No. 97-1894

In the Supreme Court of the United States

OCTOBER TERM, 1997

SEAHORSE COASTAL ASSISTANCE & TOWING, ET AL., PETITIONERS

v.

THEODORE FLEISCHMANN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a marine construction worker who builds bulkheads, piers, and docks is a "harbor-worker" and therefore satisfies the "status" requirement for coverage as an employee under Section 2(3) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3).

2. Whether the worker's injury occurred on a "situs" covered by Section 3(a) of the LHWCA, 33 U.S.C. 903(a), when the injury occurred on a bulkhead built on pilings and extending into navigable waters.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 137 F.3d 131. The notice of affirmance by the Benefits Review Board (Pet. App. 18a-19a) and the decision and order of the administrative law judge (Pet. App. 20a-27a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 23, 1998. The petition for a writ of certiorari was filed on May 26, 1998 (the Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. Section 2(3) of the LHWCA defines the term "employee," with certain exceptions not relevant here, as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker.

33 U.S.C. 902(3). Section 3(a) of the LHWCA provides that an employee is entitled to compensation under the Act only if his injury occurs

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a). Those two requirements are referred to as the Act's "status" and "situs" requirements. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977).

2. In December 1990, respondent Theodore Fleischmann began working for petitioner Seahorse Coastal Assistance & Towing as a pile driver and laborer, a job that required him to build bulkheads (which ordinarily act as retaining walls for land), piers, and floating docks. Pet. App. 2a, 22a-23a & n.2. In October 1991, he helped to remove and replace part

of a bulkhead that had collapsed forward into a navigable canal. *Id.* at 2a. The new bulkhead was built by driving piles deep into the bed of the canal, attaching a horizontal retaining system to the piles, and then dredging material from the bottom of the canal to fill in the area between the new bulkhead and solid land. *Id.* at 3a. Respondent Fleischmann performed that work primarily on a floating dock, which was tied to a barge. *Ibid.*

On October 22, 1991, the bulkhead was attached to the land at both ends but was separated from the land by about 12 to 15 feet of water and dredging material. Pet. App. 3a. Respondent Fleischmann was cleaning the barge and removing lumber from the floating dock. *Ibid.* While standing on top of the bulkhead and pulling on a tow line to move the barge, he reached for a second tow line, slipped, and fell landward, into the dredging material and water. *Ibid.*; see also *id.* at 23a. He sustained injuries to his right knee and subsequently applied for benefits under the LHWCA. *Id.* at 4a.[1]

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[1] LHWCA claims are filed with the Department of Labor's Office of Workers' Compensation Programs (OWCP). See 33 U.S.C. 919(a) and (c); 20 C.F.R. 702.311-702.315. If OWCP is unable to resolve a claim informally, the claimant or employer may obtain a hearing before an administrative law judge (ALJ). 33 U.S.C. 919(c) and (d); 20 C.F.R. 702.316-702.317, 702.331. ALJ decisions are reviewable by the Department's Benefits Review Board, and the Board's decisions are subject to review in the courts of appeals. 33 U.S.C. 921(a)-(c) (1994 & Supp. II 1996); 20 C.F.R. 702.391, 802.410(a). The Director of OWCP is a party in the administrative proceedings, see 20 C.F.R. 702.333(b), 801.2(a) (10), and must be named as a respondent in any proceeding for review in the court of appeals. See Fed. R. App. P. 15(a); *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 117 S. Ct. 796, 805-808 (1997). The Director actively

3. An administrative law judge (ALJ) denied benefits on the ground that respondent Fleischmann failed to meet the "status" requirement for coverage under the LHWCA. Pet. App. 20a-27a. To meet that requirement, the ALJ explained, a claimant must show either that he was injured on actual navigable waters, or that he satisfies the occupational test for "employee" status set forth in 33 U.S.C. 902(3). *Id.* at 25a.[2] Respondent Fleischmann could not establish "employee" status under the first test, the ALJ reasoned, because he was injured on the bulkhead and areas landward of it, where any water had been permanently withdrawn from the canal. *Ibid.* The ALJ also found that respondent Fleischmann had failed to establish occupational status under Section 902(3) because his job was not related to the movement of cargo between ship and land transportation

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participated in this case before the Board and in the court of appeals.

[2] The current definition of "employee" was added to the LHWCA when the Act was amended in 1972. See *Director, OWCP* v. *Perini North River Assocs.*, 459 U.S. 297, 313 (1983). At the time the 1972 amendments were passed, workers injured upon navigable waters in the course of their employment were generally covered by the Act regardless of the nature of their duties. See *id.* at 311-312. The Court in *Perini* concluded that the 1972 amendments should not be construed "to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972." *Id.* at 315. It therefore held that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in [33 U.S.C. 902(3)], and is covered under the LHWCA, providing, of course, that he is the employee of a statutory 'employer,' and is not excluded by any other provision of the Act." *Id.* at 324.

and did not serve to facilitate those functions. *Id.* at 26a. Respondent Fleischmann appealed to the Benefits Review Board. See note 1, *supra*.

4. In 1996, Congress directed that all appeals that had been pending before the Board for more than one year were to be deemed affirmed if the Board did not act by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, § 101(d), 110 Stat. 1321-219; see 33 U.S.C. 921 note (Supp. II 1996). Respondent Fleischmann's appeal had been pending before the Board for more than a year on September 12, 1996, and the ALJ's decision therefore became final as of that date. Pet. App. 18a-19a. Respondent Fleischmann sought further review in the court of appeals.

5. The court of appeals reversed and remanded for an award of benefits. Pet. App. 1a-17a. The court first held that respondent Fleischmann satisfied the Act's status requirement. The court stated that it "d[id] not need to determine whether the landward side of the bulkhead constituted actual navigable waters," *id.* at 8a, since respondent Fleischmann qualified as a "harbor worker," one of the occupations specified in Section 902(3). *Id.* at 8a-14a. The court of appeals stated that it owed deference to the view of the Director, OWCP, that respondent Fleischmann qualified for compensation as a "harbor worker." *Id.* at 9a. The court further explained that "[a]n employee can establish coverage under § 902(3) either by referring to his or her overall duties or to the particular project the employee was engaged in at the time of injury." *Id.* at 11a. The court of appeals concluded that respondent Fleischmann's "general employment of building piers and docks suffices to establish the requisite

connection to ships to confer him with status as a harbor worker." *Id.* at 11a-12a.

The court of appeals also held that Fleischmann satisfied the "situs" test set forth in 33 U.S.C. 903(a). Pet. App. 14a-17a. The court agreed with the Ninth Circuit that under Section 903(a), a "pier" is a covered situs whether or not it is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. Pet. App. 14a-15a (citing *Hurston* v. *Director, OWCP*, 989 F.2d 1547 (9th Cir. 1993)). The court further agreed with the *Hurston* court that the term "pier," which is not defined in Section 903(a), means "a structure built on pilings extending from land to navigable water." *Id.* at 15a (quoting *Hurston*, 989 F.2d at 1553). The bulkhead at issue in the instant case satisfied that definition, the court concluded, because it was built on pilings and extended into navigable water. *Ibid.*

The court of appeals also stated that its treatment of the pier as a covered situs was consistent with congressional purposes. It explained that "[t]his case exemplifies the concerns that fueled the 1972 amendments; [respondent] Fleischmann would clearly have been covered had he been injured while working on a work platform only several feet away, where he spent a substantial portion of his work hours." Pet. App. 15a. The court observed that "[a]lthough the line demarking a covered situs has to be drawn somewhere, Congress made it clear in enacting the 1972 amendments that it considered the water's edge an place to draw it." *Id.* at 15a-16a; see also *id.* at 11a ("One of Congress's purposes in amending the LHWCA was to 'ensure that a worker who could have been covered part of the time by the pre-1972 Act would be com-

pletely covered by the 1972 Act.'") (quoting *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 75 (1979)).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that respondent Fleischmann satisfied the LHWCA's "status" requirement. The Act defines covered employees to include "any person engaged in maritime employment, including * * * any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3). Use of the term "including" indicates that the term "harbor-worker" is not limited to ship repairmen, shipbuilders and shipbreakers. Cf. *Chesapeake & O. Ry.* v. *Schwalb*, 493 U.S. 40, 45 (1989) ("[t]he employment that is maritime within the meaning of § 902(3) expressly includes the specified occupations but obviously is not limited to those callings"). The Director, OWCP, who represents the agency charged with administering the LHWCA, see 33 U.S.C. 939(a); 20 C.F.R. 701.202(a), has long construed "harbor-worker" to include a number of occupations, including "marine construction workers," that are "clearly identified with the water or the waterfront." LHWCA Program Memorandum No. 58, at 15-16 (Aug. 10, 1977); see also *De Martino* v. *Bethlehem Steel Co.*, 164 F.2d 177, 178 (1st Cir. 1947) (worker employed on a dock as a painter is a harbor-worker).

The court of appeals correctly recognized that the Director's interpretation of an ambiguous, undefined term contained in the LHWCA is entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a-10a. The court of appeals was also correct in holding that "including marine construction workers within the meaning of 'harbor worker' is reasonable and preserves the purposes of the statute." *Id.* at 10a. The court relied on the ALJ's "factual finding that [respondent] Fleischmann's general employment responsibilities included 'building bulkheads, piers, and floating docks.'" *Id.* at 11a. Those tasks are clearly identified with the waterfront and are the kinds of activities one would expect in a "harbor." See *Black's Law Dictionary* 717 (6th ed. 1990) (defining the term "harbor" to include "a sheltered place, natural or artificial, on the coast of a sea, lake, or other body of water"); LHWCA Program Memorandum No. 58, *supra*, at 15-16.[3]

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[3] Petitioner asserts (Pet. 11 n.5) that the Director's construction of the term "harbor-worker" is entitled to no deference because it concerns the agency's "interpretation of its own jurisdiction." That argument is without merit. "[I]t is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) (collecting cases); see also *Dole* v. *United Steelworkers*, 494 U.S. 26, 54-55 (1990) (White, J., dissenting) (collecting cases); Pet. App. 10a n.2. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990), on which petitioner relies (see Pet. 11 n.5), held only that an administrative agency is not entitled to deference regarding the contours of a private right of action in the federal courts. It is far from clear, in any event, that the interpretive question posed by this case is properly characterized as implicating the

Petitioner asserts that the court of appeals' disposition of the status issue "blows a hole in the limitation on the coverage of the LHWCA intended by Congress." Pet. 12. Contrary to petitioner's assertion (see *ibid.*), however, the court of appeals did not suggest that "[a]nyone who performs some work on the water could be called a 'harbor worker.'" Rather, the court based its decision on the maritime nature of Fleischmann's overall responsibilities, explaining that "Fleischmann's general employment of building piers and docks suffices to establish the requisite connection to ships to confer him with status as a harbor worker." Pet. App. 11a-12a; see also LHWCA Program Memorandum No. 58, *supra*, at 17-19 (discussing limits on when an employee who has some duties over water is engaged in maritime employment).

Petitioner contends (Pet. 6, 12) that the decision below conflicts with the ruling of the Ninth Circuit in *McGray Construction Co.* v. *Director, OWCP*, 112 F.3d 1025, 1030 (1997), opinion withdrawn, 124 F.3d 1310 (1997). Because the Ninth Circuit has withdrawn its opinion in *McGray*, see 124 F.3d at 1310, any inconsistency between that opinion and the Second Circuit's decision in the instant case would provide no ground for this Court's review. In any event, no conflict exists. The court in *McGray* stated that "only a worker who builds or repairs a structure *used*

Director's "jurisdiction." Whether respondent Fleischmann is a "harbor-worker" may determine his right to compensation, but it does not affect the Department of Labor's obligation to adjudicate his claim. Cf. *Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring) ("there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority").

to facilitate maritime commerce or navigation is * * * a harbor worker" under the LHWCA. 112 F.3d at 1030. It concluded that the pier at issue in that case, which was "used exclusively for processing and transporting oil, a nonmaritime activity" (*ibid.*), did not meet that description. That holding is in no way inconsistent with the decision below, which held that "Fleischmann's general employment of building piers and docks suffices to establish the requisite connection to ships to confer him with status as a harbor worker." Pet. App. 11a-12a.[4]

2. The court of appeals also correctly held that the pier on which Fleischmann's injury occurred was a covered situs under the LHWCA. Pet. App. 14a-17a. The Act provides that a covered situs includes not only navigable waters, but "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a); see p. 2, *supra*. The term "pier," although undefined in the LHWCA, is broad enough to include the bulkhead in this case, which was built on pilings, extended into navigable water, and served to protect land from erosion. See *Webster's Ninth New Collegiate Dictionary* 890 (1989) (definition of "pier" includes "a structure (as a breakwater) extending into navigable water for use as

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[4] The court of appeals in the instant case explained that "[a]n employee can establish coverage under § 902(3) either by referring to his or her overall duties or to the particular project the employee was engaged in at the time of injury." Pet. App. 11a. The court decided this case on the former ground. See *id.* at 11a-12a. The court also noted, however, that the activities leading directly to Fleischmann's injury had significant links to shipping and navigation. See *id.* at 12a n.3.

a landing place or promenade or to protect or form a harbor").

Contrary to petitioner's suggestion (see Pet. 12), Section 903(a) does not require that a "pier" be "customarily used * * * in loading, unloading, repairing, dismantling, or building a vessel" in order to qualify as a covered situs under the LHWCA. Rather, that phrase is properly understood to modify only the term "other adjoining area." The Court in *Northeast Marine Terminal* observed that "it is not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas,'" and noted that the House sponsor had described the Section as expanding coverage to the enumerated structures with "little concern with respect to how these facilities were used." 432 U.S. at 280; see *Hurston* v. *Director, OWCP*, 989 F.2d 1547, 1552 (9th Cir. 1993) (holding that the "customarily used" requirement does not apply to the structures enumerated in Section 903(a)); Pet. App. 14a-16a (adopting the reasoning of the *Hurston* court). Although this Court's decision in *Northeast Marine Terminal* did not definitively resolve the issue, see 432 U.S. at 281, petitioner cites no decision holding that the "piers" covered by the Act are limited to those "customarily used in loading, unloading, repairing, dismantling, or building a vessel."

Construing the term "pier" to include the bulkhead in this case also effectuates Congress's intent that the LHWCA provide a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Northeast Marine Terminal*, 432 U.S. at 272 (quoting S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972)). Congress

"wanted a system that did not depend on the 'fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water.'" *Northeast Marine Terminal*, 432 U.S. at 272 (citing S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10). Respondent Fleischmann would have been covered by the LHWCA if his injury had occurred while he was working on the floating dock. Pet. App. 10a-11a; see note 2, *supra*. He would also have been covered if he had fallen from the bulkhead into the navigable waters of the canal, rather than in the other direction into the dredging material and water that separated the bulkhead from solid land. See *Perini*, 459 U.S. at 315-316; *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 225 (1969) (Douglas, J., dissenting) (noting pre-1972 incongruity "that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened"). The court of appeals therefore correctly concluded that "[t]his case exemplifies the concerns that fueled the 1972 amendments." Pet. App. 15a.

Petitioner contends (Pet. 12-14) that the decision below conflicts with *Brooker* v. *Durocher Dock & Dredge*, 133 F.3d 1390 (11th Cir. 1998), petition for cert. pending, No. 98-18. In *Brooker*, an employer was building a new seawall or bulkhead to protect an electric generating plant from an encroaching river. *Id.* at 1391. The court of appeals stated that the new seawall extended twenty feet out from the old seawall. *Ibid.* A welder working on the project was injured when he fell landside, in the area between the old seawall and the power plant. *Ibid.* The Eleventh Circuit upheld the ALJ's denial of benefits, concluding that the seawall in question was not a pier and was not otherwise part of an adjoining area customar-

ily used by an employer for specified activities. *Id.* at 1393-1394.[5]

The Eleventh Circuit's decision is concededly in tension with the decision below, since the two courts reached different conclusions regarding the application of the situs requirement to somewhat similar physical structures. The disagreement between the two circuits, however, appears to involve only the application of law to fact.

The court in *Brooker* stated that "whether a facility is a 'pier' is a pure factual question"; it placed primary emphasis on the appearance of the structure and the fact that "the supervisor of the seawall construction project with fourteen years of experience unequivocally answered 'no,' when asked whether the facility was a pier." 133 F.3d at 1393. Moreover, the worker in *Brooker* fell into the area landward of the old seawall, and thus at some remove from the structure (the new seawall) that, when completed, would constitute the closest analogue to what the Second Circuit found to be a "pier" in this case. The structure on which Fleischmann was located at the time of injury in this case (the new seawall), by contrast, was (and was to remain) immediately adjacent to the water. See Pet. App. 3a (Fleischmann injured while standing on top of the bulkhead and moving a barge by pulling on a tow line). Absent a clear disagreement between the courts of appeals as to the

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[5] The court in *Brooker* reserved the question whether a "pier" must be "customarily used in loading, unloading, repairing, dismantling, or building a vessel" in order to qualify as a covered situs under the LHWCA. See 133 F.3d at 1394.

governing legal principles, we believe that review by this Court would be premature.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] We also note that the result in the instant case might not change even if the bulkhead was determined not to be a "pier." See C.A. App. A124-A125 (Director's argument to the Board that the bulkhead was part of an area adjoining navigable waters that was used for loading and unloading construction materials).