No. __-___

In the
Supreme Court of the United States

Jeffrey G. Carswell, Heinz Eriksen, and
Svenning Tevede Juhl, Representative of
Bent Hansen (Deceased),
Petitioners

v.

E. Pihl & Son, Topseo-Jensen & Schroeder Ltd.
(Danish Construction Company), Director OWCP,
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR A WRIT OF CERTIORARI

The Longshore and Harbor Worker's Compensation Act (LHWCA)

If the First Circuit had jurisdiction to review Petitioners' wage-loss claims, did its finding that a US Labor Director could oppose their claims to protect a privately-financed Fund, violate Congress's intention for Directors to exercise only administrative support functions in cases under the Longshore and Harbor Workers Compensation Act?

LIST OF PARTIES IN THE FIRST CIRCUIT COURT BELOW

i) Danes, Jeffrey G. Carswell, Heinz Eriksen and Bent Hansen were Petitioners. Mr. Hansen died of his occupational cancer in 2019 and was represented by his son, Svenning Tvede Juhl.

ii) E. Pihl & Son, a major Danish corporation, appeared as Respondent- employer, being a surviving member of the Danish Construction Company, a disbanded Danish business partnership.

Topseo-Jensen & Schroeder Ltd, also a former Danish partnership member, refused to appear or take part in any proceedings, including Federal review.

iii) District Director OWCP entered appearance as a party- Defendant with the employer in opposing Petitioners' claims in Administrative Law Judge hearings and Benefits Review Board proceedings.

The First Circuit's judgement affirming his litigation standing, also apparently entitled him to be a party-Respondent in the Federal review and not a representative of the Benefits Review Board under Rule 15 (a) of the Federal Rules of Appellate Procedure.

CORPORATE DISCLOSURE STATEMENT

All three Danish Petitioners are individuals without corporate personality.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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OPINIONS AND ORDERS ENTERED IN THE CASE

Administrative Agencies

i) Petitioners filed wage- loss claims under the Defense Base Act in June and July 2010 with the OWCP District Director in Boston, in the Labor Department's First Compensation Zone which deals with civilian occupational injuries at US Military bases in Greenland.

ii) The Boston Director transferred the matters for hearings in June 2012 to a US Labor Department Administrative Law Judge in the Second Compensation Zone in New York City. Hearings commenced before the Administrative Law Judge in December 2012.

iii) On July 23rd. 2014 the Administrative Law Judge issued an order fully setting- out her reasons for permitting the Director to act as a party- defendant based on his fiduciary responsibility to the Special Fund; an issue queried in *Harcum*, but left undecided. Consolidated Cases of Carswell 2012 LDA- 00540; Hansen 2012 LDA- 00541; Eriksen 2012 LDA-00543 v. E. Phil & Son *et al*.

iv) On October 18th. 2017, the Administrative Law Judge issued a 164 page unpublished Decision and Order denying workers compensation in Petitioners' consolidated cases; Carswell 2012 LDA- 00540; Hansen 2012 LDA-00541; Eriksen 2012 LDA- 00543 v E. Pihl & Son *et al*.

This voluminous Decision and Order, which details extensive evidence in the case and findings on other issues, is not included in the Appendix. The Director's standing is only briefly addressed at page 161, with a reference to the July 23rd. 2014 Order above, which contains the fullest account of the ALJ's reasons, including a discussion of the *Harcum* case and the Director's Fund responsibilities.

If the Court requires this 164 page Decision and Order it can be provided in a Supplementary Appendix.

v) On December 11th. 2018 the US Department of Labor's Benefits Review Board, issued an unpublished Decision and Order affirming the Director's standing and denial of Petitioners' workers compensation in BRB consolidated cases Carswell 18-0091; Hansen 18-0092; Eriksen 18-0093 v. E. Pihl & Son *et al*.

Federal Appellate Review

Second Circuit

vi) Since the original agency denial of wage- losses was determined in New York, Petitioners filed a petition for review in the Second Circuit Court of Appeals in January 2019.

vii) On February 1st. 2019 the Second Circuit issued an interlocutory order for compulsory mediation hearings on March 6th. 2019, under its Civil Appeals Mediation Program, (CAMP); Consolidated Docket No.19-151, Carswell *et al* v. E. Pihl & Son.

viii) On February 14th. 2019, The Director moved to transfer Petitioners' review to the First Circuit, which only has voluntary CAMP proceedings, in which respondents subsequently refused to participate. [1]

ix) On February 21st. 2019 the Second Circuit vacated its March 6th. 2019 CAMP hearing date as a result of the Director's transfer motion. (Docket No. 19-151)

x) On June 18th. 2019 the Second Circuit granted the Director's motion, over Petitioners' objections, in an unpublished order transferring their Federal review to the First Circuit. (Jeffery G. Carswell *et al,* Petitioners *v*. E. Pihl & Son *et al*, Respondents; Docket No. 19-151)

First Circuit

xi) Due to an irreconcilable dispute among Federal Circuit courts on review jurisdiction over Petitioners' Defense Base Act wage- loss cases, Petitioners filed a

[1] The Director previously sought to avoid mediation or settlement of Petitioners' wage- loss claims when E. Pihl & Son declared bankruptcy, almost a year into the Administrative Law Judge hearings, by threatening its Copenhagen trustees with a bogus $200 million claim if they considered settlement. This only came to light after being widely reported in the Danish Press.

motion requesting the First Circuit to certify this issue for instructions under 28 USC 1254 (2)

The First Circuit denied the motion in an unpublished order of October 18th. 2019. (Jeffery G. Carswell *et al,* Petitioners *v*. E. Pihl & Son *et al*, Respondents; Consolidated Docket No.19-1630.)

xii) On May 27th. 2021, the First Circuit issued an order denying Petitioners' Federal review of their wage- loss claims. (Jeffery G. Carswell *et al,* Petitioners *v*. E. Pihl & Son *et al*, Respondents; Consolidated Docket No. 19- 1630.)

xiii) Petitioners filed timely Petitions for rehearing on June 8th. 2021, which the Chief Judge and five others denied on August 11th. 2021. (Jeffery G. Carswell *et al,* Petitioners *v*. E. Pihl & Son *et al*, Respondents Consolidated Docket No. 19- 1630.)

BASIS OF US SUPREME COURT JURISDICTION

i) Statutory Provisions For Supreme Court Review;

a) 28 USC 1651 (a) provides the US Supreme Court with jurisdiction to consider and issue Writs of Certiorari.

b) 28 USC 1254 (1) empowers the US Supreme Court to do so in matters before or after rendition of judgement in the US Courts of Appeals. In the latter regard, the judgement for which certiorari is sought is final and a mandate was issued by the First Circuit on

August 18th. 2012; (Jeffery G. Carswell *et al,* Petitioners *v*. E. Pihl & Son *et al*, Respondents Consolidated Docket No. 19- 1630.)

ii) Date of Judgement for Review;

Re- hearing of the First Circuit order of May 27th. 2021 for which certiorari is sought, was denied on August 11th. 2021. This petition is accordingly timely, being filed within the 90 day period pursuant to this Court's Rule 13(3).

iii) Certiorari Petition Raises Proper Questions for Review

a) Rule 10 (c)

As appears more fully below, the First Circuit's finding that an OWCP Director has standing as a party- defendant to oppose worker's claims under the Longshore and Harbor Workers Compensation Act, currently conflicts with two prior decisions of this Court on Congress's intent. This Court has previously queried, but not yet determined if the Director could have such standing from his status as manager of a privately- financed Special Fund for workers' benefit.

b) Rule 10 (a)

As Appears more fully below, an ongoing Circuit dispute exists over which Federal courts have jurisdiction to review wage loss claims, such as Petitioners, under the Defense Base Act extension of

the Longshore and Harbor Workers Compensation Act.

Five Circuits hold that only the Federal District courts have jurisdiction, while four Circuits, including the First and Second, hold that only Circuit courts have such jurisdiction.

The core question is whether a prior amendment of the Longshore and Harbor Workers Compensation Act also amended its Defense Base Act extension.

The constitutionality of an Act of Congress is not in question.

The validity of certain Labor Secretary Regulations is in question.

THE STATUTORY PROVISIONS INVOLVED

Longshore and Harbor Workers Compensation Act: 33 USC Ch.18

A) The District Director's Administrative Support Roles.

[Since 2008, the "*Deputy Commissioner*" referred in the statute, is now called the "*District Director*", *per* 20 CFR 701.301(a)(7)]

Sec. 907 (b) Physician selection; administrative supervision;

"The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished."

Sec. 907 (e) Physical examination; medical questions; report of physical impairment;

"In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report containing his estimate of the employee's physical impairment and such other information as may be appropriate."

Sec. 908 (i) (1)

"Whenever the parties to any claim for compensation under this chapter, including survivors' benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress."

Sec. 914 (h) Investigations;

"The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped

or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties." [2]

Sec. 918 (b) Special Fund

"In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; "

Sec. 919 (a) Filing of claim;

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[2] In Petitioners' cases, where wage loss entitlement was controverted, the Director referred the matter to an Administrative Law Judge after a conference- call with the parties.

"Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

Sec.919 (b) Notice of claim;

"Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail."

Sec. 930 (a) Time for sending; contents; copy to deputy commissioner;

"Within ten days from the date of any injury, which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death

occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred. Notwithstanding the requirements of this subsection, each employer shall keep a record of each and every injury regardless of whether such injury results in the loss of one or more shifts of work."

Sec. 939 (c) Furnishing information and assistance; directing vocational rehabilitation

"(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available."

Sec. 940 (f) Conflict of interest

"Neither a deputy commissioner or Board member nor any business associate of a deputy commissioner or Board member shall appear as attorney in any proceeding under this chapter, and no deputy commissioner or Board member shall act in any such case in which he is interested, or when he is employed by any party in interest or related to any party in

interest by consanguinity or affinity within the third degree, as determined by the common law."

Labor Secretary's Post- "*Harcum*" Regulations

B) Standing Issue.

20 CFR 702.333 Formal hearings; parties.

"(a) The necessary parties for a formal hearing are the claimant and the employer or insurance carrier, and the administrative law judge assigned the case.

(b) The Solicitor of Labor or his designee may appear and participate in any formal hearing held pursuant to these regulations on behalf of the Director as an interested party." [3]

20 CFR 802.201 Who may file an appeal.

"(a) A party.

(1) Any party or party-in-interest adversely affected or aggrieved by a decision or order issued pursuant to one of the Acts over which the Board has appellate jurisdiction may appeal a decision or order of an

[3] Federal law does not recognize an "interested party" as a party- litigant. Such a "party" can be disregarded in deciding issues of *res judicata*. *Green v. Bogue* 158 US 478,503.

administrative law judge or deputy commissioner [4] to the Board by filing a notice of appeal pursuant to this subpart. (See § 802.205(b) and (c) for exceptions to this general rule.)
A party who files a notice of appeal shall be deemed the petitioner. The Director, OWCP, when acting as a representative of the Special Fund established under the Longshore and Harbor Workers' Compensation Act or the Black Lung Disability Trust Fund established by the Black Lung Benefits Act, or, when appealing a decision or order which affects the administration of one of the Acts, shall be considered a party adversely affected."

20 CFR 802.410 Judicial review of Board decisions.

"(a) Within 60 days after a decision by the Board has been filed pursuant to § 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

(b) The Director, OWCP, as designee of the Secretary of Labor responsible for the administration and enforcement of the statutes listed in § 802.101, shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section [9] 21(c) of the LHWCA."

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[4] An order of the *"Deputy Commissioner"*/ Director, relates to his remaining capacity to enforce Administrative Law Judge determinations and rule on modes of payment.

The Ongoing Jurisdictional Conflict Among the Circuits

C) i. Federal Review under the Longshore and Harbor Workers Compensation Act: 33 US Code 921 (c) after the 1972 amendment.

" c) Any person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside."

ii. Federal Review under unamended Defense Base Act 42 U.S. Code Sec. 1653 (b), an extension of the Longshore and Harbor Workers Compensation Act.

"Judicial proceedings provided under sections 18 and 21 [5] of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. 918, 921] in respect to a compensation order made pursuant to this chapter 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

[5] Sec. "18", refers to [Sec. 918 LHWCA], and the Director's role under the unamended Defense Base Act in enforcing judgements in the District Courts.

Sec "21" refers to [Sec. 921 LHWCA] and Federal review of compensation orders under the unamended Defense Base Act extension which are also in the District Courts.

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."

STATEMENT OF THE CASE

Petitioners filed their cases under 33 USC Ch. 18, Sec. 919 (a), the Longshore and Harbor Workers Compensation Act, (LHWCA) [6] as extended to injured foreign military base workers under 42 USC Sec. 1651 (a), of the Defense Base Act, (DBA).

1) The Precipitating Event

Petitioners' long term occupational cancers resulted from emergency work following the tragic 1968 crash and burning of a US B-52 and its four thermo- nuclear bombs on fjord sea- ice, in the proximity of a remote US Arctic Circle Air Force Base at Thule, Greenland.

One crew member was killed and several others suffered severe frostbite injuries. The crash did not detonate the four nuclear bombs. However, their weapons- grade plutonium components burned in the intense conflagration releasing trillions of respirable particles of Pu 239 into the air, contaminating the

[6] Note, amended Sec. 919 (d) stripped the "*Deputy Commissioner*"/ Director of all prior adjudicatory powers to grant or deny compensation, transferring them instead to Administrative Law Judges. The amendment confusingly failed to alter prior references to his "orders" throughout the Act, now limited only to his administrative enforcement functions.

crash site and adjacent lands with airborne re-suspension of its 24,000 year radioactive half- life.

This form of Pu 239's alpha- ionizing radiation cannot penetrate healthy skin, but has deadly long term cancer effects if inhaled or ingested, remaining in the body for decades, internally irradiating tissues and organs until slowly excreted in the urine and feces.

It is so dangerous that it can only be handled safely by laboratory workers through sleeve gloves in sealed fume cupboards at negative pressure. The US Nuclear Regulatory Commission requires only NIOSH approved respirators to be used to prevent internal radiation from inhalation and ingestion. (NRC 10 CFR 20 Sub Part H sec. 1703)

Outside of well- equipped laboratories, it is extremely difficult to detect with standard radiation detection equipment.

Inhaled minuscule amounts of one milligram of Pu 239's high radioactive linear energy transmission, (High LET) and its heavy metal component, (Pu Oxide), will result in 6- 12 late cancer deaths, [7] while ingestion of 0.5 gram of Pu 239 is as fatal as 0.1 gram of cyanide. [8]

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[7] US National Academy of Sciences. When the late Pu 239 cancer deaths occur decades later, they are not statistically detectable in the general population's cancer death rate.

[8] Livermore National Laboratory.

2) "Clean- Up" Attempts and Petitioners' Exposure

The removal of wind- blown Pu 239 contamination in the Arctic Circle is in reality an impossible task. The US Military however asserted it had removed half of it in blackened snow and ice from the re- frozen fjord crash site. Due to manpower shortages in 1968, this removal task, ("Operation Crested Ice") utilized Danish civilian Base workers such as Petitioners, in continuous 7/24 emergency shift- work in a race against seasonal melting of the crash site sea- ice.

None of the then young Danish Petitioners had any knowledge of radiation and were neither issued with sealed ventilator masks against internal Pu 239 irradiation, nor radiation suits or basic radiation detectors. They were told, "*Everything was safe*". [9]

[9] All three Petitioners were employed by a Danish contractor with the US Air Force and not a US Energy Department contractor whose employees can claim under the Energy Employees Occupational Injuries Compensation Act, which determines liability by scientific clinical testing.

Truckloads of contaminated crash site snow and ice were continuously brought into an unventilated Base hanger from the permanent Arctic darkness and off-loaded down wooden chutes into empty aviation fuel drums, causing a permanent fog of re-suspended contaminated snow in which Petitioners worked. The drums were filled and seal-welded in groups of 15 to 16, but due to the extreme cold and the urgency of the operation, the welds frequently failed leaking contaminated contents onto the Hanger floor, creating a toxic slurry with loading spillages, which also had to be eventually removed and stored in containers as hazardous.

Hansen, a carpenter, made the wooden chutes and constantly repaired them in the Hanger. He also constructed and assembled shelters at the contaminated crash site.

Eriksen a fireman, worked in the Hanger during his shifts to extinguish fires in the loaded drums during welding procedures which ignited splinters of chute and residual aviation fuel.

Carswell a civilian freight manager monitored the welding process in the Hanger and attached Hazardous Warning Labels on the sealed containers. He visited the crash site on several occasions to assess the amount of hazardous freight for transshipment by sea to the US and formally liaised with US Military officers, helping them to manhandle large radioactive parts of the bombs onto flatbed trucks. In early spring he escorted Air Force scientists who were protected by

full face masks and radiation suits, in their inspection of the sealed containers.

He remained at the Base for three years after the "clean- up" operation and following the curious Base tradition, consumed Mess beverages with "fizzy" ice cubes obtained from icebergs trapped in the fjord in question during subsequent Arctic winters.

3) Petitioners' Late Cancers.

Carswell developed stomach cancer and related esophageal cancer in 1984 requiring surgical operations to remove part of his stomach and esophagus, leaving him with permanent, debilitating internal scar tissues, requiring further operations to reduce the pain, as well as continual bi- yearly endoscope monitoring.

Hansen developed left kidney cancer and kidney removal in 2002.

Eriksen also developed left kidney cancer and kidney removal in 2005.

The employer's kidney expert, Dr. Russo, estimated their very large "sporadic" left kidney tumors, (i.e., due to an external event), would have taken 30 to 40 years to develop, placing the event approximately within the "clean- up" period.

4) The Director's Actions as Party- Defendant.

On August 9th. 2012, the Administrative Law judge, (ALJ) issued an order for the first hearing date on December 4th. 2012 in New York City, with initial discovery before then. [10]

Petitioners duly made initial discovery and booked travel and New York hotel accommodations. The employer did nothing. Likewise, despite four months' notice, the Director made no arrangement for Petitioners' mandatory independent medical examinations while in New York, forcing them to return to New York, if they could afford it. If not, their cases could not proceed.

The ALJ allowed Petitioners to testify but adjourned the hearings to July 2013, for cross- examination after the employer refused to proceed. An order was issued against the Director to pay Petitioners' air and hotel costs to enable them to return from Denmark for their medical examinations.

Late in 2013 when the employer, (a major Danish corporation with international undertakings) declared bankruptcy, the Director threatened its Copenhagen bankruptcy trustees with a bogus $200 million claim if they considered settling Petitioners' wage loss claims. A84,85 This only came to light after being extensively reported in the Danish Press.

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[10] Erroneously docketed as a hearing date for "*August 9th. 2012*", misleading the First Circuit into believing there were "*months of sparring*" between the parties before the December hearing date. A5

During the entire course of the lengthy and protracted hearings the Director filed opposition motions, cross-examined Petitioners and witnesses, filed evidence in opposition, and sought delays to implead other parties.

5) Scientific Evidence and ALJ Findings.

Care is required to properly understand the scientific evidence. The ALJ dismissed the wage loss claims on the basis that Petitioners' ionizing radiation exposure could not cause stomach, esophageal or kidney cancers, citing the epidemiological evidence of the employer's expert, Dr Fred Mettler, which she determined rebutted the statutory presumption of causation.

The ALJ ignored the fact that Mettler's evidence was i) Hostile to Federal law which attributes such cancers to ionizing radiation exposure. [11] ii) Conflicted with accepted science on late cancers from minuscule inhalation and ingestion of Pu 239 with resulting decades of internal irradiation. iii) Overlooked the fact that Mettler's probability evidence was based on external radiations with low linear energy transmission, (Low LET), not Pu 239's high internal

[11] 20 CFR 30.5 (gg); 28 CFR 79. 22 (b); 38 CFR 3.309 (d);

"Substantive" evidence to rebut the statutory presumption must be in accordance with Federal law. *Garvey Grain Co. v. Director OWCP* 639 F 2nd. 366, 370; *Consolidated Coal Co.v. Kramer* 305 F 3rd. 203; *Labelle Processing Co. v. Swarrow* 72 F 3rd. 308, 314, 315.

alpha linear energy transmission, (High LET), though Mettler noted the material difference in his report; namely that Low LET genetic radiation- damage "*can be repaired at a relatively rapid rate*." Whereas Pu 239's High LET genetic damage is permanent.

The ALJ found it was "*prudent*" to permit the Director to act as a party- defendant in opposing Petitioners' wage loss claims since *"he might be requested to authorize payment*" from the privately- financed workers' Special Fund. This was despite the fact that the Director entered opposition to Petitioners' wage loss claims almost a year before the employer declared bankruptcy and workers are the Fund's sole beneficiaries.

The ALJ found there was a "*consensus*" among the parties that only clinical testing of Petitioners' urine or blood for Pu 239 exposure could determine their claims, but the Director's independent medical examiner refused to conduct such tests, though supplied with Petitioners' written consents for urine and blood samples.

REASONS FOR ALLOWING A WRIT OF CERTIORARI

A) The Director Standing as Party- Litigant in Opposition to "Protect" the Privately-Financed Injured Workers' Special Fund

The First Circuit held that the Director's opposition to wage- loss claims as a party- litigant in LHWCA

proceedings, to protect the privately financed Special Fund, did not conflict with this Court's decision in *Director OWCP v. Newport News Shipbuilding & Dry Dock Co.*514 US 122 (the *Harcum* case). A18

Harcum held that the Director was not adversely affected in such proceedings entitling her to party-litigant standing and the right to petition for Federal review. It noted however it was "possible" the Director might be considered adversely affected in LHWCA proceedings as the manager of a privately- financed Special Fund, but stated that; "We leave those issues to be resolved in a case where the Director's relationship to the fund is immediately before us." *Harcum* 128.

This issue is now before the Court.

If left unreviewed and unresolved, Directors will have *carte blanch* to oppose all injured workers claims as party- litigants, on the mere pretext that their employers might become unable to pay compensation. [12]

This effects a "sea- change" in the LHWCA's compromise- resolution scheme, potentially requiring injured workers, as sole beneficiaries of the Fund, to fight both the Government and their employers.

Also, if left unreviewed, Directors, as party- litigants, can assert the right to appear as party- respondents in LHWCA Federal review proceedings, in conflict with

[12] The Director entered appearance in opposition to Petitioner's cases almost a year *before* the employer's bankruptcy.

this Court's finding in *Ingalls Shipbuilding Co. v. Director OWCP* 519 US 248, 265, that Directors can only appear in a representative capacity under FRAP 15(a) as Benefits Review Board (BRB) representatives. It also implies that Directors will have a right to challenge LHWCA decisions of the BRB by Federal review as party- petitioners, contrary to this Court's decision in *Harcum*.

i) Litigating Director v. Congressional *Quid Pro Quo* Compromise Scheme.

In *Potomac Electrical Power Co. v. Director OWCP* 449 US 268, 281, this Court noted that unlike tort litigation, compromise is the central intention of the LHWCA's compensation scheme. In Fn 24, it elaborated on the *quid pro quo* nature of its compensation citing standard authorities:

> "Workmen's compensation acts are in the nature of a compromise or *quid pro quo* between employer and employee. Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees.....
> employers are made certain that, irrespective of their fault, liability to an injured workman is limited under workmen's compensation. Employees, on the other hand, ordinarily give up the right of suit for damages for personal injuries against employers in return for the certainty of compensation payments as recompense for those injuries."

In the prior case of *Baltimore & Philadelphia Steamboat Co. v. Norton* 284 US 408, 414, the Court also found that the LHWCA's *quid pro quo* compromise provisions "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."

In *Director OWCP v. Newport News Shipbuilding &Dry Dock Co.*514 US 122, 132, Harcum, this Court unanimously determined that one of the Director's principal roles under the LHWCA "is to serve as the broker of informal settlements between employers and employees. 33 U. S. C. § 914(h)"

The First Circuit's affirmation of Directors as party-litigants in opposition to avoid possible requests for Fund payments, is incongruous and incompatible with this main Congressionally mandated function of facilitating compromise settlements under the Act's *quid pro quo*- scheme.

ii) Director's Conflict of Interest as Party- Litigant for Fund "Protection".

The First Circuit's finding of a Director's litigation interest in protecting the privately- financed Special Fund is also incompatible with Congress's specific intention to exclude Directors under Sec.940 (f) from appearing in proceedings in which they have an interest.

Sec. 940 (f) ..."no deputy commissioner, [Director] or Board member shall act in any such case in which he is interested..."

It also indicates the First Circuit's misunderstanding of the Act's Special Fund provisions for workers.

Sec. 918 (b), provides the Director with sole discretion to order Fund payments, "to the extent he shall deem advisable...after consideration of current payments from the Special Fund." Only the Director, and not the ALJ, has enforcement functions under this provision and he cannot be ordered to make such payments. Since Congress's statutory scheme places Fund payments solely in the Director's discretion, "unjustified claims" on it are legally meaningless.

His bogus $200 million threat to the Copenhagen bankruptcy trustees to avoid any LHWCA compromise settlement was supported by the apparent mis-characterization of Petitioners' no- fault wage- loss claims by the employer's New York attorneys, as personal injury class- action test cases. This was disclosed in the January 6th. 2014 e -mail of its Kromann- Reumert trustees to the Director. A84,85

iii) Congressional Intent and the Director's Litigation "Standing"

Unlike Sec 932 (k) of the Black Lung Benefits Act, (BLBA 30 USC 932 (k), Congress did not confer any standing on Directors as a party in LHWCA proceedings.

The issue of such standing arose in *Harcum*, when a Director attempted to challenge a BRB decision as a party- petitioner in a Federal review.

This Court scrutinized the LHWCA for evidence of a Congressional intent to make Directors parties to its procedures, which would give them standing as party-petitioners on review. It unanimously found that "With regard to claims that proceed to ALJ hearings the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board or thence to the federal court of appeals." (*Harcum* 126)

The Court also considered whether a Director could have a litigation interest in LHWCA proceedings arising from an impairment of an administrative function under the Act. [13] It reviewed four groups of the Director's administrative functions, including disbursements from the Special Fund. (*ibid* 130, 131), and found that a Director had to be "adversely affected or aggrieved" for a litigation interest to arise. The Court found that an agency exercising a governmental function was not an adversely affected "person" under Sec 702 Administrative Procedure Act (APA), which could create such standing, citing its prior decision in *United States v. ICC* 337 US 433, 434. Nor had Congress conferred such standing on the Director under the LHWCA. *Harcum* 129.

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[13] The Secretary of Labor's administrative functions under the Act are delegated to the Director; 20 CFR 701.201, 202.

For the purposes of the present Certiorari Petition, the Court noted that;

> "It is possible that the Director's status as manager of the privately financed fund removes her from the "person" limitation, just as it may remove her from the more general limitation that agencies *qua* agencies are not 'adversely affected or aggrieved.' We leave those issues to be resolved in a case where the Director's relationship to the fund is immediately before us."

Harcum 128.

That issue is now before the Court in this petition. If the Director is considered "adversely" effected, the further question for this Court to consider would be whether LHWCA Sec. 940 (f) excludes him in any event, from appearing in such proceedings due to his interest, as manager of the privately- financed Fund.

iv) Invalidity of Post- *Harcum* Regulations in LHWCA Cases.

The First Circuit materially relied on the Labor Secretary's post- *Harcum* regulations, A 17,18, in finding the Director had party- litigant standing under the LHWCA to "protect" the Special Fund. A 19

The Secretary issued his own contrary construction of the LHWCA in a flurry of post- *Harcum* regulations, including 20 CFR 702.333 (b), authorizing the Director to appear as a litigant in ALJ and BRB proceedings,

and 20 CFR 802. 201(a) deeming the Director to be "adversely affected" in LHWCA proceedings entitling him to review BRB decisions.

This Court previously noted in *Potomac*, *supra*, at 278-279, that the Labor Department will ignore Federal court interpretations of the LHWCA which it is "dissatisfied" with and apply its own constructions.

For the Secretary's regulations to be valid as delegated rules to implement Congress's intent under the LHWCA, they must comply with that intent, as construed by this Court in *Harcum*.

In *J.W. Hampton Jr. Co. v. United States* 276 US 394, 406 this Court previously noted that Congress can secure the exact execution of its legislative intention by delegating authority to executive branch officers to make public regulations for its implementation.

Such delegated regulatory authority however requires to be "exercised under and in pursuance of the law."

The Secretary's post- *Harcum* regulations, in so far as the LHWCA is concerned, are clearly not in pursuance of such law as authoritatively interpreted by this Court. Nor are they consistent with Sec. 940 (f) LHWCA, prohibiting Directors from participating in such proceedings in pursuance of their interests. [14]

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[14] *Hampton* was specifically referred to and argued in Petitioners' briefs filed with the First Circuit, BRB and ALJ. The First Circuit curiously deemed this argument "waived", A 20, based on a case, (*US v. Zannio*), where a party merely

In *Ingalls Shipbuilding Co. v. Director OWCP* 519 US 248, 263 this Court referred to these regulations on the issue of whether a Director could appear in LHWCA Federal review proceedings as a party-respondent.

Though it expressed no finding on their validity in LHWCA cases, it also found no basis or "guidance" from them in determining the Director's review standing. As such, it determined he had only limited representative standing on behalf of the BRB under FRAP 15 (a), and not as a party- respondent. *Ingalls*, 265 [15]

If the regulations had been valid, the Director would have been entitled in *Ingalls* to appear as an "adversely" effected party- respondent in Federal reviews, not as a FRAP 15 (a) representative of the BRB. He would also be entitled to challenge BRB decisions on review as a party- petitioner, contrary to *Harcum*.

v) LHWCA Credibility Problems if Certiorari Writ Denied.

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incorporated all arguments of his co- defendants by general reference, without giving any details.

[15] Scalia J, who authored the unanimous decision in *Harcum,* dissenting. Any involvement of Directors in Federal reviews created a "zany system". *Ingalls* 277.

The First Circuit's decision effectively drives a "coach and horses" through the LHWCA's *quid pro quo* compromise scheme and the Director's administrative support roles, especially as a Sec. 914 (h) "broker" of compromise settlements.

In Petitioners' cases, the Director, as a party-defendant, threatened the employer's bankruptcy trustees with a bogus $200 million claim if they considered settling the wage- loss claims; only revealed later in the Danish Press.

As a party- defendant, he made no administrative arrangements for Petitioners' independent medical examinations in the four months before they arrived from Denmark to testify in New York, prompting the ALJ to issue an order against him to pay their extra travel and hotel costs.

In *Berger v. United States* 295 US 78,88, this Court reversed criminal convictions on the basis of the egregious trial behavior of a US Attorney. Like the Director, the US Attorney was a government representative and not a party to the underlying controversy. [16]

If the First Circuit's decision on the Director's party-litigant standing is not reviewed and reversed, it will seriously undermine Public confidence and credibility in the LHWCA's compromise- compensation scheme,

[16] *Harcum* 131, found that "The LHWCA is a scheme for fair and efficient resolution of a class of private disputes, managed and arbitered by the Government."

which is deemed to serve an important Public interest. *Baltimore & Philadelphia Steamboat Co. supra*,414.

Labor Directors' impartiality in executing their administrative support roles in this regard, (especially in appointing independent medical examiners), will be impugned, if they simultaneously seek to dismiss such cases in concert with employers.

Availability of legal representation in complex cases, may also be detrimentally affected, if injured workers now have to fight both the US government and their employers.

This is clearly not what Congress intended. As in *Berger* the First Circuit's decision should be vacated due to the Director's egregious actions which warrant remand for LHWCA computation and award of Petitioners' individual wage-losses.

B) Circuit Courts' Conflict over Defense Base Act Review Jurisdiction

This issue indicates over forty years of indifference by the Federal Civil Justice system as to which Federal court can exercise review jurisdiction in workers' Defense Base Act cases.

The First Circuit disregarded the concept of cooperative judicial Federalism by denying Petitioners' 28 USC 1254 (2) request for instructions on whether Federal Circuit courts or Federal District courts have such review powers. A 31

The 1941 Defense Base Act (DBA) 42 USC 1651 - 1655, extended the LHWCA to United States and foreign workers employed in essential support roles at its numerous military bases throughout the world. In addition to carpenters, firemen and freight handlers, as in this case, DBA Sec. 1651 (6) also includes welfare workers who assist US military personnel, such as the United Services Organization, Red Cross and Salvation Army.

Congress originally referred Federal review of agency compensation orders to the Federal District courts under both the LHWCA, 33 USC 921 (c) and the DBA Sec. 1653 (b).

In 1972 it amended the LHWCA, referring such reviews to the Circuit courts, but left DBA reviews to the District courts unamended.

It is not clear if this was an oversight by Congress or its intention. In the 1921 Packers and Stockyards Act for example, Congress gave Federal Circuit courts review jurisdiction over the Agriculture Secretary's decisions in Packers' cases, but District court's review jurisdiction over his decisions in Stockyards' cases.

i) Current Unresolved Jurisdictional Dispute Among Circuit Courts

Five, (5) Circuit courts currently hold that only District courts have jurisdiction to review workers compensation orders in DBA cases, namely the Fourth, Fifth, Six, Eleventh and DC Circuits respectively in; *Lee v. Boeing Co.* 123 F.3rd. 801,805;

AFIA/CIGNA Worldwide v. Felkner 930 F. 2nd. 1111,1116; *Home Indemnity Co. v. Stillwell* 597 F.2nd. 87, 88-89; *ITT Base Serv. v. Hickson* 155 F. 3rd. 1272, 1275; and *Hice v. Director OWCP* 156 F. 3rd. 214 at 217.

Four (4) Circuit courts currently hold that only Circuit courts have review powers in DBA cases, namely, the First, Second, Seventh and Ninth Circuits respectively in; *Truczinskas v. Director OWCP*, 699 F.3rd. 672,675; *Service Employees Int'l. Inc. v. Director OWCP*,595 F. 3rd. 447,452; *Pearce v. Director OWCP*, 647 F. 2nd. 716, 720; and *Pearce v. Director OWCP*, 603 F. 2nd. 763, 769- 771.

ii) Conflict Within US Department of Labor Agencies.

The Director argued in requesting the Second Circuit to transfer Petitioners' cases to the First Circuit, that only Circuit courts have review jurisdiction in DBA cases. See also 20 CFR 802.410 (a), at page 13 above.

But the Benefits Review Board advises parties in DBA cases to first seek District court review. The Board's "NOTICE OF APPEAL RIGHTS" attached to its denial- affirmation of Petitioners' wage- losses, states that;

> "*In Defense Base Act cases, The United States Courts of Appeals for the Fourth, Fifth, Sixth and Eleventh Circuits have held that decisions must initially be appealed to the United States District Court where the office of the appropriate*

district director is located." A 53

An identical notice appears on the Board website.

iii) Unresolved DBA Jurisdictional Conflict Widely Criticized

This conflict has been the subject of extensive legal writings, concluding that the Supreme Court's resolution of this jurisdictional problem is necessary and long overdue. See for example "*Appeal of Defense Base Act Claims to the Courts: The Disagreement Over Forum Continues*." Markovich & Parker. (August 2010, Pub. 135; Rel. 721; Benefits Review Board Service-Longshore Reporter).

iv) Anomalous System of Federal Review.

Whether the District or Circuit courts will review DBA claims is currently dependent on the Labor Department's allocation of injury claims from geographically disparate overseas military bases, to one of its eleven Compensation Districts across the United States.

For example, DBA claims for injuries sustained on Midway Islands bases will be referred to the Fourth Compensation District in Atlanta, where the 11th. Circuit Court holds that only the District courts have Federal review jurisdiction. (*ITT Base Serv. v. Hickson* 155 F. 3rd. 1272, 1275)

But DBA claims from bases in Iraq will be referred to the Second Compensation District in New York, where

the 2nd. Circuit holds that only Circuit courts have review jurisdiction. (*Service Employees Int'l. Inc. v. Director OWCP*,595 F. 3rd. 447,452)

This anomalous situation is inimical to the proper administration of justice. The Federal courts' continued failure to resolve this problem by certification also undermines the concept of cooperative judicial Federalism. See *Lehman Bros. v. Schein* 416 US 386,391.

In *Parrot v. Guardian Life Ins. Co. of America* 338 F 3rd. 140, 144. (2nd. Cir. 2003), Sotomayor J, (now Associate Justice of this Court), concurred in finding certification for resolution of legal issues is necessary for the proper administration of justice when the same unresolved questions will continually recur in the future.

v) Certiorari Writ Warranted to Ensure Legal Validity of Review Orders.

The two conflicting opinions on review jurisdiction by the various Circuit courts cannot both be correct. The First Circuit has no review powers over Petitioners' agency cases under 28 USC 1295 and is entirely reliant on the correct legal interpretation of Congress's review intentions in DBA- LHWCA cases. That interpretation can only be authoritatively supplied by this Court.

Orders of Federal courts which completely lack jurisdiction, are legally null and void. *United States Aid Funds v. Espinosa* 559 US 260,270. In Petitioners'

cases, the First Circuit cannot rely on a jurisdictional error for possible "finality of judgement" enforcement of its order, as it was fully aware of its doubtful unresolved review jurisdiction in denying Petitioners' 28 USC 1254 (2) certification request.

Unless a certiorari writ is issued on this question, the uncertain legal validity of such Federal review orders will continue indefinitely, creating an ongoing problem for the Federal administration of justice in DBA cases.

CONCLUSION

For the compelling reasons stated above, a Writ of Certiorari to the First Circuit Court of Appeals should issue on the question presented.

Dated: New York, New York

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