No. 20-1013

In the Supreme Court of the United States

CLARENCE J. SIMON, JR.,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, LONGNECKER PROPERTIES, INC., AND SEABRIGHT INSURANCE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS LONGNECKER PROPERTIES, INC. AND SEABRIGHT INSURANCE COMPANY

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THE QUESTION PROPERLY PRESENTED

The compromise section of 33 U.S.C. Section 933(g) states that a Longshore worker forfeits the right to benefits by settling a third party tort claim without the prior written approval of the employer and workers' compensation carrier. The question presented is whether a writ should be granted when the lower courts properly applied 933(g) to bar petitioner's claims for benefits as a result of his settlement with the third party, Tri-Drill, without the prior written consent of his employer and its workers' compensation carrier.

CORPORATE DISCLOSURE STATEMENT

Longnecker Properties, LLC is a privately-held corporation with no parent company and no ownership by any publicly traded company.

Clarendon National Insurance Company ("CNIC") is the successor in interest to SeaBright Insurance Company with respect to the insurance policy issued to Longnecker Properties. CNIC is wholly owned by Enstar Holdings (US) LLC, which is wholly owned by Enstar USA, Inc. Enstar USA, Inc. is wholly owned by Enstar (Asia-Pac) Holdings Limited, which is wholly owned by Kenmare Holdings Ltd. Kenmare Holdings Ltd. is wholly owned by Enstar Group Limited, the shares of which are publicly traded on the NASDAQ exchange.

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INTRODUCTION

The Petition for Writ of Certiorari rehashes arguments that have been made and rejected six times – by the U.S. District Court for the Western District of Louisiana, by the USDOL Administrative Law Judge (twice), by the Benefits Review Board, and by the U.S. Fifth Circuit Court of Appeal (twice). If we count petitions for rehearing, this matter has been briefed eight times in the lower courts, and each time the arguments of Petitioner have been properly and soundly rejected. This, his **ninth** and final attempt, should be rejected just the same. Petitioner incorrectly claims that there is a conflict in the circuits, when in fact there is none. Petitioner incorrectly claims that there was no valid settlement of the third party claim to trigger 33(g), when in fact there was one. He incorrectly phrases the questions presented and improperly relies upon unsupported assertions that are not in evidence. This case involves matters of well-settled law, which the lower courts applied correctly. The Petition for Writ of Certiorari should be denied accordingly.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fifth Circuit correctly affirmed the ALJ and the BRB in holding that 33 U.S.C Section 933(g) bars Clarence Simon from recovering LHWCA benefits because he previously settled his claim with a third party without obtaining the employer's prior written approval. The appellate court found no error of fact or law in the decisions by the Administrative Law Judge ("ALJ") and Benefits Review Board ("BRB") that a settlement

existed and that the settlement was valid based on collateral estoppel.

The factual finding by the lower courts that Petitioner settled without his employer's consent is supported by substantial evidence in the record and by state law on settlements. The settlement itself has been fully litigated between the parties in the United States District Court for the Western District of Louisiana and the U.S. Fifth Circuit Court of Appeals, and thus collateral estoppel applies to this case. 933(g) of the LHWCA bars Petitioner from recovering further compensation from his former employer, and there is no dispute among the Circuit Courts of Appeal as to the application of this bar. All cases cited by Petitioner out of the Ninth Circuit agree with the Fifth Circuit in principle, and are easily distinguished on factual grounds.

Respondents also dispute Petitioner's assertions of fact in his "Questions Presented" that his counsel lacked "actual or apparent authority" to finalize a settlement on Petitioner's behalf. As discussed below, this issue was already decided against Petitioner and in favor of Respondents in the U.S. District Court and the Fifth Circuit Court of Appeals. Respondents object to the unsworn self-serving testimony of counsel and request that this Court disregard it entirely.

REASONS FOR DENYING CERTIORARI

Petitioner's Petition for a Writ of Certiorari should be denied for three compelling reasons. First, there is simply no factual dispute as to the existence of a settlement, and there is no need for this Court to wade through Petitioner's blatant attempts to rehash settled facts and previously rejected arguments. Second, Petitioner's assertion that there is a conflict in circuit opinions is based entirely on a mischaracterization of those opinions. In truth, there is no such conflict, as each of Petitioner's citations can easily be distinguished on simple factual issues. Third, the Fifth Circuit's decision properly applied U.S.C. 933(g), which specifically recognizes the remedy afforded to the employer by all of the separate lower courts who have reviewed the facts.

I. NO FACTUAL DISPUTE EXISTS AS TO THE EXISTENCE OF A SETTLEMENT AND THE APPLICABILITY OF 33 U.S.C. 933(g).

Petitioner's first two questions can be restated very simply as attempts to remix factual evidence that is concrete in its foundation. The Benefits Review Board and United States Fifth Circuit Court of Appeal were bound to accept the administrative law judge's findings of fact and conclusions of law so long as they were supported by substantial evidence, were rational, and were consistent with applicable law. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991); 33 U.S.C.A. § 921(b)(3). As the *Mijangos* court noted, appellate review of an administrative law judge's findings of fact is not an exercise in engaging in a *de novo* review of the evidence or to substitute its

views for those of the ALJ. Deference to factual review is key.

What is that concrete foundation? The foundation starts with a decision by the U.S. District Judge after a contradictory hearing that Petitioner and his attorney settled his tort claim with Tri-Drill without the Employer's consent, and that collateral estoppel validated the existence of that settlement.[1] The Fifth Circuit subsequently affirmed that decision. Those facts and that legal determination were confirmed by the Administrative Law Judge and every court since.

Petitioner has had ample opportunity to litigate these factual issues in the lower courts, and has shown no factual basis to assert that Petitioner's counsel "lacked authority" or that Petitioner "did not accept" the settlement. In truth, these are factual issues that have been well settled by all of the previous courts who have reviewed the substantial evidence that contradicts these assertions.

Petitioner bore a heavy burden in those lower courts to show that these decisions were not supported by substantial evidence or that they did not exercise the proper standard of review, and failed to meet that burden. The Fifth Circuit and the Benefits Review Board both correctly applied the law of review as evidenced by Petitioner's lack of briefing on that point. The overwhelming evidence is crystal clear: Petitioner entered into a settlement agreement with a third party

[1] This citation was not included in petitioner's brief, but is found at *Simon v. Longnecker Properties*, No. 12-1178, 2015 WL 9482899 (W.D. LA. December 28, 2015)

tortfeasor that jeopardized the employer's ability to transfer the potential LHWCA loss.

II. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR DECISIONS OF OTHER CIRCUITS.

Petitioner understands full well that arguing for judicial review of factual issues is a hill he will expire upon. Instead, Petitioner claims, without support, that this writ must be granted to correct a conflict among the circuits, yet fails in every regard to establish any conflict. As the United States Fifth Circuit Court of Appeal has stated, future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. **There are no exceptions to this rule**: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction. *Nicklos Drilling Co. v. Cowart,* 907 F.2d 1552 (5th Cir. 1990).

Likewise, in each and every case cited by Petitioner, the Ninth Circuit Court of Appeals wrestled with the same issue, whether to bar the respective claimant's future Longshore claims. Petitioner first relies upon *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558 (9th Cir. 1990) in a failed quest to note a conflict, calling *Mobley* "similar factual circumstances." There is nothing "similar" about *Mobley* to the case *sub judice*. The Ninth Circuit determined that the claimant in *Mobley* timely notified the employer of his asbestos related settlements with various tortfeasors *prior* to the time

the employer was subject to future compensation exposure and that Mobley did not enter into a settlement for "less than the compensation" to which he was actually entitled. Just as the Fifth Circuit addressed the bar to compensation as a result of Petitioner's actions in this case, the Ninth Circuit also addressed the defense asserted by the employer to any future benefits pursuant to 33(g) as a result of the asbestos settlements.

Yet, Petitioner failed to note important distinctions. The administrative law judge in *Mobley* denied claimant indemnity benefits in the case for lack of evidence of disability, meaning no future indemnity was even owed to that claimant, so he never settled for "less than" the compensation under the Act (a critical requirement for the 33(g) bar). In contrast, Petitioner fails to note that the administrative law judge, affirmed by the BRB in review, specifically found that Petitioner's settlement with Tri-Drill was less than his lifetime entitlement to compensation under the Act, a factual finding not to be disturbed on review. Benefits Review Board Opinion 17-0579, October 11, 2018, at page 5. Thus, *Mobley* can be easily distinguished from the case at bar because *Mobley*'s employer did not show one critical requirement under 33(g), while Petitioner's employer **conclusively proved** that Petitioner settled for less than the compensation under the Act.

Second, Petitioner failed to note that in the case at bar, Petitioner's act of settling with Tri-Drill at a critical juncture in the tort claim (the motion for summary judgment which dismissed Tri-Drill from the proceeding with prejudice) affected the employer's right

of recovery and/or transfer of the loss. In addition, unlike the claimant in *Mobley*, Petitioner continues to deny the existence of the settlement even after it was confirmed by a United States District Judge after a contradictory hearing.

In fact, Petitioner fails to note that the Benefits Review Board found that Petitioner did not challenge:

1. The ALJ's findings that he was a "person entitled to compensation";

2. The ALJ's findings that Petitioner would be entitled to more than $8,000 under the Act; and

3. The ALJ's findings that Employer gave no prior approval of the settlement between Petitioner and Tri-Drill. BRB opinion No. 17-0579, page 7.

Thus, the BRB "affirmed these findings as unchallenged on appeal." BRB opinion No. 17-0579, footnote 11. Petitioner cannot insinuate in his brief that these are still viable issues herein.

In effect, Petitioner relies on a Ninth Circuit opinion that **a claimant settled his tort claim with no ill effect on the employer** to support his contention that **Petitioner did <u>not</u> settle his tort claim** (which did have an adverse effect on his employer). This is a false comparison. There was ill effect on the employer herein, and petitioner did in fact settle his claim. Clearly, any reliance on *Mobley* in creating a "conflict" is misplaced and misleading as nothing in the *Mobley* opinion differs from Fifth Circuit jurisprudence on the application of 33(g)'s bar.

Petitioner's other citations should also be quickly disregarded. Claimant next cites *Mallott & Peterson v. Dir. OWCP*, 98 F.3d 1170 (9th Cir. 1996), overruled on other grounds by *Price v. Stevedoring Service of America,* 697 F.3d 820 (9th Cir. 2012), where the Ninth Circuit affirmed the BRB's finding that claimant's attorney was not a "representative" within the meaning of Section 33(g). But *Mallott*, like *Mobley,* does not create a "conflict", and is also in harmony with the Fifth Circuit's opinions. *Mallott* recognized that a settlement without the employer's consent will trigger the effects of Section 33(g). Again, the only "distinction" is factual: the attorney for the claimant in that case signed an unauthorized settlement *under California law*. In this case, the federal district judge and the Benefits Review Board alike took pains to examine *Louisiana law* on collateral estoppel to determine that Petitioner had, in fact, perfected a valid and binding settlement with the third party defendant.

Thus, there is no conflict, and nothing to resolve, because both the Ninth Circuit and Fifth Circuit agree: lower courts ultimately look to state substantive law to determine whether a claimant in any given tort case has entered into a valid and binding settlement. This is precisely what the U.S. District Court did in this case in finding that there had been a valid and binding settlement without the prior written consent of Respondents. The Fifth Circuit correctly affirmed that decision.

Next, Petitioner cites *O'Neil v. Bunge Corp.,* 365 F.3d 820, 38 BRB 57 (CRT) (9th Cir. 2004) but fails to state that *O'Neil* follows the same analysis outlined

above vis-a-vis the application of state law for contractual analysis. In fact, *O'Neil* does not refer to tort settlements that fall under 933(g) at all, an important distinction that Petitioner failed to address. In *O'Neil*, the Ninth Circuit noted that state law should apply to settlements under the Act, but where the LHWCA imposed more stringent requirements—such as the signature requirement under 908(i)—it would not read an exception into the rule posed by that section.

The language cited by Petitioner is a red herring; not only are more stringent LHWCA requirements under 33(g) not an issue in this case, but notably, the *O'Neil* decision involved a settlement between an employer and its injured employee under Section 908(i), whereas the present litigation deals with the implications of entering into a third-party tort settlement without employer authorization as required by Section 933(g). As such, the additional form requirements of 908(i) do not apply, and *O'Neil* simply does not reflect a disagreement between the circuits as to the applicability of 33(g)'s complete bar.

Finally, we turn to Petitioner's discussion of *Hale v. Bae Systems*, 801 Fed. Appx. 600 (9th Cir. 2020). *Hale* is a death benefits case with a dispute as to who were the "representatives" (not counsel, but the actual representatives) of the deceased in terms of the LHWCA claim. The children of the decedents filed separate tort suits regarding the same asbestos claims that were present in the LHWCA claims, and settled those claims without the employers' (and allegedly, the

widows') consent. Only the daughters signed the settlement agreements in question.

The employer sought to make the settlements signed by the daughters of the decedents not only effective against the widows, but to make them effective under 33(g) to bar recovery, since they purportedly evidenced settlements without the employers' consent. As you can see, *Hale* is most certainly not a case where the Ninth Circuit questioned the validity of the Supreme Court's decision in *Nicklos* regarding forfeiture of benefits, or criticized any decision by the Fifth Circuit on the applicability of Louisiana law on collateral estoppel or settlements to the 33(g) bar on recovery. Instead, the case turned on whether the daughters were the actual representatives of the widows (and not the decedents) under California law.

Again, Petitioner attempts to create a sliver of a wedge between the Circuit Court opinions where none exists. In this case, the federal district court, the ALJ, the BRB and the Fifth Circuit carefully examined Louisiana law on the issues that were applicable, just as the Ninth Circuit reviewed California law on the issues that were applicable to *Hale*. There simply is no dispute among the circuits herein.

Petitioner fails to note that the lower courts found that counsel had authority to settle the claim on claimant's behalf, thus perfecting a true settlement that triggered forfeiture of benefits under 33(g). At every stage of the proceeding, Petitioner has made the exact same argument, only to have it rejected time and again after ample briefing. Any argument or claim or

even suggestion that the agreement is not valid as per the Act or not enforceable under Louisiana law has already been thoroughly considered by the lower courts.

Ironically, Petitioner cites the very language from the *Hale* opinion that dooms him. Petitioner noted that the *Hale* court rejected the claim that anyone ***but the claimant or his legal representative*** could enter into a 'settlement with a third person' such that the forfeiture provision was triggered. (Petitioner's petition, page 6; emphasis added). That's exactly what happened here. The undisputed factual determinations of the lower courts conclusively establish that Petitioner and his legal representative entered into this settlement.

CONCLUSION

The Respondents long ago satisfied their burden of proof under Section 33(g) by showing that Petitioner (1) entered into a fully executed settlement; (2) with a third party, Tri-Drill; (3) and did not obtain Respondents prior written approval. There is no conflict among the circuit courts of appeal regarding the bar of benefits under Section 33(g), and the facts clearly support the lower courts' factual determination that a settlement was reached without employer consent as well as the application of state law on collateral estoppel. The Petition for Writ of Certiorari should be denied, or otherwise the Fifth Circuit ruling should be affirmed.

Respectfully submitted:

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