money.” 4 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* § 25.1, at 490 (2d ed. 1986). Traditionally, the tort suit aims at “returning to the pre-tort status quo.” John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law For the Redress of Wrongs*, 115 Yale L.J. 524, 604 (2005). Thus, in tort actions for personal injury, the date of injury is a critical baseline for damages.

Workers’ compensation claims are a different matter. Like state worker compensation statutes, the LHWCA is neither an indemnity statute nor a replication of the common law cause of action for negligent injury, such as the right of action Congress provided to seamen under the Jones Act, 46 U.S.C.

§ 688. Instead, disability payments under the LHWCA are “compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages.” *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 126 (1997). The essence of disability, under the Act, “is economic, not physical.” *Id.* at 125.

The level of benefits is not set to make the claimant whole, but to provide sufficient monetary support to keep the injured worker from becoming dependent upon the state or society.

As the California Supreme Court explained,

The purpose of the [workers compensation] award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability [by] assuring the injured workman subsistence while he is unable to work.

Dep’t of Rehab. v. Workers’ Comp. Appeals Bd., 70 P.3d 1076, 1087 (2003) (internal quotations omitted). See also *HDV Constr. Sys, Inc. v. Aragon*, 66 So. 3d 331 (Fla. Dist. Ct. App. 2011) (“The purpose of workers’ compensation is to provide statutorily-limited sustenance and medical benefits . . . so that these expenses are not visited on society at large.”); *Delahoussaye v. Live Oak Gardens, Ltd.*, 21 So. 3d 1060, 1062-63 (La. Ct. App. 2009) (Workers’ compensation seeks to provide “basic subsistence levels thought to be reasonable and economically feasible, not to replace wages at pre-injury levels.”).

The relevant baseline for determining the appropriate amount for the claimant's support is not the date of injury, which may be years in the past. It is instead the date of the compensation order.

In setting the maximum disability benefit, Congress looked to the National Commission on State Workmen's Compensation Laws, which Congress had created to assess whether state compensation systems provided "an adequate, prompt, and equitable system of compensation for injury or death arising out of or in the course of employment." 29 U.S.C. § 676(a)(2) (1976).

One of the most important recommendations in the Commission's landmark report was that maximum disability benefits "be at least 200 percent of the State's average weekly wage." The Report of the National Commission on State Workmen's Compensation Laws Recommendation 3.9 (July 1972). Significantly, the Commission recommended that, "for all maximum weekly benefits, the maximum be linked to the State's average weekly wage *for the latest available year* as determined by the agency administering the State employment security program." *Id.* at R. 3.10. (emphasis added) Congress adopted these recommendations in amending the LHWCA to add 33 U.S.C. § 906(c). *Dir., Office of Workers' Comp. Programs v. Boughman*, 545 F.2d 210, 215 n.15 (D.C. Cir. 1976).

The few reported state judicial decisions to address this issue indicate adoption of this recommendation. See *Americana Dutch Hotel v. McWilliams*, 733 So. 2d 536, 537 (Fla. Dist. Ct. App. 1999) (Florida workers compensation total benefits "shall not exceed the maximum weekly compensation

rate in effect at the time of payment”); *Dunbar v. Tammelleo*, 673 A.2d 1063, 1067 (R.I. 1996) (claimant’s benefits limited by statute to 150% of the average state weekly at the time of the award); *Nielson v. State, Indus. Special Indem. Fund*, 684 P.2d 280, 285 (Idaho 1984) (claimant award limited to 90% of the currently applicable average weekly wage).

C. Basing the Maximum Benefit On the Date of Injury Provides a Financial Incentive for Employers/Carriers To Contest and Delay Payment, Contrary to the Purpose of the LHWCA.

1. Speedy and Certain Payment of Benefits Is An Essential Feature of the LHWCA.

The central purpose of workers compensation legislation, including the LHWCA, is to provide prompt and certain payment of compensation owed under the Act. See *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 461 U.S. 624, 636 (1983) (construing LHWCA consistent with its “goal of providing prompt compensation to injured workers”); *Pallas Shipping*, 461 U.S. at 539 (noting the “Act’s aims of ensuring prompt payment to injured workers” without the burden of litigating claims”); *Potomac Elec. Power Co. v. Dir., Office of Workers’ Comp. Programs*, 449 U.S. 268, 279 (1980) (LHWCA designed to afford “prompt relief without the expense, uncertainty, and delay that tort actions entail.”).

Speed and certainty of compensation are not mere incidentals. Indeed, this Court has indicated that the speed and certainty of compensation under workers compensation legislation, compared to tort causes of action against employers, are essential to the constitutional validity of depriving injured workers of their common law remedies.

The industrial revolution brought progress and prosperity to America, but it also left legions of injured and maimed workers and destitute families. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 69-72 (1967). Tort law at the end of the 19th Century largely shielded the nation's industries from liability, erecting an "unholy trinity" of often-insurmountable defenses of contributory negligence, assumption of risk, and the fellow-servant rule. William Prosser, *Handbook of the Law of Torts* § 80 (4th ed. 1971); see also Arthur Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206, 223 (1952).

Beginning with New York in 1910 and spreading rapidly across the country, states enacted workers compensation statutes based on the economic doctrine that the cost of workplace injuries ought to be borne by employers, who are best able to prevent accidents and spread their cost. 1 Arthur Larson, *Larson's Workers' Compensation Law* § 4.30 (1998). Such legislation has been described as striking a "bargain" by which laborers gave up their right to seek full recovery in tort in exchange for quick and certain compensation through an administrative process. See 1B. Larson at § 1.04; Martha T. McCluskey, *The Illusion of Efficiency In Workers Compensation "Reform,"* 50 Rutgers. L. Rev.

657, 670 (1998). As the Eleventh Circuit recently observed, the LHWCA is premised on this same “bargain.” *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1125 (11th Cir. 2011).

This Court upheld New York’s statute, recognizing the bargain whereby the “employee is no longer able to recover as much as before in case of being injured through the employer’s negligence, [but] has a certain and speedy remedy without *New York Central R. Co. v. White*, 243 U.S. 188, 201 (1917).” Indeed, the Court “doubted whether the state could abolish all rights of action, . . . without setting up something adequate in their stead.” Two years later, this Court reaffirmed that abolition of the injured worker’s common law cause of action does not violate due process “when established as a reasonable substitute for the legal measure of duty and responsibility previously existing.” *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919).

After this Court held in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), that state workers’ compensation programs could not apply to maritime workers within the federal admiralty jurisdiction, Congress enacted the LHWCA to provide workers’ compensation for those workers. See *Pennsylvania R.R. Co. v. O’Rourke*, 344 U.S. 334, 335-37 (1953).

This Court has consistently maintained that the LHWCA, like workers compensation statutes, is based on a “quid pro quo” in which employees gave up the right of suit for damages for personal injuries in return for prompt and certain compensation payments under the Act. *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 131 (1995); *Washington*

Metro. Area Transit Auth. v. Johnson, 467 U.S. 925, 931-32 (1984); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983); *Potomac Elec. Power*, 449 U.S. at 282; *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

2. Fixing the maximum benefit to the date of injury provides a financial incentive for employer/carriers to contest liability and delay compensation.

In order to provide compensation with speed and certainty, the LHWCA contemplates that in most cases the employer will pay benefits owed to an injured worker under the Act without requiring the claimant to obtain a compensation order. *See* 33 U.S.C. § 914(a). Thus,

[a] fundamental aspect of the Act is the expectation that employers will pay compensation promptly and directly without the necessity of a formal award.

¹ Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-1, at 381 (3d ed. 2001).

When an injured employee has lost more earning capacity than the maximum of 200 percent of the national weekly wage, using the national average that is current at the time of the compensation order encourages prompt voluntary payment. National average wages have risen annually without exception since 1951. *See* National Average Wage Index (2010), *available at* <http://www.ssa.gov/oact/cola/AWI.html> (last visited Nov. 16, 2011). An employer/carrier can therefore

anticipate that extended delay will likely result in a higher compensation award.

The Ninth Circuit's construction of § 906(c), however, points in exactly the opposite direction. If an employer/carrier is presented with a claim by a highly paid employee and is assured that its payment is already capped at twice the national average as of the date of injury, there is no incentive to pay the claim voluntarily. Indeed, the lower court's interpretation creates a financial incentive for the employer/carrier to controvert liability,² in the hope that the injured worker, facing mounting bills, may settle for a small amount.

The Eleventh Circuit rejected a proposed construction of the LHWCA that would have extinguished a claim for permanent total disability benefits if the employee dies prior to an award. Judge Hatchett explained:

Under Dry Dock's interpretation of the Act, an employer might be inclined to delay payment for as long as possible, harboring the expectation that an employee's death would limit its liability. Congress could not have intended such a result.

Alabama Dry Dock & Shipbuilding Co. v. Dir., Office of Workers' Comp. Programs, 804 F.2d 1558, 1560 (11th Cir. 1986).

² By filing notice of controversion of liability, the employer/carrier is exempt from interest or delay penalties up to the date of the award. 33 U.S.C. § 14(d) & (e).

AAJ submits that Congress similarly could not have intended to create a financial incentive for employers/carriers to contest liability and delay payment owed under the Act.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Date: November 21, 2011 Respectfully submitted,

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