IN THE SUPREME COURT OF THE UNITED STATES

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DANA ROBERTS, :

Petitioner : No. 10-1399

v. :

SEA-LAND SERVICES, INC., ET AL. :

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Washington, D.C.

Wednesday, January 11, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:23 a.m.

APPEARANCES:

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P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 10-1399, Roberts v. Sea-Land Services.

Mr. Gillelan.

ORAL ARGUMENT OF JOSHUA T. GILLELAN, II,

ON BEHALF OF THE PETITIONER

MR. GILLELAN: Mr. Chief Justice, and may it please the Court:

Dana Roberts was injured and shortly thereafter became disabled in the course of his work for Sea-Land in fiscal year 2002, but he was not awarded compensation until fiscal year 2007.

The question presented here is whether the maximum weekly rate established by section 6 of the Longshore Act that was in effect at the time his disability began or that which was in effect at the time he was awarded compensation governs his case. He is entitled to whichever maximum is the applicable one.

Section 6(c) of the act provides explicitly that the applicable maximum is that in effect at the time that the claimant is "newly awarded compensation." The term "award" or "awarded" in the Longshore Act has a consistent meaning throughout, contrary to the views of

the court of appeals below; and that meaning is a compensation order filed pursuant to section 19(e) of the act, which is described in section 19(e) as "the order making the award."

JUSTICE SCALIA: It seems to me that -- that the two parties are at extremes and that there is indeed something in the middle. I mean, you say it has to be the determination of entitlement to compensation by the agency. The other side says: No, it's just entitlement, whether it's been decreed or not. Why -- why wouldn't it be an award, however, if it was the employer that voluntarily paid the amount due, which is what he's supposed to do anyway, right? Why wouldn't that be an award of compensation?

MR. GILLELAN: Well, because the statute -- in some sense of the word "award" --

JUSTICE SCALIA: Yes, a sense that -- that the text would bear, as opposed to the -- to the sense that the other side argues here.

MR. GILLELAN: I think that the text will not bear that reading, in particular because the payments that you are describing that could be considered an award are described throughout the act as payments "without an award." Now, how the claimant can have been newly awarded benefits at the time the

employer makes a payment "without an award" I think defies the meaning of that word.

JUSTICE SCALIA: Where -- well, I wish you would submit the sections of the act that use it that way, that say compensation without an award.

MR. GILLELAN: Section 14(a) through (e) refers to compensation payments without an award.

JUSTICE SCALIA: Okay.

MR. GILLELAN: Those are the provisions. Section 14(a) and (b) directs those payments without an award.

JUSTICE GINSBURG: And the -- and the critical time, then -- I think, isn't it true that most compensation payments are the -- are as a result of voluntary action by the employer and not a proceeding?

MR. GILLELAN: That is true, yes.

JUSTICE GINSBURG: So then in those cases, when the employer says, okay, I will voluntarily make this compensation available, then the measuring -- the -- the pay would be measured by the time the employer makes -- makes the compensation available, right?

MR. GILLELAN: I think not, because the -- the statutory provision says it's the award that is determinative.

JUSTICE SCALIA: Well, it's --

JUSTICE GINSBURG: But there's no award.

MR. GILLELAN: But there can be an award. I think that's the critical --

JUSTICE GINSBURG: But we have -- what is -- I mean, it can be. But here's a person who has been injured and gets compensation without having to bring any legal proceeding for it. What is the weekly -- the measure then? It can't be an award, the date of the award, because there is no award. So what is it?

MR. GILLELAN: The employer that wants to lock in this year's maximum rate and not have his liability progress above that simply needs to have an award entered.

JUSTICE SCALIA: No, he doesn't. No, he doesn't. He can just begin payment. The -- (c), which is the section we are talking about here, doesn't just provide for newly awarded compensation. It also says "survivors currently receiving compensation for permanent total disability or death benefits."

"Currently receiving." Now, does that mean it has to have been decreed by the agency? I don't think so.

MR. GILLELAN: That provision, which -- that clause --

JUSTICE SCALIA: That clause.

MR. GILLELAN: -- that separate clause, which is not in this case, because --

JUSTICE SCALIA: I understand. But it -- but it applies to the question, it seems to me, that Justice Ginsburg asked, doesn't it?

MR. GILLELAN: No, I think not.

JUSTICE SCALIA: No?

MR. GILLELAN: The function of that clause is that in permanent total and death cases, because there is an annual escalator provision, whatever your rate is this year going to go up. If it's permanent total or death case, it is going to go up each October 1st by the increase in the national average wage.

JUSTICE SCALIA: But only if you have been receiving compensation.

MR. GILLELAN: If you -- if --

JUSTICE SCALIA: Okay? If neither the employment -- if neither the employer gives you the compensation voluntarily nor as you -- as you contend, there has been an award by the agency, you are out; (c) doesn't apply. Right?

MR. GILLELAN: I wouldn't say (c) doesn't apply, no. I think --

JUSTICE SCALIA: How else would it apply?

You are either receiving compensation, which I would understand to mean receiving it from the employer or by reason of an award, or else you have been newly awarded compensation, which I guess means it hasn't yet been paid, but -- but you have the award in your pocket.

MR. GILLELAN: Well, the -- the function of that separate clause is for cases in which an award has been entered of death benefits or permanent total disability benefits, and everything up to that point is governed by the maximum that is in effect at the time of that --

JUSTICE SCALIA: It doesn't say that, counsel. It says "survivors currently receiving compensation."

It doesn't say by virtue of an award. It says "receiving compensation." So if the employer is paying it voluntarily, you are in there. And then it goes on and it contrasts with receiving compensation those newly awarded compensation. You are not yet receiving it, but you have been awarded it.

MR. GILLELAN: Well, Mr. Roberts did not fall within the currently receiving compensation --

JUSTICE SCALIA: I understand that. But I'm just trying to make sense out of the provision. And it doesn't seem to me to make any sense unless you read it

just the way I suggested.

MR. GILLELAN: Okay. I hope I can provide that sense. The function of that separate clause is that a claimant who has been awarded compensation at a given rate, which is the maximum at the time of the award, will continue to receive compensation --

JUSTICE SCALIA: It doesn't say that. It says nothing about an award. The last part talks about an award. It says "currently receiving compensation for permanent total disability or death benefits." And if you are receiving it from your employer, I don't know why that isn't covered by that. Why isn't it covered?

MR. GILLELAN: I can certainly see that those terms would appear to apply to that situation in which the employer is paying compensation for death or for permanent total disability. That wouldn't provide us for a maximum -- any applicable maximum.

JUSTICE SCALIA: I don't think it affects your case. It's just a matter of understanding what this provision is talking about.

MR. GILLELAN: Yes. And what I'm trying to say about the function of this clause is that a claimant who has been awarded compensation for permanent total disability -- let's assume the employer hasn't paid anything until the ALJ issues an award, and at the time

that award is issued the maximum is $1,000 a week and the employer was -- the employee was making more than 1500, so that maximum is the rate.

JUSTICE SCALIA: But if the employer has been paying voluntarily, you don't penalize the employee for not having an award, right? I mean he's in the same position; the employer has conceded the liability.

MR. GILLELAN: He certainly is not in the same position, no.

JUSTICE SOTOMAYOR: Counsel, would Justice Scalia's reading in your judgment -- accept his proposition that those currently receiving voluntary payments from the employer fall under subsection (c). Would his reading require the employer every year to recalculate the benefits to the maximum that's established that year?

MR. GILLELAN: Yes, it would. Yes, it would.

JUSTICE SOTOMAYOR: And that's why his reading --

MR. GILLELAN: And that is precisely the function of that clause.

JUSTICE SOTOMAYOR: The function of (b) is to set a maximum that will control all payments present and future.

MR. GILLELAN: Yes, yes, definitely.

JUSTICE SOTOMAYOR: And so if you read it the way he does, that maximum would change each year.

MR. GILLELAN: Yes. And for permanent total disability and death cases --

JUSTICE SCALIA: I don't understand why that's so only for employment -- for employer payments and not the case for awards. If that's so for the employer's payment, why isn't it so for awards that have been decreed? Why don't they change every year?

MR. GILLELAN: They do. If the award is for permanent total disability or for death, they do.

JUSTICE SCALIA: Okay, so then my reading makes perfect sense.

MR. GILLELAN: Yes, your reading does make perfect sense. And the function of that second -- the clause for those currently receiving compensation for permanent total or death, is that even when the maximum continues to go up after the date of an award that new maximum is the applicable one for the continuing period of disability or survivorship.

CHIEF JUSTICE ROBERTS: When -- one of the arguments on the other side that I thought made some sense was the idea that you should focus on a particular point in time when you are figuring out what the amount

of the award is going to be; that it doesn't make -- that it's at least odd to say, well, we're going to calculate how much you're entitled to at this point, but in terms of the applicable maximum we are going to wait however long it takes and calculate that as of this point. Doesn't it make more sense to figure out the applicable numbers at the same point in time?

MR. GILLELAN: Marginally more sense, perhaps so. But that is an argument that should be addressed to Congress. Congress could easily have made section 6(c) turn on the time of injury. Instead they had provided very explicitly --

CHIEF JUSTICE ROBERTS: So if we think -- if we think the statute -- in other words, your argument, your response is that the statute is unambiguous and it can't be read in a more sensical way.

MR. GILLELAN: Yes. Yes.

CHIEF JUSTICE ROBERTS: Okay.

MR. GILLELAN: Yes, and that each use of the term "award," contrary to the Ninth Circuit's view, is consistent with that. That is, whenever Congress refers in this statute to an award or compensation being awarded, it is talking about the order making the award as its described in section 19(e).

JUSTICE SCALIA: You don't really have to

establish that, do you? All you have to establish is that there is no way in which newly awarded compensation means entitlement to compensation. That's all you have to establish.

MR. GILLELAN: That is exactly true.

JUSTICE SCALIA: You don't have to show that it's used consistently throughout, only that it's never used to mean entitlement to compensation.

MR. GILLELAN: That is exactly correct.

JUSTICE ALITO: Are you conceding in answer to these questions that your reading doesn't really make any sense, that's just what Congress -- that's what Congress did?

MR. GILLELAN: No, I hope I am not conceding that.

JUSTICE ALITO: Well, what sense does it make? Why should the ceiling depend on whether an employee is getting compensation voluntarily from the employer or as a result of a formal award? If you have two identical, identically situated employees and one is getting the compensation without an award and one is getting it with an award, as you understand the term "award," why -- what sense does it make to treat them differently?

MR. GILLELAN: I would say they certainly

are not identically situated. The claimant who has an award --

JUSTICE ALITO: They are identically situated in every respect except one. One has a formal award, one does not. What sense does it make to treat them differently?

MR. GILLELAN: There are serious consequences of the fact that one has an award and the other is being paid only without an award.

JUSTICE SCALIA: Counsel, if I understood your response to my prior line of questioning, you deny that they are treated differently. The one who is receiving compensation is treated the same, under the same provision. There are two parts to it: Survivors currently receiving compensation and survivors newly awarded compensation.

Those two classes are treated exactly the same. The only one that is treated differently is somebody who is neither being paid by the employer nor has yet received an award.

MR. GILLELAN: No. No.

JUSTICE SCALIA: No?

MR. GILLELAN: No, no.

The clause that depends on whether you are currently receiving only applies to permanent total

disability and death cases. In all other cases, the clause that says "newly awarded" is the only applicable provision.

JUSTICE SCALIA: I see. Partial disability, in other words.

MR. GILLELAN: Correct.

JUSTICE SCALIA: Okay.

MR. GILLELAN: And temporary total. Temporary total has -- the rates do not go up each year.

JUSTICE BREYER: Would you then go back -- I did have the same question Justice Alito asked and I would like to hear the answer. The answer has -- I will add one footnote, perhaps, which might make it a more complete answer, and that is that it makes very little sense to me when a worker becomes disabled on January 1, 1990, for example, he is now disabled. And so we calculate what his wage was.

His wage was $200 a week. And now we say, but that shouldn't exceed twice the average weekly wage, and we are not going to apply it to him. You are going to apply it to him at some random date. His wage that he is getting paid is figured out as of January 1, 1990.

MR. GILLELAN: Yes.

JUSTICE BREYER: But the maximum that it could be is figured out as of January 1, 1998, when he

finishes a proceeding.

Now, I just -- for both reasons, why would you distinguish and why would you get that result? For those two reasons it doesn't seem to make much sense to me, your reading of it, while theirs does make sense. Now, you explain why that is.

MR. GILLELAN: Okay. Okay. I think the point is to encourage the employer to get an award entered promptly, because that way they will lock in that early maximum rate or minimum rate. The minimum rate provision applies exactly the same way under section 6(c).

JUSTICE KAGAN: But I thought Congress wanted the system to operate so that people just did it voluntarily without an award.

MR. GILLELAN: Well, they want that to happen as often as possible, but the employer has the right in any case to file a notice with the Department of Labor saying, we do not believe the claimant is entitled to compensation.

JUSTICE SCALIA: Counsel, it really doesn't make a whole lot of sense. I mean, it seems to me you have to acknowledge that it would be a much better statute had it been written differently. And really your argument here is it's not up to us to revise the

inadequacies of a statute. I mean, your argument is you just can't read the language that way. And it provides a stupid result. And there are such things as stupid statutes and this is one of them, right?

MR. GILLELAN: I don't think it's stupid, but yes, my basic argument is --

JUSTICE BREYER: You think it is not stupid because you think it is a good idea to give a lot of work to the Department of Labor and that all the employers are going to do this voluntarily and there will never be a problem with it; all should be encouraged to go and get a certificate from the Department of Labor. All right. I will take that as something.

Now, why is it I can't read the statute the way that it seems to make somewhat more sense? I don't see any words here that stop me from reading it.

MR. GILLELAN: "Newly awarded compensation" are the critical words.

JUSTICE BREYER: Where exactly? You mean in (c)?

MR. GILLELAN: In (c), yes, 6(c).

JUSTICE BREYER: You just told me that just this had to do with permanent or total disability, and this is far --

MR. GILLELAN: No. Excuse me. The other clause of that provision, the one that says "currently receiving compensation," that one only applies to survivors and permanent totally disabled workers.

JUSTICE BREYER: Why don't they both? I mean, as I read it naturally, it says that -- we now have a special thing, you know, which these people are the dead ones and the widows are getting it and the permanently disabled people, and the -- this individual, and the secretary, the secretary or his delegate is going to calculate this thing all the time, and they've got a special thing here for -- for -- for permanent people, permanently disabled, and they are saying as to those people, we are giving them a break. They can't look for more work. They can't look for -- they are dead, for example, and they can't find other sources of income.

And so we say that, that if the average wage goes up and their wage was higher to begin with, we will raise it a bit. And that applies not only to the people who are just getting this for the first time in the relevant period; it also applies to all those who have been getting it. It applies to both groups. Well, that makes sense to me.

MR. GILLELAN: For permanent total

disability and death, yes.

JUSTICE BREYER: Right. So the whole thing applies just to the permanently disabled and the death things. What says it applies to anybody else?

MR. GILLELAN: No, the -- the clause --

JUSTICE BREYER: The whole thing. The whole -- the whole -- all of (c,) that's in my thing here that's seven lines. All of (c) applies to permanently disabled and those who died.

MR. GILLELAN: Well, that's certainly -- no one has put forward that construction, and that would mean that there is no maximum applicable to other categories of disability, like Mr. Roberts's disability.

JUSTICE BREYER: Oh, yes. Oh. I feel slightly like an Abbott and Costello movie, but I am getting --

JUSTICE SOTOMAYOR: Counsel, so what happens to your argument if we disagree with you that employers have a way to seek a compensation order? As I read the regulations, the only way they can do that is if the employee files a claim, and the employee's filing of the claim then sets the process in motion. I can't imagine that any employee, knowing that a future award could help them, would bother filing a claim to help the employer lock in his rate.

MR. GILLELAN: I think -- actually my experience, my universal experience with this statute, is that that is not a realistic view of what claimant's behavior is.

The critical difference is an award -- the entry of an award does not merely confirm that the employer is making payments; it requires it to continue making those payments until --

JUSTICE SOTOMAYOR: That's not my question. Most of your argument is premised on the -- I thought, that the employer could lock in his rate --

MR. GILLELAN: Yes.

JUSTICE SOTOMAYOR: -- by seeking an award.

MR. GILLELAN: Yes.

JUSTICE SOTOMAYOR: If I disagree with you that the Act doesn't provide for that and neither do the regulations, that only employees can seek awards, what happens to your argument?

MR. GILLELAN: Oh, I think -- well -- I have trouble accepting that hypothetical situation, because --

JUSTICE SOTOMAYOR: As I've studied it, I think that's the case. Assume that fact to be true, that employers have no regulatory or statutory right to seek an award. They can either stop paying and have the

employee make a claim or not.

How -- what does this do to your argument, if that's accurate?

MR. GILLELAN: Nothing. It simply requires the employer to induce the claimant to file a claim if it wants that award.

JUSTICE SOTOMAYOR: By stopping payment.

MR. GILLELAN: Yes.

JUSTICE SOTOMAYOR: So that destroys the whole voluntary payment aspect.

MR. GILLELAN: Well, they wouldn't -- indeed, they wouldn't have to stop payment. They simply need to tell the claimant: If you don't file a claim, we are going to stop payments.

JUSTICE SOTOMAYOR: That's an odd statute.

JUSTICE BREYER: I see. Is your argument this now -- I'm sorry to be so slow. But that, look, there is a statute here that says compensation cannot exceed more than 200 percent of the annual or weekly wage, then in (3) it says how to calculate that particular number.

And then you guy over to (c) and (c) says that calculated number applies to those newly awarded compensation. And you're saying "newly awarded compensation" means somebody got it through an award,

not somebody got it automatically. And since somebody got it -- had to get it through an award or it wouldn't apply when you just get it because they pay for it, it just doesn't apply. You have to go get the award, and the word you are turning on is "newly awarded."

MR. GILLELAN: Yes.

JUSTICE BREYER: That's the argument?

MR. GILLELAN: Yes, it is.

JUSTICE BREYER: Like Abbott and Costello, I don't know what I'm talking about. But I do -- I do -- I was, I was -- now I fully understand your argument.

JUSTICE SOTOMAYOR: Mr. Gillelan, could I just --

JUSTICE SCALIA: Counsel, could I ask you about another inconsistency in this section? We have gone over one, which I think is there. Isn't there a group left out of this thing, even under, even under the government's interpretation of it? What happens to people who are receiving compensation for temporary total disability or for partial disability? They don't -- they don't come under either one of those two categories, even under the government's interpretation, right?

MR. GILLELAN: No. I think under the government's interpretation, as under ours, they fall

under those --

JUSTICE SCALIA: No, they haven't gotten an award yet. They have not gotten an award yet and they are only partially disabled or have temporary permanent disability. They are not covered by (c), are they?

MR. GILLELAN: Well, they are covered by it, but before we know which year's maximum applies, an award --

JUSTICE SCALIA: Oh, that's right, but they -- but it doesn't take effect --

MR. GILLELAN: That's correct.

JUSTICE SCALIA: -- during that year.

MR. GILLELAN: That's correct.

JUSTICE SCALIA: Well, does that make any sense?

MR. GILLELAN: Yes --

JUSTICE SCALIA: No, it doesn't. But you say the statute doesn't make sense.

MR. GILLELAN: I think it does because it encourages the employer to have an award entered so that it will have the benefit of the current maximum rate and not next year's or the year's after or the year's after that.

JUSTICE KAGAN: All right --

JUSTICE SCALIA: That's not a serious --

CHIEF JUSTICE ROBERTS: Go ahead. You have been waiting the longest.

(Laughter.)

JUSTICE KAGAN: I think the way the argument has gone so far is that we've all been saying this can't make sense, and you have been saying, as you have every right to say, yes, but this is what the statute says based on the "newly awarded" language.

But that does assume that "newly awarded" can't mean an entitlement. And then you run up against some other statutory provisions where an award does seem to mean, not a formal compensation order, but instead an entitlement to funds. So 908(d)(1), it seems as though the word "award" means entitlement; 910(h)(1), it seems as though the word "award" means an entitlement; and 933(b), which says "award in a compensation order," suggests that awards can be made in a formal order or awards can be made differently because of an entitlement that is automatically paid.

So I guess there are three places that it seems to me your reading of the word, your limited reading of the phrase "newly awarded," runs into problems in those three ways, and I'm left then thinking we should do what makes sense.

MR. GILLELAN: I may have missed what the

third of those was. I have the --

JUSTICE KAGAN: 933(b), 908(c)(1) and 910(h)(1).

MR. GILLELAN: Ah, okay. Um, yes, 9 -- the section '8(d)(1) that they are referring to refers to an award to an employee -- the unpaid portion of an award to an employee who dies before that award has been paid out. Their reading of "award" in that provision is contradicted by the subsequent paragraph of the same subsection, which says "an award may be made after the death of the injured employee."

It's 908(d)(3). Now that is impossible on their reading of "award" on the reading they give "award" on section '8(d)(1). No, what it means in '8(d)(1), as throughout the act, is an award. And if none has been entered while the claimant is still alive, it is entered after his death.

And the survivors under that provision take the rest of it that had not been paid before the death. Now, you have essentially the same analysis of those other provisions. Yes, in those other provisions as well, it does mean a compensation order. If you cut it loose from that statutory foundation, we get three or four different possible meanings that the Respondents try to put on it, and we are cut loose from anything.

JUSTICE SCALIA: Well, you're -- you're making your case harder than it has to be, it seems to me, by saying that it always means an award of compensation by the agency.

I -- I think in -- in '8(d), I don't think it means that, but it certainly means an amount due and not an entitlement. It means an amount, a specific amount due. And that explains its meaning elsewhere, but that's quite different from saying that it means entitlement.

MR. GILLELAN: No doubt it is, yes. And -- and perhaps there may be some variation in the meaning in the other provisions. That's possible. But in section '6(d), we think it has to mean the entry of an award. That's the only definite event it could refer to.

JUSTICE SCALIA: Oh, I think that's true, but only because of the earlier portion of '6(c) which -- which covers all other payments that are not by virtue of an award, receiving compensation.

MR. GILLELAN: Yes. Right.

I would reserve what time I have left.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GILLELAN: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Palmore.

ORAL ARGUMENT OF JOSEPH R. PALMORE

ON BEHALF OF THE FEDERAL RESPONDENT

MR. PALMORE: Mr. Chief Justice, and may it please the Court:

Petitioner's interpretation of section 906, which hinges entirely on the date of an administrative compensation order, renders that provision impossible to apply in the many cases expressly contemplated by the act in which there is no such order. That interpretation also creates arbitrary distinctions between beneficiaries' benefit levels based on administrative happenstance.

JUSTICE SCALIA: Your -- I'm sorry.

CHIEF JUSTICE ROBERTS: So if you're walking down the street, you're on a business enterprise, they haven't shoveled the snow, you slip and fall and you're hurt, you go home and say: Good news, I've been awarded damages?

MR. PALMORE: The statute provides for the award of damages, and I think this is -- this -- the key to this, understanding how this scheme works, is understanding section 914 and section 913. These are at page 17a of the appendix.

JUSTICE SCALIA: We're not talking about how the scheme works. Grant you that it makes a lot more

sense your way, but will you grant that it's not up to us to rewrite the statute?

MR. PALMORE: It's absolutely not up to you --

JUSTICE SCALIA: Okay.

MR. PALMORE: -- to rewrite the statute, Justice Scalia.

JUSTICE SCALIA: So what we're talking about is whether "awarded" in that provision can bear the meaning that you want to give it. Let's assume that Congress passes a -- a new statute providing for tax credits for -- for each child, okay? My wife gives birth to a child just before Christmas, and I say: Oh, goody; I've been awarded $2,000. I wouldn't say that. That's not a normal use of the language.

MR. PALMORE: I think it's --

JUSTICE SCALIA: I am entitled to it under this statute. But when the event of having a child occurs, I don't say: "I've been awarded $2,000." You might say it analogously. I mean, you know: Oh, hey, I've been awarded $2,000. But that's analogous. And statutes are not written by analogy; they're written to say what they say.

And I don't know anybody that would use the term "awarded" the way you want it used. The Chief

Justice's example is another one: Oh, good, I've been awarded damages. You haven't been awarded damages. You're entitled to them.

MR. PALMORE: I think Justice Kagan highlighted three provisions where the statute does in fact use the word "award" to indicate a statutory entitlement.

JUSTICE SCALIA: Let's go through those.

MR. PALMORE: I'd be glad to, Justice Scalia.

JUSTICE SCALIA: And you -- you show me how -- I agree with you that they don't mean the entry of an award by the agency, but I don't agree with you that the only -- only reading you can give them is entitlement.

MR. PALMORE: Well, Justice -- to start with, section 933, which is at page 24a of the government appendix. This is one of the sections highlighted by Justice Kagan.

JUSTICE SCALIA: 933 of the gray brief?

MR. PALMORE: Of the gray brief. 933(b) says: "Acceptance of compensation under an award in a compensation order filed by the deputy commissioner will have certain consequences." That expressly contemplates -- this is page 24a, Justice Scalia.

Sorry.

JUSTICE SCALIA: I'm sorry. Give me a minute. Give me a minute.

MR. PALMORE: Okay.

JUSTICE SCALIA: The language is important, isn't it.

MR. PALMORE: Absolutely.

JUSTICE SCALIA: What page?

MR. PALMORE: Page 24a of the appendix to the gray brief.

JUSTICE SCALIA: Okay, got it.

MR. PALMORE: Okay.

JUSTICE SCALIA: And the language is?

MR. PALMORE: So the first sentence says: "Acceptance of compensation under an award in a compensation order" --

JUSTICE SCALIA: Right.

MR. PALMORE: -- "filed by the deputy commissioner shall have certain legal consequences" --

JUSTICE SCALIA: Right.

MR. PALMORE: -- that aren't important here. That sentence, even read by itself, suggests there can be an award that's not in a compensation order.

Moreover --

JUSTICE SCALIA: Oh, yes. Yes.

MR. PALMORE: -- the last sentence says: "For purposes of this subsection" -- not the purposes of the entire act -- "for purposes of this subsection, term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner and the administrative law judge."

JUSTICE SCALIA: That's -- that's true. And what that means is that it can be considered an award if you've gotten it from the employer voluntarily. That is still an award of compensation.

That's all that that last sentence proves.

MR. PALMORE: I think it contemplates -- it certainly precludes, I think, Petitioner -- Petitioner's --

JUSTICE SCALIA: Oh, yes. Yes. I agree he's wrong.

(Laughter.)

MR. PALMORE: Well, the actual -- the actual receipt interpretation that Your Honor is advancing is not one that's been advanced in this case. It would have extraordinarily -- extraordinary practical difficulties and application would be really inconsistent.

JUSTICE SCALIA: No, no, no. I think he's persuaded me that in -- in the section we're talking

about, subsection (c), the only meaning left for "award" is an award by the agency, because --

MR. PALMORE: Well, I'd like to try -- I'd like to try to convince you otherwise.

JUSTICE SCALIA: But -- but you have to show me one other provision at least where the only meaning you can give "award" is entitlement to money.

MR. PALMORE: Well, I think section 910(h)(1), another provision cited by Justice Kagan, is another example.

JUSTICE SCALIA: (H)(1)?

MR. PALMORE: (H)(1).

JUSTICE SCALIA: "Upward adjustments to" --

MR. PALMORE: At 15a.

JUSTICE SCALIA: -- "compensation to" --

MR. PALMORE: Right. This is a very complicated provision, but what's important to note here is that Congress made -- this was Congress's attempt to provide additional benefits to beneficiaries whose disabilities commenced before 1972.

JUSTICE SCALIA: Right.

MR. PALMORE: They make a critical --

JUSTICE SOTOMAYOR: What page are you on?

MR. PALMORE: I'm sorry. Page 15a of the appendix to the gray brief.

The specifics aren't as important as the use of the phrase, and it's one, two three, four, five lines from the bottom, "or his survivor was awarded compensation as the result of death." So it makes a key determinant for figuring out how these adjustments are going to be made whether someone was awarded compensation prior to October 27th, 1972. There's no indication here, and it would make no sense to suggest, that Congress meant to distinguish between people who had a formal compensation order and those who didn't.

I think -- but if I could go back to section --

JUSTICE SOTOMAYOR: And his answer to that was -- his answer to that was that the provision also permits an entry after someone -- of an order after someone dies.

MR. PALMORE: That's his answer on some of the other provisions --

JUSTICE SOTOMAYOR: So it's -- the incongruity is taken care of by the act directly.

MR. PALMORE: Right. But here, here there'd be no reason for someone to go in and get a compensation order, because these are long-past disabilities, and Congress was simply creating a rule for how to true-up these past beneficiaries and provide them additional

benefits.

But I think if you --

JUSTICE SCALIA: What -- what does "awarded compensation at less than the maximum rate" mean? I'm not sure what that refers to.

MR. PALMORE: There was an old maximum. Prior to 1972, there was a $70 maximum.

JUSTICE SCALIA: Right.

MR. PALMORE: Okay. So if someone --

JUSTICE SCALIA: Aren't you entitled to get the maximum? No?

MR. PALMORE: Yes. But some people -- two-thirds of their average weekly wage resulted in a figure below the maximum, right. So for those people, what section 910(h)(1) did was said if you were awarded compensation at less than the prior maximum, you were going to get an inflation adjustment.

JUSTICE SCALIA: I got you.

MR. PALMORE: For everyone else who was already at the maximum, they got a new, statutorily-created time of injury, which was itself significant that Congress went -- used that route.

But there's no indication --

JUSTICE SCALIA: You're right, it doesn't make sense.

MR. PALMORE: It doesn't make sense under Petitioner's reading. I think it does make sense under our reading.

JUSTICE SCALIA: Yes, yes.

MR. PALMORE: Okay?

And if you go to page 17a, I think these are the key provisions for understanding how section 906 works in the statutory scheme. Section 914, at the bottom of the page -- 17a to the government's brief -- provides that: "Employers must pay compensation without a compensation order promptly, as soon as they have notice of an injury."

(B), which is on the next page, 18a, says that the first payment has to come in 14 days, within 14 days of notice of the injury, "unless the employer controverts liability." So if I'm an employer and I have an employee who's injured, I've got to get out my checkbook on day 14 and start writing checks.

I need to know what number to fill in.

CHIEF JUSTICE ROBERTS: But you're doing that -- you're doing that without an award.

MR. PALMORE: Correct.

CHIEF JUSTICE ROBERTS: So how can you say what the employer pays should be considered an award if it's not an award?

MR. PALMORE: Because if you don't consider that, then the -- the statutory provision is impossible to apply. Because then it's unclear -- and I haven't heard Petitioner answer what the statutory maximum is -- if that employee who gets his first check after 14 days has not been newly awarded compensation --

JUSTICE KENNEDY: Well, then we're back -- we're back into (b) overrides (a). You -- you are saying that (a) would be interpreted in favor of the Petitioner but for (b).

MR. PALMORE: No, I'm saying that --

JUSTICE KENNEDY: Because I agree with the Chief Justice. With -- without an award it -- it seems to me it tends to help the Petitioner.

MR. PALMORE: That use of "award" clearly means compensation order, and I'm not here to suggest that the -- that the statute never uses the word award to mean compensation order. Often it does, and in this case that provision does. But the larger point is that that employer --

JUSTICE KENNEDY: Oh, I see.

MR. PALMORE: -- has to start payments in 14 days, and he has to know what statutory maximum applies. Under Petitioner's view of the statute, there is no answer to that question, because that employee has

not been newly awarded compensation, so section 906(c) --

JUSTICE KAGAN: And in what percentage of the cases are we in that world?

MR. PALMORE: It's a -- in a substantial majority of cases no claim is ever filed, Justice Kagan. Page 38 of the red brief points to legislative history before Congress in 1972 which demonstrated that, and that remains the case. This is a workers' compensation -- team -- that encourages employers to pay, which without administrative compulsion. It's supposed to be simple to apply. The employer is supposed to know how much to write that check for at the time he writes that first check, after the 14 days.

JUSTICE GINSBURG: But your reading doesn't encourage employers to pay, because they can stop -- just by saying they contest, right?

MR. PALMORE: Absolutely. They have a statutory right to controvert.

JUSTICE GINSBURG: So -- so your reading leads I think to protraction. And they get that date of injury rule no matter how long they string it out under your reading. If you read -- what is the magic phrase -- newly --

MR. PALMORE: Newly awarded compensation.

JUSTICE GINSBURG: You can say, well, that means in the case of the employer who pays promptly, pays immediately and continues to pay voluntarily, that the compensation is required when the employer starts paying voluntarily. But if the employer stops paying, then the compensation is newly awarded when there is an award.

So I don't see why -- what kind of problems this statute would have if we say newly awarded could mean awarded by the statute, which would be newly awarded when you are injured. But it can also mean compensation ordered by an award. So, you have the employer who pays promptly can lock in that early date, but if he doesn't pay promptly, the -- then the ceiling is going to go up till the time the award is entered.

What is wrong with that reading?

MR. PALMORE: It's again a reading that hasn't been advanced in this case but I understand Your Honor's question and Your Honor's point. I think that reading of it would be very difficult to apply because there may be many cases when the employer will write one or two checks and then stop. There made be cases in which the employer will write a check for the wrong amount; there will later be a dispute about what the proper benefit level would be.

So I think you'd develop a whole new body of case law and controversy about what it meant for the employer to have paid --

CHIEF JUSTICE ROBERTS: But those aren't going to be the typical cases, I think. You say there may be cases and I suppose there may be. I assume what happens -- employers don't just write checks. They say this is how we calculate what we owe you. And it is based on the maximum of this year, not any future ones, and if the employee says no, no, no; I have a right to get the -- then the employer will say well, okay, I either agree with that or not, but you don't get a check.

MR. PALMORE: Well, the -- the employer will need to protect itself by writing that check unless it's going to controvert liability. Justice Ginsburg pointed to one of Petitioner's arguments that this provides an incentive for employers not to controvert liability when they don't have a good faith basis for doing so, but section 938 of the act provides for attorneys fees in that situation so there is already a remedy for that kind of situation.

CHIEF JUSTICE ROBERTS: I -- I understand the amounts at issue here. What is the usual amount that is at stake in this sort of case? We are talking

about the concerns, I guess on both -- about gamesmanship, but how much difference are we talking about?

MR. PALMORE: Well, the --

CHIEF JUSTICE ROBERTS: I don't know; maybe you don't have statistics, on an average.

MR. PALMORE: Well, I can give you this case as an -- as an illustration. So in this case the Petitioner's disability began in 2002, so our view is that that was when he was initially awarded compensation so the 2002 maximum of $966 applies. Petitioner's view is that because he received a formal compensation order in 2007, the 2007 maximum applies, this 1,114, so it can make a considerable difference.

I think, though, that Petitioner recognizes --

CHIEF JUSTICE ROBERTS: The consequence -- I mean, there is a time value of money, too. The consequence of the employee saying, I'm going to wait 5 years, because I think the maximum is going to be a lot higher is that he doesn't get anything in the meantime, right?

MR. PALMORE: Well, that's -- that's right.

CHIEF JUSTICE ROBERTS: It's reasonable for an employer to say, okay, if you want to wait, I'll

wait.

MR. PALMORE: That's right. The larger point though is that in many cases in which compensation is paid without compulsion of a compensation order, an employee never files a claim. Section 913 expressly contemplates that by saying that an employee has 1 year in which to file a claim from an injury unless he has been receiving payments, in which the time runs from the last payment received.

JUSTICE BREYER: What happens, just for my technical knowledge here, the -- the employee suffers partial disability on February 1. He then doesn't notify the employer until, let's say, February 10, and then the employer waits for a week or so, and then begins to pay.

Now is the employer supposed to calculate the -- the weekly wage that he's paying on in the week February 1 to February 10 -- or 3 days he puts it aside. But -- the first week? Or does he do it on the first week he got notice? How is that -- how does that work?

MR. PALMORE: Well, he needs to provide -- he needs to make a payment within 14 days.

JUSTICE BREYER: That's right. But I'm saying he has to write the check now.

MR. PALMORE: Right.

JUSTICE BREYER: And the wage could have changed in those few weeks.

MR. PALMORE: It's from the --

JUSTICE BREYER: The first week he didn't get the notice, then the second week he did get the notice. Which week does he calculate the payment on?

MR. PALMORE: From when the disability commenced.

JUSTICE BREYER: All right.

MR. PALMORE: But you're not --

JUSTICE BREYER: Then we can't -- we cannot read this thing "award" to mean award by the employer. We can't read it to mean award by the -- by the government, in your view. We have to mean it to mean the time that he became entitled to some money?

MR. PALMORE: That is our submission, Justice Breyer.

JUSTICE BREYER: And the tough thing is saying, well, that that's an award. That's what this case turns on.

MR. PALMORE: Well, as we've -- as I was discussing earlier we -- sometimes do awards that way.

JUSTICE BREYER: And what you pointed to in the statute is you pointed to some situations which say we have situation 3 and 4, and they are not present

here. But in situation 3 or 4, award does mean this.

MR. PALMORE: I think --

JUSTICE BREYER: All right. That --

MR. PALMORE: Right. I think if I can show you -- if I can show you -- there are some cases --

JUSTICE BREYER: You don't have another example of a -- of a situation where award did mean -- so you are saying there are some others where award doesn't mean, okay.

MR. PALMORE: Well, I think there are --

JUSTICE BREYER: But is there anything -- what is the most analogous thing you can find anywhere where award has referred to the time that a person became entitled to a thing, prior to the time anyone was -- became obliged to give him some money?

MR. PALMORE: Well, I think --

JUSTICE BREYER: Even if that time first was the period for -- way for calculating the money?

MR. PALMORE: I think 910(h)(1) is that example --

JUSTICE BREYER: 910(h)(1).

MR. PALMORE: And I hesitate to go back into the weeds of that provision.

JUSTICE BREYER: No, no, don't do it again.

(Laughter.)

MR. PALMORE: But the first sentence says -- it talks about those who were entitled to total permanent disability or death, which commenced, so it talks about commencement of entitlement.

JUSTICE BREYER: It says awarded was awarded compensation.

MR. PALMORE: And then later it uses awarded compensation. If I could go back quickly to the claim --

JUSTICE BREYER: Yes, okay.

JUSTICE SOTOMAYOR: Your brief -- your brief seem to use the newly awarded compensation, your meaning of it, at the time of injury, at the time of disability, the time of entitlement to compensation; and it seems to use those terms interchangeably. What term are you settling on and why?

MR. PALMORE: Okay. I think we address this in footnote 9 of our brief. It's the commencement of entitlement to disability benefits, which is almost always going to be when disability itself commences. Petitioner has pointed out that there is an idiosyncratic set of cases in which, if a disability lasts more than 3 days but fewer than 14, you are not compensated for those first 3 days. So under that unusual it would be day 4, but the employer who writes

that check at day 14 is going to know. That's -- that's the --

JUSTICE BREYER: I mean, you can do it. You can say it's the time that the statute awards him the compensation. That's the English language.

MR. PALMORE: That's -- that's correct, Justice -- Justice Breyer. And I think that --

JUSTICE BREYER: And it's the statute that is doing the awarding.

MR. PALMORE: To make his -- I think Petitioner has developed kind of a procedural work-around to the -- the problem created by his interpretation the statute, which is if he needs a compensation order in every case to make the scheme make sense, to get compensation order he needs a claim in every case. And as the colloquy before reflected, the way he can get a claim in every case, because in many cases the claims are not filed today, is that the employer must threaten the disabled employee to cut off benefits if that employee doesn't file a claim.

Threaten to controvert liability when that employer has no good faith basis for doing so. All to get the employee to file a claim that the claim -- that the employee doesn't think is necessary, to get a compensation order which serves no other purpose than to

trigger this maximum rate provision.

That is contrary to the way this statute is supposed to work. The statute is supposed to encourage amicable agreement between employers and employees to avoid administrative process and the gearing up of the administrative machinery wherever possible.

And Petitioners proffered solution to the problem of the absence of a compensation order in every case is contrary to that of the entire thrust of the Longshore Act as a workers' compensation scheme.

JUSTICE GINSBURG: And your answer to the problem of an employer protracting, so he doesn't have to pay sooner, he can wait till later is there would be no penalty as long as the employer says I am contesting, but you say the attorneys fees, is that --

MR. PALMORE: Attorneys' fees and interest, both of which are generally applicable remedies that apply to cases that don't implicate the statutory maximum or the statutory minimum. Petitioner's solution using his reading of the statute to deal with employer delays over-inclusive and under-inclusive.

It is over-inclusive because it's going to deal with cases in which there hasn't been delay by any responsibility by an employer, but there's been administrative delay, there's been the dispute. But

it's also under-inclusive in that it only deals with those small number of cases that deal with the statutory maximum or minimum.

CHIEF JUSTICE ROBERTS: Thank you Mr. Palmore.

We will have Mr. Keisler speak for a bit. Mr. Kiesler.

ORAL ARGUMENT OF PETER D. KIESLER

ON BEHALF OF THE PRIVATE RESPONDENT

MR. KEISLER: Mr. Chief Justice and may it please the Court:

I would like to begin if I may by addressing Justice Scalia's and the Chief Justice's questions on whether the term award can bear the meaning that ascribe to it and then explain why, since it can bear that meaning, this is the only sensible interpretation of the act.

First, it is not uncommon, Your Honor, to use the term award to describe a benefit conferred by a statute. The dictionary definition is a benefit conferred. Your Honor, Justice Scalia used a formulation, what if a statute awards a tax credit. Well, the Court's decision in New Energy Company v. Limbach began an Ohio statute awards a tax credit to a certain producer of ethanol. I think even Your Honor

was the author of that decision. It is --

JUSTICE SCALIA: I agree with that. You can speak of the statute as awarding something. But when you use the phrase "newly awarded" you are not referring to the enactment of the statute. You are referring to the time at which the person qualifies under the statute. And I don't know any usage of that sort that a person -- well, you know, when my wife has a baby, "I have been awarded money. " You haven't been awarded money.

MR. KEISLER: I think the party becomes newly awarded at the time that the party becomes disabled, and therefore there is an amount due under the statute. And --

JUSTICE SCALIA: Yes, that's what you say. But, I don't know any common usage that employees the term --

MR. KEISLER: But it is a usage within the Longshore Act elsewhere, as Mr. --

JUSTICE BREYER: But, about the business, was newly awarded the tax credit at the time they made the deduction.

MR. KEISLER: At the time they became qualified for what the statute required them to do to get the tax credit, yes. And that is how it is used in

910 (h)(1), as Justice Kagan said. It's how it's used in 908. And section 933, specifically provides Petitioner's definition of award, a formal compensation order, but says it is only for purposes of this subsection.

CHIEF JUSTICE ROBERTS: But that's not the way it is used in 914.

MR. KEISLER: That's correct. And that's why this is a case like Robinson v. Shell Oil, in which the word employer was used throughout Title VII in different ways. And what the court said is you then have to look at the context of the individual provision in which the word appears that you are construing to determine how the word is being used in that particular provision.

And here the most fundamental reason why it is an untenable construction of this act to rely on the date of a compensation order to determine the applicable maximum rate is that then the act would be silent as to the maximum rate in the vast majority of instances in which compensation is paid, because as Mr. Palmore said, in the vast majority of instances no claim is filed.

And as Justice Sotomayor pointed out, when no claim is filed, no compensation order will ever be issued. And that's not an accident. That is a function

of a very central feature of the act's design that Petitioner's interpretation is entirely at odds with.

The act is designed to enable compensation to be calculated precisely and as early as possible so the money can get into the employee's hands very quickly and with a minimum of instances in which the administrative machinery has to be invoked. That's why the norm is no compensation order. And so Petitioner's interpretation is counter to that in at least two respects.

It relies on the existence of a compensation order which in most instances won't and shouldn't issue, and would maximize, rather than minimize, the number of instances in which someone has to go and get an order to force compensation orders out of a system to make Petitioner's interpretation work even though everything is happening exactly as the Act says it should be. The employer is voluntarily paying exactly the amount that the employee says is due, and there is no need to get the agency involved.

CHIEF JUSTICE ROBERTS: But how much of a practical problem is this? I understand the amounts are here, but if it's five years, and apparently the employee was happy to wait five years to get an award. Normally if you are an employee and you are disabled,

and the employer says, well here's what we are going to give you, and it's based on the maximum of the latest we have.

You're not going to say: I'm going to wait; these wages are going to go up nationally, and I'm going to wait a year; maybe I'll wait for years because I think there's a trend on national average wages, and I'm going to cash in on that; I am going to be without money for the next four years and I am disabled but -- I mean, that doesn't sound to me to be a plausible situation.

MR. KEISLER: But if Your Honor thinks about the situation in which the employee is voluntarily receiving from the employer everything that the employee agrees is due. Then the question is, in that circumstance where the employer is doing everything right, what can the employer do to force out of the system a compensation order that will lock in the maximum rate? And Petitioner's solution to that problem evidences the problem with his position.

CHIEF JUSTICE ROBERTS: Well, no, I mean -- apparently -- I don't know what the employers do, but usually in a situation like this, the employers have good lawyers and they write at the end of the check, you know: This is in full satisfaction of any claims under the -- the whatever.

MR. KEISLER: But there is no compensation order until that employee files a claim. And under Petitioner's interpretation, there would therefore be no knowable maximum rate. And Petitioner's solution to that problem, on page 16 of his reply brief, is to say that the employer should threaten a bad faith cutoff of funds. The employer should say: I will cut you off unless you file a claim. That is bad for everyone.

It's bad for the employee who has access to payments delayed; it's bad for the employer who apparently is being told that it must controvert liability in bad faith because the employer doesn't in fact disagree that the employee is entitled to liability or face a 10% penalty for cutting off the employee without a basis for controverting liability, and it's bad for the agency who suddenly has all these claims filed, all in a situation in which everything is working exactly as the Act intends.

JUSTICE SCALIA: Give me your example again of award used as -- a penalty?

MR. KEISLER: 910(8)(1).

JUSTICE SCALIA: No, no, no; not from the statute. You, you--

MR. KEISLER: New Energy Company v Limbach. It was a commerce clause case from, I think, 1989 in

which Your Honor began the opinion by saying, to describe a setup, an Ohio statute awards tax benefits to, and then describes the category of energy producers who could take advantage of the tax benefit. And I think those energy producers --

JUSTICE SCALIA: That wasn't -- you, you gave another example.

MR. KEISLER: Robinson v. Shell oil?

JUSTICE SCALIA: No, not a case.

MR. KEISLER: Okay.

JUSTICE SCALIA: Just an example you made up out of your fertile imagination which seemed to me pretty good. I forgot it. I will get it from the transcript.

MR. KEISLER: I think it's the employee who was receiving voluntary payments, and everything is proceeding the way the Act intended. But, the employer, in order to know what its maximum rate will be, in order not to be surprised 5 years hence by a maximum rate that only then can be known, has to force a compensation order out of the system. And the only way Petitioner says the employer can do that is by threatening a bad faith cutoff of funds.

Whether it happens frequently or infrequently, Mr. Chief Justice, I think an

interpretation that relies on a mechanism that is so obviously counter to the way the statute is supposed to function is, by virtue of that, an extremely unlikely and unnatural interpretation of the statute.

JUSTICE GINSBURG: What percentage of the compensation cases involve the statutory maximum? Because if your pay is less than the statutory maximum, this issue doesn't come up.

MR. KEISLER: In 1972, Congress was told that it would be about 10 percent. My understanding is since then it's grown so that I'm told that about 20 percent of cases today require application of the maximum rate.

CHIEF JUSTICE ROBERTS: Does the maximum always go up?

MR. KEISLER: Ever since 1972, each year's maximum as calculated by the Secretary of Labor has been higher than the preceding year.

CHIEF JUSTICE ROBERTS: Theoretically, it can go down.

MR. KEISLER: Theoretically, it can. It never has.

If the Court has no further questions.

JUSTICE KAGAN: Mr. Keisler, if I could just go back to this language. If, according to Justice

Scalia's old opinion, the statute awards compensation at the time of disability, essentially what you would be saying is that an employer who becomes disabled in a certain year is awarded compensation at that time.

Is that right?

MR. KEISLER: That's right, Your Honor.

JUSTICE SCALIA: Yes. But I didn't say in that opinion that the -- the employer in -- in that cases -- or whoever it was that was entitled within the statute -- was "newly awarded" it. I agree the statute awards it, but when you say somebody is "newly awarded," you're talking about an event at that time. And that's -- that's a different usage.

MR. KEISLER: I think the function of "newly" in this statute is something different, Justice Scalia. And that relates to the questions that Your Honor and Justice Breyer were asking about the relationship between the "currently receiving" clause and the final clause. I think the "currently receiving" clause, which relates to those with permanent total disability and death, is an adjunct to another provision of the act, section 19(f), which provides for a COLA, a cost of living increase every year for that narrow subset of the most disabled of employees.

They and they alone get that annual bump-up.

And so that "currently receiving" clause is written for that category to make sure that their bump-up isn't capped by a static maximum rate. The other part of the clause, "newly awarded compensation," is about everybody else.

Now, I think the use of the word "newly" there is just to distinguish it from the "currently receiving" clause, which is escalating year by year. And those newly awarded compensation, meaning at one point, fixed in time -- only when you are "newly" awarded compensation are you then going to have your maximum rate fixed.

And then -- and both Petitioner and we agree -- whatever it's fixed at, whatever year, that stays the same for the duration of your collection of compensation.

If the Court has no further questions, I thank the Court.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Gillelan, if I got that right, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JOSHUA T. GILLELAN, II,

ON BEHALF OF THE PETITIONER

JUSTICE SOTOMAYOR: Counsel, let's assume an employer pays, continues to pay over a period of time,

and the employee needs more money and goes in and says "you owe me more money; I'm going to make a claim." The board says, "no, he doesn't owe you more money. He was paying the right amount." And so you're not entitled to the 1200 you're asking for; you're only entitled to the 1000 he was paying.

Under your view, if that happened 5 or 10 years after the payments started, would the employer be liable for the higher average 10 years later?

MR. GILLELAN: Only, of course, if the employees' own wages at the time of the injury qualified for that.

JUSTICE SOTOMAYOR: Assuming it does, that the answer is yes?

MR. GILLELAN: Yes.

JUSTICE SOTOMAYOR: So what stops an employee from simply doing what I said? What stops an employee from kicking up his own maximum by -- whenever he chooses to do it, years and years later?

MR. GILLELAN: Well, I think in that situation, the claimant hasn't triggered that award. In fact, the claimant has triggered the maximum that's in effect at the time of that award that only makes -- it's an award only of what the employer has been paying. It's not a denial, as its characterized in the

government's brief. But it is -- an award only of what of the employer has been paying.

If the claimant did not bring it forward with that, and the employer let it go for still further years, then even a subsequent year's maximum would be the idea --

JUSTICE SOTOMAYOR: If we find any ambiguity in the statute, in the statutory language, would it then make more sense to adopt your meaning or the government's, given all of the factors that the government argues counsels in its favor?

MR. GILLELAN: I think each of those arguments is fallacious. They misdescribe the statute in their reasons why this is not a sensible provision. But even if there is an ambiguity --

JUSTICE SOTOMAYOR: Assume that --

MR. GILLELAN: Before -- before we lose, that -- the other possible meanings of "newly awarded" have got to include what they say the test is.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:23 p.m., the case in the above-entitled matter was submitted.)

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