No. 05-371

In the Supreme Court of the United States

GENERAL CONSTRUCTION CO., ET AL.,
PETITIONERS

v.

ROBERT CASTRO, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a claimant's average annual earnings used to determine his compensation rate under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq*., should be computed under 33 U.S.C. 910(a), rather than under 33 U.S.C. 910(c), when the claimant worked more than 75% of the workdays available for a five-day worker, the employment in which he worked was not seasonal, and there is no practical difficulty in applying Section 910(a).

2. Whether a worker who suffers an injury falling under the LHWCA's schedule for permanent partial disability benefits in 33 U.S.C. 908(c) may receive total disability benefits while participating in a vocational rehabilitation program approved by the Department of Labor's Office of Workers' Compensation Programs when such participation precludes otherwise suitable alternative employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 401 F. 3d 963. The decision of the Benefits Review Board (Pet. App. 32-62) is reported at 37 Ben. Rev. Bd. Serv. 65. The decision of the administrative law judge (Pet. App. 63-88) is reported at 36 Ben. Rev. Bd. Serv. 407.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2005. A petition for rehearing was denied on May 20, 2005 (Pet. App. 89-90). On July 21, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including Septem-

ber 17, 2005, and the petition was filed on September 19, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, requires covered employers to provide compensation for disability or death resulting from work-related injuries of covered employees. 33 U.S.C. 904, 908. The statute establishes four categories of disability benefits, distinguished by the degree of the disability (total or partial) and by its duration (permanent or temporary). 33 U.S.C. 908(a)-(c) and (e); *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 273-274 (1980).

In general, disability means an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). To determine whether a claimant is totally disabled under that definition, courts apply a burden-shifting test. See *Bunge Corp.* v. *Carlisle*, 227 F.3d 934, 941 (7th Cir. 2000); *Norfolk Shipbuilding & Drydock Corp.* v. *Hord*, 193 F.3d 797, 800 (4th Cir. 1999); *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984). Under that test, an injured employee who cannot return to his or her usual work establishes a *prima facie* case of total disability. Pet. App. 10. The employer must then demonstrate the availability of suitable alternative employment. *Ibid.* If the employer makes that showing, the claimant may nonetheless be entitled to total disability benefits if the claimant is unable to secure such employment. *Ibid.*

Three courts of appeals have concluded that employees who are receiving vocational rehabilitation services under the direction of the Secretary of Labor, see 33 U.S.C. 939(c)(1) and (2), may be entitled to a total disability award. Pet. App. 10-15; *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 315 F.3d 286, 292-296 (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n* v. *Abbott*, 40 F.3d 122, 127-128 (5th Cir. 1994). Depending on the facts of a particular case, participation in a vocational rehabilitation program may render a claimant unavailable to accept otherwise alternative employment. Pet. App. 11, 37; *Newport News*, 315 F.3d at 293-295; *Abbott*, 40 F.3d at 127-128.

An employee who suffers a work-related injury that falls under a "schedule" set forth in 33 U.S.C. 908(c)(1)-(20) is entitled to compensation for permanent partial disability whether or not his or her earning capacity has actually been impaired. *Potomac Elec.*, 449 U.S. at 269. An employee with such a "scheduled" injury can recover compensation for permanent partial disability only under the "schedule." *Id.* at 270-271. A scheduled injury can also give rise to an award for permanent total disability under 33 U.S.C. 908(a). 449 U.S. at 277 n.17. "[S]ince the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17.

b. Under the LHWCA, the basis for computing compensation is "the average weekly wage of the injured employee at the time of injury." 33 U.S.C. 910. "[A]verage weekly wage[]" is defined as "one fifty-second part of [the employee's] average annual earnings." 33 U.S.C. 910(d)(1).

There are three methods for determining an employee's average annual earnings. First, if the injured employee worked in the same employment in which he was injured "during substantially the whole of the year immediately preceding [the] injury," average annual earnings are determined by multiplying the claimant's average daily wage during that period by 300, in the case of a six-day worker, or 260, in the case of a five-day worker. 33 U.S.C. 910(a). Second, if the employee did not work in such employment during substantially the whole of the prior year, the same calculation is employed using the average daily wage of an employee of the same class engaged during the same period in the same or similar employment. 33 U.S.C. 910(b). Third, "[i]f either of the foregoing methods * * * cannot reasonably and fairly be applied," an employee's average annual earnings is the sum that "reasonably represent[s] the annual earning capacity of the injured employee," taking into account the claimant's previous earnings and the earnings of other employees in similar employment. 33 U.S.C. 910(c).

2. Respondent Roberto Castro injured his right knee in 1998 while employed as a pile driver by petitioner General Construction. Pet. App. 4, 33, 65. That type of injury is listed under the "schedule" in 33 U.S.C. 908(c). Pet. App. 7, 34-35, 77-79. After Castro underwent three reconstructive knee surgeries and attempted unsuccessfully to return to work at General Construction, his physician recommended vocational retraining. *Id. at* 4, 33-34, 66, 68. The Department of Labor's Office of Workers' Compensation Programs approved a vocational rehabilitation program under which Castro attended hotel management classes. *Id*. at 2, 5, 34, 64, 74. Castro filed a LHWCA claim seeking total disability compensation

for the period during which he was enrolled in the vocational rehabilitation program. *Id.* at 2, 34, 64. General Construction and its insurer, petitioner Liberty Northwest Insurance Corp., disputed Castro's entitlement to total disability compensation for the vocational rehabilitation period and argued that his average weekly wage should be computed under 33 U.S.C. 910(c) rather than 33 U.S.C. 910(a). *Id.* at 8, 64, 84-85.

3. An administrative law judge (ALJ) awarded permanent total disability compensation for the period during which Castro attended vocational training. Pet. App. 79-84. The ALJ reasoned that, because Castro's knee injury fell within the Section 908(c) "schedule," Castro had to establish a right to total disability compensation in order to avoid the limitations of the "schedule" for permanent partial disabilities. *Id.* at 79. The ALJ concluded that Castro was unable to return to his usual work. *Id.* at 35, 67-68, 74. The ALJ further found that he retained some wage-earning capacity because petitioners showed that Castro was capable of returning to work in a number of suitable alternative jobs. *Id.* at 79-81. The ALJ awarded compensation for total disability, however, because Castro showed that he could not perform such work while enrolled in vocational training. *Id.* at 81-82. The ALJ also found that Castro's long-term earning potential would be greater after completing the program. *Id.* at 83.

In calculating Castro's average weekly wage for purposes of setting compensation, the ALJ concluded that, under Ninth Circuit precedent, when a claimant works more than 75% of the work days in the measuring year, 33 U.S.C. 910(a) presumptively applies. Pet. App. 84-86. Castro worked 77.4% of the applicable work days and petitioners could not rebut the presumption, the ALJ

concluded, by arguing only that Castro had never actually earned the type of wages at which he would be compensated under 33 U.S.C. 910(a). Pet App. 86. The ALJ accordingly awarded compensation based on an average weekly wage of $1004.37, *id.* at 87, rather than the $756.65 for which petitioners argued. *Id.* at 6, 36.

4. The Benefits Review Board (Board) affirmed the ALJ's award of benefits. Pet. App. 32-62. The Board reasoned that, under the burden-shifting test that courts use in determining total disability, an injured claimant may establish entitlement to total disability compensation for periods during which he or she is enrolled in a vocational rehabilitation program. *Id.* at 42-43. The Board also concluded that the ALJ properly applied that test in this case. *Id.* at 46-50.

The Board also affirmed the ALJ's use of 33 U.S.C. 910(a) to calculate the average weekly wage. Pet. App. 55-60. The Board agreed with the ALJ that petitioners could not rebut the presumptive use of Section 910(a) solely by arguing that its use overcompensated Castro. *Id.* at 59-60.

5. The court of appeals affirmed the Board's decision. Pet. App. 1-31. The court agreed with the Fourth and Fifth Circuits that the LHWCA permits an award of total disability benefits during a period of vocational rehabilitation. *Id.* at 13-15; see *Newport News*, 315 F.3d at 292-293; *Abbott*, 40 F.3d at 127-128. The court rejected petitioners' arguments for denying compensation, including an argument that this Court's decision in *Potomac Electric* precludes an award. Pet. App. 15-20. The court of appeals explained that, in *Potomac Electric*, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, those benefits are the claimant's exclusive remedy and the claimant

cannot recover partial disability benefits based on loss of wage-earning capacity. *Id.* at 19. The court of appeals concluded that *Potomac Electric* does not address or preclude a claim for *total* disability, the kind of award at issue here. *Id.* at 20.

The court of appeals also upheld the use of 33 U.S.C. 910(a), rather than Section 910(c), to calculate the average weekly wage. Pet. App. 20-27. The court explained that under its earlier decision in *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1058 (9th Cir. 1998), Section 910(a) "presumptively applies when a claimant works more than 75% of the workdays of the measuring year." Pet. App. 22 (internal quotation marks omitted). The court rejected petitioners' argument that Section 910(a) should not apply because it would lead to overcompensation. *Id.* at 23-24. "Given the virtual inevitability of overcompensation under [Section 910(a)]," the court "decline[d] to interpret the existence of [Section 910(c)] as a statutory bar to any application of the LHWCA resulting in arguable overcompensation." *Id.* at 24.

ARGUMENT

1. Petitioners contend (Pet. 9) that the court of appeals erred in adopting a rule that requires the application of Section 910(a) when an employee worked at least 75% of the workdays available for a five-day worker in the year prior to the injury. The Court recently denied a petition for a writ of certiorari in a case raising the same issue, see *Stevedoring Servs. of Am.* v. *Price*, 382 F.3d 878, 883-885 (9th Cir. 2004), cert. denied, 125 S. Ct. 1724 (2005), and there is no reason for a different outcome here.

a. Petitioners contend (Pet. 10, 12 n.6) that the court of appeals' decision imposes a rigid bright-line rule that

requires compensation under Section 910(a) when a claimant worked more than 75% of the workdays in the preceding year. That contention reflects a misreading of the court of appeals' decision. The Ninth Circuit did not hold that Section 910(a) must be applied in all cases in which an employee has worked at least 75% of the workdays. That court has expressly recognized that, even when an employee has worked at least 75% of the workdays, Section 910(a) does not apply when the nature of the claimant's work is seasonal or intermittent, *Price*, 382 F.2d at 884, when there is insufficient evidence in the record to enable the ALJ to make an accurate calculation under Section 910(a), *ibid.* or potentially in other special circumstances. *Matulic* v. *Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). At the same time, the court acknowledged that ALJs may apply Section 910(a) even "when the claimant has worked less than 75% of these days, if the reduction in working days is atypical of the worker's actual earning capacity." Pet. App. 22 (internal quotation marks omitted).

In this case, the court of appeals found that Castro worked 77.4% of the workdays in the year preceding his injury. Pet. App. 26-27. Petitioners presented no evidence that the nature of his employment was seasonal or intermittent, that an accurate calculation could not be made under Section 910(a), or that there was any other special circumstance that would make it unfair or unreasonable to apply Section 910(a). The Ninth Circuit therefore applied Section 910(a) in this case not because it invariably applies that subsection when a claimant worked at least 75% of the workdays of the preceding year, but because petitioners offered no persuasive reason that Section 910(a) should not apply given the facts of this case.

To the extent that petitioners object to any reliance on a percentage figure in determining whether Section 910(a) applies, that objection is misguided. The text of Section 910(a) expressly provides that its method of calculation applies not only when a claimant worked the entire year preceding the injury, but also when the claimant worked "substantially the whole of the year." 33 U.S.C. 910(a). In making a determination whether a claimant has worked "substantially" the whole of the year, a court must necessarily consider the percentage of days that the employee worked. And using a particular percentage figure as a rule of thumb to determine what is "substantially" the whole of the year eases administration of the statute and is consistent with the approach that the Court has adopted in other contexts. See *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 371 (1995) (concluding, as an appropriate rule of thumb for the ordinary case, that a worker who spends less than 30% of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act (Merchant Marines Act of 1920, ch. 250, 41 Stat. 988)).

Congress's specification that Section 910(a) applies when a worker has worked "substantially" the whole of the year also answers petitioners' argument that the court of appeals' approach leads to overcompensation. By making Section 910(a) applicable when an employee has not worked the entire year, but only "substantially" the whole year, Congress clearly contemplated some degree of overcompensation. As the Fifth Circuit has explained, overcompensation "is built into the system." See *Gulf Best Elec., Inc.* v. *Methe*, 396 F. 3d 601, 606 n.1 (2004). And petitioners have not shown that a 75% figure departs so far from the customary hours worked in

the industry that it produces more overcompensation than Congress could have intended.

b. In any event, review of the first question presented is unwarranted because no other circuit has taken a position on whether the court of appeals' approach in this case best implements the LHWCA. Although the Seventh, Fifth, and Fourth Circuits have not adopted an approach like that of the Ninth Circuit (see Pet. 10-12), neither have they rejected such an approach. And their holdings are consistent with the Ninth Circuit's decision below.

Petitioners contend that the decision below conflicts with *Strand* v. *Hansen Seaway Service, Inc.*, 614 F.2d 572 (7th Cir. 1980). There is, however, no conflict. In that case, the Seventh Circuit applied Section 910(c), rather than Section 910(a), to a claimant who worked 84% of the available workdays in the preceding year because the court found the claimant's employment to be "seasonal." *Id.* at 574-576. That holding is consistent with the Ninth Circuit's approach, because the Ninth Circuit has expressly held that Section 910(a) does not apply to "seasonal" employment." *Price*, 382 F.3d at 884 (citing *Marshall* v. *Andrew F. Mahoney Co.*, 56 F.2d 74, 78 (9th Cir. 1932)).

In arguing that *Strand* conflicts with the decision below, petitioners rely (Pet. 11) on a statement of the court below that its decision in *Matulic* rejected *Strand*. Pet. App. 25. But that statement cannot transform consistent decisions into conflicting ones. The fact remains that both the Seventh Circuit and the Ninth Circuit apply Section 910(c), rather than Section 910(a), to seasonal employment, and petitioners have not identified any case in the 25 years since *Strand* was decided in which the Seventh Circuit has applied the statute to

non-seasonal employment in a way that is in conflict with the decision below.

Contrary to petitioners' contention (Pet. 12), the Fifth Circuit's decision in *Methe* also does not conflict with the Ninth Circuit's approach. In that case, the Fifth Circuit held that the ALJ erred in applying Section 910(c) rather than Section 910(a), where the claimant worked 91% of available workdays the year preceding the injury, and the only objection to applying Section 910(a) was that it would lead to overcompensation. 396 F.3d at 606-607. That holding is consistent with the decision below, because the Ninth Circuit would have reached the same conclusion. Although the Fifth Circuit did not adopt the Ninth Circuit's precise approach, it did not reject that approach either. *Id.* at 606. Indeed, the Fifth Circuit expressly relied on the Ninth Circuit's observation in *Matulic* that Congress intended for Section 910(a) to apply in most cases even though it results in overcompensation. 396 F.3d at 606 n.1.

Petitioners similarly err in contending (Pet. 12) that the decision below conflicts with the Fourth Circuit's decision in *Baltimore & Ohio R.R.* v. *Clark*, 59 F.2d 595 (4th Cir. 1932). In that case, the Fourth Circuit applied Section 910(c), rather than Section 910(a), because it concluded that the claimant's work was intermittent and discontinuous, and because the claimant worked only 48% of the workdays in the previous year. *Id.* at 599 (prior year's earnings were $527.30, or 48% of the full-year earnings). That holding does not conflict with the Ninth Circuit's approach, because the Ninth Circuit would not apply a presumption in favor of the application of Section 910(a) to a claimant who worked only 48% of the workdays in the preceding year.

2. Petitioners contend (Pet. 13) that the court of appeals erred in holding that Castro could receive an award of total disability benefits for the time he spent participating in a Department of Labor-approved vocational rehabilitation program. That contention is without merit and does not warrant review.

The LHWCA distinguishes between partial and total disabilities, but it does not define the difference between the two. Filling that gap, the court of appeals reasonably concluded that a claimant who is enrolled in a rehabilitative program and can demonstrate that participation in the program precludes him from engaging in otherwise suitable employment may receive total disability benefits for the duration of the program. The LHWCA provides that "[t]he Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange * * * for such rehabilitation." 33 U.S.C. 939(c)(2). It is consistent with that directive and the rehabilitative goals of the Act to conclude that an employee may receive a total disability award for the period during which the claimant's participation in a rehabilitative program precludes him from accepting alternative work.

The decision below is consistent with the holdings of the only two other courts of appeals that have addressed the issue. In particular, both the Fourth and Fifth Circuits have held that employees who are receiving vocational rehabilitation services may be given a total disability award when participation in the program renders the claimant unavailable for employment. *Newport News*, 315 F.3d at 292-296 (4th Cir.); *Louisiana Ins.*, 40 F.3d at 127-128 (5th Cir.).

Petitioners contend (Pet. 14-15) that, under the Court's decision in *Potomac Electric Power Co.* v. *Direc-*

tor, OWCP, 449 U.S. 268 (1980), Castro's eligibility for an award of partial disability under the schedule precludes any alternative recovery. Petitioners' reliance on *Potomac Electric* is misplaced. In that case, the Court held that when a claimant is entitled to partial disability benefits for a scheduled injury, the claimant may not elect to recover benefits for a *partial* disability based on the claimant's lost earning capacity. *Id.* at 273-274. That holding has no application here, because Castro is seeking to recover for a *total* disability, not a partial disability. As the Court explained in *Potomac Electric*, "since the § 8(c) schedule applies only in cases of permanent partial disability, once it is determined that an employee is totally disabled the schedule becomes irrelevant." *Id.* at 278 n.17; see *Norfolk Shipbuilding & Drydock Corp.* v. *Hord*, 193 F.3d 797, 802 n.4 (4th Cir. 1999); *DM & IR Ry. Co.* v. *Director, OWCP*, 151 F.3d 1120, 1122 (8th Cir. 1998).

Petitioners similarly err in contending (Pet. 16) that Castro's injury did not cause his inability to work during vocational rehabilitation. Castro's injury caused his need for vocational rehabilitation, and while in vocational rehabilitation, he could not participate in alternative work. Moreover, Castro participated in an OWCP-approved program, and did so because it gave him the best long-term earning potential. Pet. App. 83. In those circumstances, Castro's injury was a cause of his inability to work. In any event, that fact-bound question does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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