No. 10-1164

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEPHANIE H. WHEELER,

Petitioner,

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENT

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On December 9, 2010, the Court heard oral argument on the question whether section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, permits an injured worker whose condition deteriorates to seek modification within one year of the employer's last payment of medical benefits. The Director argued that Wheeler's modification request was timely because section 22 allows modification within one year "of the last payment of compensation," and medical benefits are "compensation" under section 22. After argument, the panel requested supplemental briefs on two issues:

> (1) What deference, if any, is due to the Director's position in this case? In particular, the parties should specify on what basis the Director's position is due deference and not purely a litigating position; and
>
> (2) What effect, if any, does the legislative history of 33 U.S.C. § 922 have on the analysis in this case?

The Director's interpretation of section 22 is, at the very least, entitled to deference under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). That the Director's view comes to the Court in a brief does not detract from that deference because there is no indication that the brief presents anything other than the agency's fair and considered judgment. Moreover, although silent on the meaning of "compensation" in section 22, the legislative history demonstrates the great breadth Congress intended in creating section 22.

I. The Director's interpretation of section 22 is entitled to *Skidmore* deference.

A. The Deference Standard

Both this Court and the Supreme Court have long recognized that, where a provision of the Longshore Act is ambiguous or silent on a point, the Director's interpretation of the provision is entitled to deference because he is the administrator of the Act. *See Metro. Stevedore Co. v. Rambo (Rambo II)*, 521 U.S. 121, 136 (1997); *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 384 (4th Cir. 1994). "The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance, and we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *United States v. Mead*, 533 U.S. 218, 227-28 (2001) (internal quotations and citations omitted). The *Mead* Court stated that the degree of deference owed varies with the circumstances, indicating that a higher level of deference–that allowed under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)–is owed where Congress intended the agency's pronouncement to have the force of law. 533 U.S. at 227-31. For interpretations falling outside *Chevron*, the Court held that the lesser degree of deference described in *Skidmore* applies. *Mead*, 533 U.S. at 235.

Under *Skidmore*, "the weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the

validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The Supreme Court relied on *Skidmore* in *Rambo II*, holding that "the Director's reasonable interpretation of the [Longshore] Act brings at least some added persuasive force to our conclusion [that a nominal award of compensation is permitted under the Act.]" 521 U.S. at 136. Thus, "[a]t the very least," the Director's reasonable interpretation is entitled to deference under *Skidmore*. *Research Triangle Park Pub. Transp. Auth. v. United States*, 83 Fed.Appx. 505, 510 (4th Cir. 2003).

The persuasive force of the Director's statutory interpretation is not lost simply because it comes to the Court in a brief. This and other courts generally defer to agency interpretations set forth in litigation briefs, and have done so even when a brief is the first and only time the agency's view is articulated. *New Times Sec. Serv., Inc. v. Jacobs, et al.*, 371 F.3d 68, 80-4 (2d Cir. 2004) (giving *Skidmore* deference to agency's statutory construction articulated for first time in brief to the court even though agency had not previously set forth construction "in *any* form" and had not exercised its power to engage in rulemaking); *Pool Co. v. Cooper*, 274 F.3d 173, 177 n. 3 and 183 (5th Cir. 2001)(noting post-*Mead* "that when the Director advances interpretations of the LHWCA in litigation briefs, such interpretations merit. . . *Skidmore* deference," and deferring to Director's

persuasive view set forth in brief where neither the Longshore Act nor the regulations resolved the matter); *Newport News Shipbuilding Co. v. Riley*, 262 F.3d 227, 231 (4th Cir. 2001) ("[OWCP's] interpretation of the Act in its briefs is entitled to some deference"). *See also Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000) (acknowledging that "litigation positions taken in briefs, just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines" are evaluated under *Skidmore* standard) . As this Court recognized in *Riley*, the Supreme Court specifically cited the Director's brief as the source of the interpretation that "added persuasive force" to its conclusion in *Rambo II*. *Riley*, 262 F.3d at 231. Indeed, the interpretation of the Fair Labor Standards Act that the Supreme Court deferred to in *Skidmore* was one advanced by the Administrator of that Act in an *amicus curiae* brief. 323 U.S. at 139. *Cf. Auer v. Robbins*, 519 U.S. 452, 462 (1997) (affording deference to agency's regulatory interpretation presented in litigation).

In limited circumstances, courts have refused to accord deference to statutory or regulatory interpretations in agency briefs; they have done so not because those interpretations were offered in litigation, but because they were *post hoc* rationalizations unsupported by, or inconsistent with, the agency's past practice. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13

(1988) (declining to give deference to agency's regulatory interpretation because it was inconsistent with interpretation advocated in past cases); *Sidwell v. Express Container Serv., Inc*., 71 F.3d 1134, 1142 (4th Cir. 1995) (Director denied deference because interpretation offered in brief extended beyond position taken in program memorandum on which claim to deference was based). But here there is simply "no reason to suspect" that the Director's interpretation of section 22 "does not reflect the agency's fair and considered judgment on the matter in question." *Newport News Shipbuilding Co. v. Director, OWCP*, 315 F.3d 286, 294 n.8 (4th Cir. 2002) (quoting *Auer*, 519 U.S. at 462). There is nothing to suggest that the Director has ever been called upon to take a position on the issue prior to this litigation. Nor is there any indication that the Director has taken a different position in any other forum or format. Finally, the Director's brief does not attempt to rationalize an action already taken by the agency but instead sets out his statutory interpretation in the first instance.

B. Applying the Standard

Under *Skidmore*, the weight given to an agency's interpretation of a statute it administers "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The arguments in the Director's initial brief and at oral

argument establish both the thoroughness of his consideration of the issue and the validity of his reasoning. Both of these factors are supported by a third: the consistency of the Director's position here with positions he has taken in the past.

This consistency is seen in two facets of his statutory construction. The first is the Director's fundamental view that section 22 should be interpreted broadly in favor of allowing modification. This position is longstanding–*see, e.g., Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-500 (4th Cir. 1999) (arguing that section 22's "rejection of a claim" includes the denial of a petition for modification, allowing a new petition to be filed within a year of that denial); *Director's Brief* in *Rambo II*, 1997 WL 10363 (arguing that award of nominal compensation to accommodate potential future loss of wage-earning capacity loss does not conflict with section 22's one-year statute of limitations)–and one with which this Court and its sister circuits have uniformly agreed. *See Director's Response Brief* at 12-14. The Director's position that a party may seek modification under section 22 within a year after payment of medical benefits is consistent with that fundamental and longstanding position.

Second, the Director's interpretation of "compensation" in section 22 is consistent with his approach to determining whether "compensation" includes medical benefits in other parts of the statute. Although he has not previously addressed this question in the section 22 context–the issue has simply not arisen–

he has in the context of other provisions. In those instances, the Director has consistently taken the position that "compensation" does not have a single meaning throughout the Act, and that whether it includes medical benefits–if not clear from the language of the provision itself–depends on the purpose of the provision in which it appears.

The Director's brief in *Lazarus v. Chevron U.S.A., Inc*., 958 F.2d 1297 (5th Cir. 1992), adopted this approach. *Brief of the Director, OWCP, as Amicus Curiae*, 1991 WL 11247894. There, the Director concluded that "compensation" as used in section 18(a) of the Act, 33 U.S.C. § 918(a), included medical benefits. The Director made the following arguments, all echoed here: (1) the definition of compensation set forth in section 2(12) of the Act is not determinative of the meaning of the term throughout the Act; (2) Congress must have intended "compensation" to include medical benefits in some circumstances, because it specifically referred to medical benefits as compensation in sections 4(a) and 6(a) of the Act; and (3) the section 2(12) definition should not be used because it would conflict with the purpose of section 18(a). *Id*., 1991 WL 11247894 at 14-16.

Where the Director has advocated a different result, he has done so because the plain language of the particular provision in which "compensation" appears makes Congress's intended meaning clear. In his brief in *Brown & Root, Inc. v. Sain*, 162 F.3d 813 (4th Cir. 1998), the Director argued that "compensation" as

used in section 33(g)(1) did not include medical benefits because in section 33(g)(2), the next subsection, Congress referred to both "compensation and medical benefits." 1998 WL 34098064 at 26. He nonetheless pointed out that "elsewhere in the [Longshore Act], the word 'compensation' has been interpreted to mean both compensation and medical benefits, *consistent within the context of the provision, and effectuating the underlying policy implicated*." *Id*. at 26 n.9 (emphasis added). Thus, the Director's position on whether the term "compensation" includes medical benefits–that it does if the provision's language does not foreclose the inclusion of medical benefits, and the purpose supports that inclusion–has remained consistent for over twenty years.

II. The legislative history of section 22 does not reveal whether the term "compensation" includes medical benefits, but does support the Director's position that the provision should be interpreted broadly.

Congress has amended section 22 on three separate occasions, in 1934, 1938 and 1984. 48 Stat. 807, ch. 354, § 5 (May 26, 1934); 52 Stat. 1167, ch. 685, § 10 (June 25, 1938); Pub. L. 98-426, §§ 16, 27(a)(2), 98 Stat. 1650, 1654 (Sept. 28, 1984). Each time, it has broadened the scope of the provision as it applies to claimants, employers, or both.[1] The legislative history of those changes, however,

[1] In 1934, Congress "broaden[ed] the grounds on which a deputy commissioner can modify an award," S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244, at 4, by adding the grounds of "mistake of fact" to "change in conditions"; extended the time for seeking modification to one year after the last

simply does not specifically address whether "compensation," in the context of section 22, includes medical benefits.

While employer correctly noted at argument that Congress chose to adopt a one-year time limit for modification in 1934,[2] and chose to retain that time limit in 1984,[3] the existence of a time limit says nothing about whether Congress considered a payment of medical benefits to be a "payment of compensation" sufficient to trigger the running of that one-year period. The Supreme Court has

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(footnote con't.)
payment of compensation, rather than allowing it only during the term of an award; authorized the reinstatement of compensation; and allowed an increased compensation rate awarded on modification to be made effective from the date of injury. 48 Stat. 807.

In 1938, Congress expanded section 22 to allow modification not only one year after the last payment of compensation, but also one year after the rejection of a claim, and to allow for the "award [of] compensation" in addition to the termination, continuance, reinstatement, increase, or decrease of such compensation. 52 Stat. 1167. The purpose was to allow modification in cases where compensation had not been previously paid. S. Rep. No. 1988, 75th Cong., 3d Sess., 8 (1938); H.R. Rep. No. 1945 at 8 (1938).

Finally, in 1984, Congress expanded who is a "party in interest" able to request modification to include even an "employer or carrier which has been granted relief under section 908(f) of this title," Pub. L. No. 98-426 § 16(1), and extended the deputy commissioner's authority to review cases to those paid under section 944(i) of the Act, Pub. L. No. 98-426 § 16(2). Both sections 908(f) and 944(i) address situations in which the employer or carrier is relieved of part of its liability, which is then paid by the Special Fund established by section 44.

[2] S. Rep. No. 588, 73d Cong., 2d Sess., 4; H.R. Rep. No. 1244, 73d Cong., 2d Sess., 4 (1934) (rejecting earlier provision for modification only "during the term of an award" in favor of modification within one year of last payment of compensation).

[3] S. Rep. No. 98-81, 98th Cong., 1st Sess., 44 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess., 20 (1983).

already rejected similar arguments to the contrary. The claimant in *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291 (1995), argued that the Court should infer from Congress's unwillingness to extend the one-year limitations period that it must have intended a narrow construction of other parts of section 22, including when an award could be reopened. The Court responded:

> We rejected this very argument in *Banks [v. Chicago Grain Trimmers Ass'n]*, 390 U.S. [459], 465 [(1968)] . . ., and its logic continues to elude us. Congress' decision to maintain a 1-year limitations period has no apparent relevance to which changed conditions may justify modifying an award.

Rambo I, 515 U.S. at 298-99. It likewise has no relevance to whether a payment of medical benefits may trigger that limitations period.

Instead, the legislative history reveals Congress' desire to adopt a broad modification provision. In amending the statute in 1934, Congress' stated intention was to allow for modification "when changed conditions . . . make[] such modification desirable in order to render justice under the act." S. Rep. No. 588, 73d Cong., 2d Sess., 3-4 (1934); H.R. Rep. No. 1244 at 4 (1934), *quoted in O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1972). Here, Ms. Wheeler's condition has changed and it is in the interests of justice to allow modification. Indeed, the only other option is to hold that Ms. Wheeler is not entitled to workers' compensation for what is concededly a work-related disability, a result wholly inconsistent with the general purposes of the Longshore Act.

CONCLUSION

The Court should afford deference to the Director's interpretation of section 22 under *Skidmore* and reverse the ALJ's and the Board's decisions denying modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, the required copies of this Brief were served electronically, through the Court's CM/ECF system, and/or by mail, postage prepaid, on the following:

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