OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

91-17

CAPTION: ESTATE OF FLOYD COWART Petitioners, v.

NICKLOS DRILLING COMPANY ET AL

CASE NO: 91-17

PLACE: Washington, D.C.

DATE: Wednesday, March 25, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

- X

ESTATE OF FLOYD COWART, :

Petitioner :

v. : No. 91-17

NICKLOS DRILLING COMPANY, :

ET AL. :

- X

Washington, D.C.

Wednesday, March 25, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

LLOYD N. FRISCHHERTZ, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

H. LEE LEWIS, JR., ESQ., Houston, Texas; on behalf of the private Respondent.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-17, Estate of Floyd Cowart v. Nicklos Drilling Company.

Mr. Frischhertz, you may proceed.

ORAL ARGUMENT OF LLOYD N. FRISCHHERTZ

ON BEHALF OF THE PETITIONER

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

At issue in the Cowart case is the statutory construction of section 33(g), sections 1 and 2, of the Longshore and Harbor Workers' Compensation Act as amended in 1984. The question presented to this Court is whether Cowart's entitlement to additional compensation, or what is called deficiency compensation, is terminated because he failed to obtain written permission from his employer, Nicklos Drilling, prior to the settlement of a third party claim.

The Court is presented with four separate issues to decide in resolving the Cowart case. One is what is the meaning of a person entitled to compensation under section 33. It has been interpreted to mean a person who is under an order of compensation or a person who has been, who is receiving compensation.

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The second issue would be what are the effects of the 1984 amendments to the Longshore and Harbor Workers' Compensation Act with reference to section 33(g)(2), which added a notice provision.

The third issue would be whether, pursuant to the authority of the Sellman decision from the Fourth Circuit, when an employer participates in the settlement process of the third party settlement, does that relieve the employee of obtaining written permission.

And fourthly, the question would be whether Mr. Cowart's settlement was in fact for an amount less than compensation to which he was entitled to.

The Court, if it resolves any of these issues in favor of Mr. Cowart, would then have to reverse the Fifth Circuit.

We can make short work of this case if we are to apply the holding of Sellman in this particular case. We can avoid --

QUESTION: That is the Fourth Circuit case, Mr. Frischhertz?

MR. FRISCHHERTZ: That's the Fourth Circuit case that I attached to my Reply Brief. That case could obviate the necessity of a very intensive discussion of what the '84 amendments meant and what the legislative history intended with regard to the application of 33(g).

The Sellman decision simply stated that when the employer participates in the settlement process 33(g) is not triggered, meaning there is no necessity for the written permission.

This is a different concept than the estoppel concept that was addressed in the 1972 amendments. The Court in Sellman simply says 33(g) is inapplicable to the application of 33(f).

The Court really doesn't go far enough, because if we resort to the simple plain language of the statute with regard to whether permission is required of an employer, all we need look at is the language of the statute. The language of the statute states if the person entitled to compensation enters into a settlement with a third person, when we have an employer such as Nicklos Drilling who not only waived subrogation, had an indemnification provision, had a provision to defend the third party, actually funded the settlement, how can that be construed to be a settlement with a third person?

QUESTION: Very easily. That's who the settlement was with.

MR. FRISCHHERTZ: The settlement is of a third party settlement, but the settlement was with Nicklos Drilling. They funded it.

QUESTION: That doesn't mean it's with them.

MR. FRISCHHERTZ: That's my argument to the Court, and I buttress that with the provisions of section 8(i) of the act which provides that an employee's termination of compensation can only be effected with a settlement that is submitted to the deputy commissioner and is approved by the deputy commissioner. This was a settlement of his compensation claim with Nicklos. This was a settlement that circumvented the provisions of section 8(i) of the act that specifically reserves to the deputy commissioner the right to scrutinize the settlement to determine whether there is adequate compensation.

QUESTION: Why was it a settlement of his compensation claim? It wasn't a settlement of his compensation claim.

MR. FRISCHHERTZ: That's what, that's my -- I agree with the Court. It should not have been a settlement of his compensation claim, but the Fifth Circuit, through its interpretation of 33(g), has held that it's a settlement of his compensation because it terminated his rights under section 33(f) for additional compensation, for future compensation.

QUESTION: The statute says that, doesn't it?

MR. FRISCHHERTZ: The statute says that, but the statute, in the language of it, states a third person. And I submit to the Court that the third person has to be,

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as Sellman said, a situation where the employer is not participating in the settlement.

Now this is in conflict with the Fifth Circuit holding. The Fifth Circuit held, in Collier, Luke, and Jackson, that the waiver of subrogation does not act to relieve the requirement of written permission. And in Jackson the Fifth Circuit said even the indemnification agreement does not so act. The Sellman decision is in direct conflict.

I submit that in this case --

QUESTION: Well, Mr. Frischhertz, what do you make of the language in the last clause of section 933(g)(2), which says that benefits are forfeited regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter?

MR. FRISCHHERTZ: That goes to the interpretation of what a person entitled to comp is and what the meaning of the amendments are. My interpretation that is submitted is the same interpretation that the Benefits Review Board held in Kahny, in Dorsey, in Pinell. That interpretation is that Congress in 1984 reenacted word for word section 33(g)(1), which mirrors the prior 33(g).

That interpretation was first gave meaning in

O'Leary, the O'Leary decision, which held that a person entitled to compensation is merely, is solely a person who is either under an order of compensation or who is currently receiving compensation. Congress reenacted word for word 33(g) that had been given the interpretation by the Benefits Review Board and by the Ninth Circuit in the unpublished O'Leary decision and by the Kahny decision in a unpublished Fifth Circuit decision that does have precedential value.

The additional provision of section 33(g)(2) applies to employee, and in fact if you read the language in 33(g)(1) the language is a person entitled to compensation. The language in 33(g)(2) deviates from that and says an employee, and it says if no written approval of the settlement is obtained and filed as required by paragraph (1), the pre-84 statute, or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to the compensation, medical benefits under this chapter shall be terminated, and then the language you're concerned with is regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

That section relates to employees, which is a class that covers all injured employees. It covers

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injured employees who settle cases for less than their amount, for more than. It covers injured employees who are receiving compensation and who are not receiving compensation. It covers employees who settle for more than or less than. It covers the entire class, and it's read to go very neatly with that class because it encompasses everything. But section (2) only requires notice.

What I submit to the Court is what Congress did was in section (1) adopt the statute as it was understood to mean through a long string of cases, of BRB cases, which was the understanding and the position of the Director of what the meaning was, and Congress was very fearful and they stated in legislative history of these quiet, secret settlements where no notice is offered to the employer.

So the employer may be refusing to pay compensation, but he still has his subrogation rights. He still has his credit rights. But how can he enforce them? He can only enforce them if he has notice. This is specifically a concern of Congress, and Congress enacted this provision to protect the employer from that specific situation.

QUESTION: But Mr. Frischhertz, didn't Congress have another reference in mind as indicated in the first

clause of sub (2), which refers specifically to written approval of settlement obtained as required in (1)?

MR. FRISCHHERTZ: That's correct. My, the interpretation that I submit to the Court is that regardless clause refers to employees who fail to notify. Section (2) is reiterating in that first statement, if no written approval of the settlement is obtained as filed, required by paragraph (1). It's referencing if no written approval is obtained as stated in (1), or the disjunctive. In fact the Fifth Circuit in its ruling essentially rewrote this statute to replace or with and. That is how they justified the wording of the statute.

I must admit that if I read this statute I could be confused. I think it is ambiguous. I think we have to give it judicial interpretation. We have had the Director who argued in behalf of Cowart in the Fifth Circuit panel rehearing and en banc, who gave a brilliant argument as to --

QUESTION: Well, what do we make of the fact that he's not giving the brilliant argument now and the Government has cut his feet off?

MR. FRISCHHERTZ: Well, I don't know if I want to answer for the Government. I think --

QUESTION: I mean, is there anything left for us to defer to?

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MR. FRISCHHERTZ: It's interesting -- of course we have acknowledged that deference is to be given to the Director when they have an interpretation that is not inconsistent with the clear language of the statute. It was my belief that they had such an interpretation before the Fifth Circuit. It was my belief that they, in the Longshore Procedural Manual, that they, that I attached, the provision I attached to my Reply Brief clearly states what their position was back in '86, and they stated clearly that their interpretation was a person entitled to comp meant someone who was receiving compensation or who was under an order.

Now there is a very lengthy legislative history that lends to that interpretation, and in fact it is discussed quite extensively by this Court in Bloomer, and it goes through the interpretation, the historical interpretation of how that came about. The historical interpretation starts in '27.

But getting back to the question as to what do we do with the Director's position who since 1977 has followed O'Leary, who has appeared in all of these cases, filed briefs even in the Sellman case, even in the Barger case that was consolidated with this case before the Fifth Circuit, and now appears here with a different position, and for me to suggest the reason for that would, to dwell

into the mind and the hierarchy and the powers that control the decision making process --

QUESTION: I just want to know whether there's anything left for us to defer to, regardless of what's in the mind of the hierarchy.

MR. FRISCHHERTZ: The only thing I suggest is there are cases that I cite in the Reply Brief that suggest that when an administrative body changes a long-standing position and makes a 180 degree reversal, that we don't give that new position the deference, but if any deference --

QUESTION: Well, what do we do about the old position? We don't have that to defer to anymore either.

MR. FRISCHHERTZ: Well, I think you can interpret the cases I cited to say that. I don't think we have to even rely on the deference issue. I think we can take and look to what Congress intended. Now let's think for a second. In 1984 Congress knows that O'Leary has made its interpretation. Congress knows that it has been followed consistently. Congress knows that if they take and amend the act to overrule O'Leary, that that will have an effect on the current entitlement to hundreds of thousands of workers who settled their cases based on O'Leary, based on what the deputy commissioners told them.

Section 39 of the act says the deputy

commissioner is to aid a claimant in making a claim and is to even, if request, provide legal representation. This Director has done so, and in 1984 if Congress amends the act to state O'Leary is overruled without a prospective application, they would take hundreds of thousands of injured, disabled workers, widows, and terminate their compensation. I don't believe Congress intended this.

If Congress had intended that, why did they not --

QUESTION: Excuse me, but at that point the right to compensation is vested, isn't it, for those prior cases?

MR. FRISCHHERTZ: Not when you have a statutory body overruling what was an administrative or a judicial interpretation. It's a retroactive application unless this Court finds differently. That's my general understanding.

But if Congress intended that, why did they not state it in their legislative history? They stated in their legislative history that they were specifically overruling judicial, and they stated they were overruling Washington Transit from this Court.

QUESTION: O'Leary is a Benefit Review Board decision?

MR. FRISCHHERTZ: Yes. That was affirmed by the

Ninth Circuit unpublished. Congress in '84 even went so far as to specifically, in section 10, overrule an administrative law judge decision. They made reference to the decision. They said we are overruling this by our construction.

QUESTION: But isn't there perhaps an answer to your fear just in the very text of subsection (2), because subsection (2) refers to the two instances in which the employee has failed to do something, he has failed to get the approval and he has failed to give notice? It simply says all rights to compensation and medical benefits shall be terminated. Doesn't that by its own terms act prospectively so that it wouldn't, it wouldn't relate back to those instances in which the right to comp has already been determined?

MR. FRISCHHERTZ: Well, if that's the interpretation, yes. But if Shelby terminated --

QUESTION: Well, but I mean, isn't that the, what the text suggests should be the interpretation, and if so doesn't that counter your argument of --

MR. FRISCHHERTZ: That's not the accepted interpretation, because right now the administrative law judges are granting summary decisions terminating compensation --

QUESTION: That do relate back.

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MR. FRISCHHERTZ: That do. They're interpreting shall to mean upon application by the employer it shall be terminated. That's how it's being applied. You have already granted numerous summary decisions by the ALJ. You have in those alone, 3,000 applications to terminate compensation. So that's not how it's being interpreted.

Let me --

QUESTION: May I just at this point -- when did the change in position, this is actually not just in the briefs here, because I didn't realize they had changed their position in their Brief in Opposition or the cert stage, but when did the ALJ start deciding these cases differently?

MR. FRISCHHERTZ: After the Fifth Circuit en banc rendered its decision in 1991, August. They have had summary decisions rendered --

QUESTION: Just in the Fifth Circuit or all over the country?

MR. FRISCHHERTZ: Oh, I think it's, I think it's probably relating only to the Fifth Circuit cases.

QUESTION: They did that even though the Director in the Fifth Circuit was, took the contrary position?

MR. FRISCHHERTZ: They did that even though. They, they seized upon the decision of the en banc Fifth

Circuit and determined that they were, there were no exceptions.

QUESTION: Well, they seized on it because they thought they had to.

MR. FRISCHHERTZ: I think they, I think if you allow the Fifth Circuit decision to stand, you have to. Exactly. How can you go against that clear decision? It says there are no exceptions. But there's a misunderstanding. The Fifth Circuit said there are no exceptions, and I basically agree with that, even if that was in O'Leary. But there are no exceptions when it's a person entitled to comp, meaning a person either receiving benefits or under an order. Then there are no exceptions. And that is what the Fifth Circuit should have said.

But what they did is they rewrote the statute to conform with their meaning. They took the or in subsection (2) and made it into an and, and the other thing they did was they rewrote, they wrote out any settlement out of the act and said section, the notice requirement only applies to judgments. Then respondents, amicus respondents and Federal respondents, are suggesting to this Court that if we're going to give meaning to it we can't write out settlements because any settlement is clearly written in subpart (2), but what we can do is say any settlement means only settlements for more than what

the employer would have been entitled to.

And of course that flies in the face of the clear language that says any settlements, meaning settlements for less than or more than. And that also flies in the face of what is the forfeiture penalty if you settle for more than, unless, and this brings us to a crucial point, unless we look at the application of 33(g) to a determined amount of compensation. And this is the way Congress envisioned it in 1959.

In 1959 when they amended the act to give the employer not an election of remedies but the employer could receive compensation and elect to pursue a third-party claim, the legislative history indicates, and it is cited by Federal respondent in their brief at page 21, that there was this envision by Congress that the employer would be receiving compensation and it would be a determined amount.

Now, this is what Mobley said in the Ninth Circuit. Mobley involved, which is a recorded case, Mobley involved a decision where someone with asbestosis was, filed a third-party suit, had his claim, settled his case, but he was not currently disabled. He was not currently disabled. The Court in Mobley says we don't terminate your right to future compensation, we don't terminate your right to medicals because you settled for

an amount more than what is the determined amount of compensation due.

To have a clear understanding we have to look at what happened in '27. In '27 the employer had to choose one way or the other. He had to accept compensation, and if he did he assigned his right to the employer.

QUESTION: This is 1927, the year, you're talking about?

MR. FRISCHHERTZ: Yes. 1927, when the act was first enacted. In 1927 he, the employee did not have a choice. He had to select compensation, and if he accepted compensation he had to notify the deputy commission and he assigned his right to the third-party claim to the employer. What was happening is, in 1927 to 1938 the employer would pay compensation for a brief period of time, receive the full assignment of the rights of the employee to the third-party claim, terminate compensation, then you had an employee who was not receiving compensation and had no third-party claim.

In 1938 Congress amended the act to say that the employer would only receive the assignment under section 33(b) if there was an order of compensation rendered by the deputy commissioner. That's where this concept that the Director had under an order compensation first surfaced. There was an order of compensation. That was

the only time there was an assignment of benefits under section (b).

The Director and the respondents suggest that we have to read section (g) with section (f), section (g) meaning the requirement of permission, with section (f), the right of recoupment and credit. And they say that we have to read that together and we have to give a person entitled to compensation and mean the same thing.

Section (f) specifically references section (b), which talks about when the assignment takes place. If we read section (f) with section (b), the only time an assignment takes place under the law as it is today is when there is a formal order. This Court has said that in Palace. In Palace the Court has said that only under a formal order is there an assignment.

And the respondent suggests that we must interpret section (f) and (g) in the same light. We must interpret it in the same light with section (b). If we want to be legalistic and look at the clear wording, then the only time there can be this necessity for written permission would be under a formal order.

But in '59 Congress intended there to be voluntary payments and they did not want double recovery, and Congress, and this -- and the courts have interpreted the necessity for written permission not just for a formal

order but also when they are actually paying compensation. This was --

QUESTION: Mr. Frischhertz, it seems to me you're troubled about the retroactivity portion, but our usual law is that statutes are construed to be prospective only, not -- judicial decisions are retroactive. It seems to me if that's a problem, you know, that can be taken care of by interpreting the statute the way it should normally be, prospectively.

MR. FRISCHHERTZ: Well, if the interpretation that the Fifth Circuit has given it is to be.

QUESTION: That's right. Why is it that you say that your opponent is reading subsection (2) so that it's converting the or to an and? It seems to me you're converting the or to an and. It says either one.

MR. FRISCHHERTZ: I, my interpretation is that when you have a person receiving compensation under an order under section (1) you need written permission. Under section (2) if you are not receiving compensation voluntarily or if you're not under an order, all you need is notice, because it says you can either obtain written approval or notice.

QUESTION: But the notice covers situations other than -- the settlement covered by paragraph 1 is only a settlement for less than what he's entitled to from

the employer. So you have to cover the situation where the employee gets recovery or settles for the amount he's entitled to from the employer or for more than that. That's why you need the notice clause.

MR. FRISCHHERTZ: But, but the notice clause says any settlement, so how can it be just for more than?

QUESTION: Well, it -- yeah, I admit it should have said any other settlement --

MR. FRISCHHERTZ: But I think --

QUESTION: -- but it still says or. It doesn't say and. Your reading converts it into an and.

MR. FRISCHHERTZ: The reading, converting to an and would mean that you need notice and written permission. And I am saying --

QUESTION: That's what you're saying.

MR. FRISCHHERTZ: No, no. Not at all.

QUESTION: You --

MR. FRISCHHERTZ: You only need notice when you are not a person entitled to compensation but an employee. And that is someone who is not receiving compensation benefits or not under an order. Only notice is required when you're not receiving compensation and you're not under an order. This is what the Director stated in their Longshore Procedural Manual. Written permission is required under section (1) when you are being paid

compensation or you're under an order.

That's the interpretation I'm advancing, that's the interpretation of the Benefits Review Board in O'Leary, Dorsey, and about 40 other cases, and the interpretation of the Director up until February 23 of 1992.

I'd like to reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Frischhertz.

Mr. Lewis, we'll hear from you.

ORAL ARGUMENT OF H. LEE LEWIS

ON BEHALF OF THE PRIVATE RESPONDENT

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

In 1985 when the suit was filed in Federal court in New Orleans by the claimant I had two problems I was facing on behalf of my client, Nicklos Drilling Company, and its insurer. Number one was, of course, that we had our compensation liability to the claimant who was unemployed. Number two, we were looking at a contractual indemnity claim brought against us by Transco Exploration Company, the third party which the claimant had sued in Federal court in New Orleans. And they had a hold harmless that ran in their favor with respect to claims brought by our employees.

I thought I saw a way to resolve both of those problems with one fell swoop, and that was by negotiating and funding through Transco a third-party settlement of Mr. Cowart's claim arising out of his injury that he sustained in 1983, and thereby not only concluding our problems with Transco, but also closing the books on the Department of Labor's case with respect to Mr. Cowart. And I looked at 933(g) and I sure thought that told me that I could do exactly what I wanted to do.

And of course this wasn't the only case in which this had been done. This has been a practice for many years for employers to conclude their liability through contributing to third-party settlements, through taking the benefits of third-party settlements, and it seems to me evident that the Congress has always recognized, and 33(g) is intended to recognize, that lump sum settlements of tort claims against third parties constitute an acceptable manner of providing compensation for injured workers in lieu of the workers' compensation scheme where those remedies are available.

QUESTION: Let me just ask to be sure I get the facts in my -- at the time of your settlement negotiations where you killed the two birds with one stone in effect, did you, you were then not paying compensation?

MR. LEWIS: Literally we were not paying -- or,

I'm sorry, is the question were we paying compensation benefits at that time?

QUESTION: Yes.

MR. LEWIS: We were not.

QUESTION: You were not. At that time, at the time you were engaging in those negotiations, was it your position that he was or was not a person entitled to compensation?

MR. LEWIS: It was our position at that time that he was a person entitled to compensation.

QUESTION: Then why weren't you paying it?

MR. LEWIS: Because we had paid him temporary total disability up until the time that he had been medically discharged and released to return to work. The position that --

QUESTION: What was that? I don't understand why that's relevant to the dispute that you were settling.

MR. LEWIS: The dispute that we were settling -- does Your Honor mean the third-party claim?

QUESTION: Well, no, the two claims. Because at that time you were, it's your view, as I understand it, that he was no longer a person entitled to any more compensation.

MR. LEWIS: The claimant was asserting that he was --

QUESTION: That what he has lost in the proceedings now is this additional compensation. He hasn't forfeited what you already paid him.

MR. LEWIS: No, sir. The claimant was asserting that he was entitled to additional compensation. It was his position that he had a scheduled injury that entitled him to additional benefits over and above what he had been paid for temporary total disability. We resisted that position.

QUESTION: Correct.

MR. LEWIS: We resisted it, frankly, primarily because we wanted to make the third-party settlement over here in the context of the lawsuit he brought against Transco and close this whole thing out without having to deal with the Department of Labor.

QUESTION: But it seems to me that you had an inconsistence in your position there, that you were treating him as a person not entitled to compensation for purposes of your negotiations with him, but once you made your settlement with the, with Transco he suddenly developed into a person entitled to compensation and therefore lost his --

MR. LEWIS: No, he was always a person entitled to compensation from the time he sustained his injury, his disability causing injury. The question was how much

compensation was he entitled to.

QUESTION: I'm not sure that's the answer you gave me a moment ago.

MR. LEWIS: Well --

QUESTION: Well, he might have been for a while a person entitled to compensation, but when you were carrying on these negotiations it was your claim that he was no longer entitled to any, he was no longer a person entitled to compensation.

MR. LEWIS: Well, I think the correct way to state our position was that it was our view that he was a person entitled to compensation who had received all the compensation he was entitled to.

QUESTION: And therefore was no longer a person entitled to compensation.

MR. LEWIS: Well, I can accept that --

QUESTION: Is that right or not?

MR. LEWIS: Yes. I can accept that, Your Honor, because if he's not a person entitled to compensation we would have nothing further to argue about here. The compensation claim would be concluded as well as the third-party claim.

QUESTION: Yes, but not for the reason given by the court below.

MR. LEWIS: Well, for purposes of the --

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QUESTION: What you're saying is under those facts you'd win no matter how we construed the statute.

MR. LEWIS: That's correct. And it would not bring up the issue that was decided by the court below. What happened was of course --

QUESTION: Mr. Lewis, why did Congress use the word employee in 933(g) when it used the phrase person entitled to compensation every place else?

MR. LEWIS: I have no idea.

QUESTION: Do they mean the same thing? And what is it?

MR. LEWIS: Well, I think that the reason is that the person entitled to compensation is not always the employee. For instance in the case of death benefits that person's survivor would be the person entitled to compensation. That is the only reason I can suppose.

QUESTION: Well, except it has a parenthesis there, or the person's representatives. Certainly it didn't, it wouldn't have needed that parenthesis if that was --

MR. LEWIS: That's probably correct, Your Honor. I don't have any other explanation to offer for the use of that term. I never heard the Department of Labor's interpretation with respect to the use of the term person entitled to compensation until some time after the hearing

before the administrative law judge in this case in April of 1986.

If we look at the circular promulgated by the Director of the OWCP and the procedures manual which sets out this interpretation of the phrase person entitled to compensation we see it's dated May 14, 1986. The decision of the Fifth Circuit in the Collier case, the one upon which we relied, was March 10, 1986, 2 months before the Director formulated his interpretation that he later asked the Fifth Circuit to defer to rather than its own prior decision.

The decision of the Fifth Circuit is, in its own language, that the wording which Congress used in 33(g)(1) and (2) frames a scheme which is unmistakable and brutally direct. The decisions of this Court, it seems to me, have made it clear that whether it's a matter of deference or whether it is a matter of according the interpretation that has been supplied by an administrative agency beyond the express wording of the statute, the necessary predicate for that is that Congress shall not have addressed the issue, shall not have addressed it overtly and directly. Congress must have been silent with respect to the matter. Congress must have addressed it ambiguously.

It seems to me it's obvious that Congress was

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not silent with respect to the matter of what to do with the employers' residual compensation liability when he, when there has been a third-party settlement made by the claimant.

QUESTION: Well, Mr. Lewis, what is your answer to the concern expressed by the petitioner about any so-called retroactive effect of the Fifth Circuit's interpretation here? Would you take the position that an employer could now go back and cut off benefits that are being received that under the new interpretation would not have been allowed?

MR. LEWIS: Yes, Your Honor.

QUESTION: Yes.

MR. LEWIS: I think as I read the Fifth Circuit's decision, opinion, there are no exceptions to 33(g)'s provision that where a third-party settlement is made for less than the amount of compensation entitlement --

QUESTION: And yet at the time that those actions were resolved the Federal, the Department was taking a different view, was taking the petitioner's view and were allowing these additional benefits.

MR. LEWIS: And I think the Department was wrong.

QUESTION: Well, but there we are. Now are we

talking about thousands of cases?

MR. LEWIS: I don't personally know that. I have been told that the reference to thousands of cases which I have heard was specifically with regard to the toxic tort claims. There are many shipyard workers, I understand, who have been exposed to asbestos and have pending third-party claims already on account of this kind of asbestosis which is latent, hasn't manifested itself in terms of disability.

My thinking on that is those people are not persons entitled to compensation because they are not yet disabled, and the definition of qualification for benefits under the Longshore and Harbor Workers' Act is disability or death resulting from injury.

QUESTION: If we accepted your interpretation and benefits were stripped from claimants who relied on the prior agency interpretation, could Congress then go back and amend the statute and restore those benefits?

MR. LEWIS: I suppose the Congress could do that. I think that the interpretation here, as I said, has its inception in May of 1986. The Collier decision of the Fifth Circuit, which is totally contrary to that interpretation, preceded that by 2 months. I think that the interpretation the Director has brought forth was conceived for the purpose of contesting the Fifth

Circuit's view on this matter in the hopes of, as it did in this case, attempting to persuade the Fifth Circuit to change its mind, either in a second approach to the case or in a rehearing en banc, or in ultimately bringing it before this Court.

I think that that administrative interpretation was a reaction to the Fifth Circuit's decision in Collier, and this case is the vehicle that it hopes to undo it. I don't think the longstanding interpretation that is 2 months younger than the Fifth Circuit's original Collier decision is entitled to deference from this Court.

QUESTION: Well, we could also reach the same result by refusing to extend it before the enactment of the revised 933(g) which included the subsection (2) for the first time, and that was 1984. So that, that means of preventing retroactivity is certainly available, isn't it?

MR. LEWIS: That's true, but as far as my own interpretation of it, I don't see that 33(g) has any different import now than it did --

QUESTION: Don't you think (2) makes it clearer than it was without (2)?

MR. LEWIS: (2) definitely makes it clearer, but I think the purpose of adding (2) was to remove any ambiguity as to determining how and in what manner the express consent of the employer is to be solicited and

given. I think when section (1) was all that 33(g) comprised the law was still what it is with respect to this situation right here, or already was what it is.

QUESTION: May I just ask this one question? You say how the consent was to be evidenced, but they both require written approval. What is the difference?

MR. LEWIS: They both require what, Your Honor?

QUESTION: Written approval. I thought you said --

MR. LEWIS: No. The, only the settlement for less than the total amount of compensation entitlement requires written approval. With respect to a settlement that would be for more --

QUESTION: Oh, I understood you to say because it covered the larger settlement as well.

MR. LEWIS: Larger settlement or judgment. In that event only --

QUESTION: Why does the statute (g)(2) take away an employee's compensation if he has received a settlement for an amount greater than the amount of benefits?

MR. LEWIS: Well, I don't think it takes it away in any retrospective sense that you could go back and get back from him what you've already paid to him. I think it would give the employer the statutory right to terminate benefits once the third-party settlement has been made

without the employer's consent. .

QUESTION: But the point of doing it was suggested in a footnote in the SG's brief that it might refer to future medicals and it might refer it, even though the settlement was on its face more than the amount of the benefits, the net would be less, so it would apply to that. Is that the rationale that you would adopt for Congress' wanting to do this?

MR. LEWIS: Well, there is a residual liability for medical benefits even in the event of third-party settlements that are for more than the amount of compensation entitlement. Only in the --

QUESTION: I mean, you are then adopting the suggesting in the Solicitor General's brief?

MR. LEWIS: I think that's correct.

QUESTION: Yes.

MR. LEWIS: Thank you very much.

QUESTION: Thank you, Mr. Lewis.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE FEDERAL RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

In our view there is only one issue before the Court today, and that is the proper interpretation of

section --

QUESTION: May I interrupt just to get one thing clear on the record? Who is the Federal respondent?

MR. DREEBEN: The Federal respondent is the Director of Office of Worker Compensation Programs.

QUESTION: And is it correct, I may not have read it, that your position as you set forth in your Brief on the Merits, you really didn't reveal that in your Brief in Opposition or your comment in the response stage.

MR. DREEBEN: That's correct, Justice Stevens. The Department was revisiting what its position would be in light of the en banc decision of the Fifth Circuit, and the position that we presented in our Merits Brief --

QUESTION: Is one that you really reached between the time cert was granted and --

MR. DREEBEN: That's correct. I'd like to allay the Court's --

QUESTION: (Inaudible.)

MR. DREEBEN: Well, the Director is supporting this position that we're presenting today.

QUESTION: Yes.

MR. DREEBEN: He is within the Department of Labor text.

QUESTION: Well, why has the Director's opinion changed in this matter?

MR. DREEBEN: Justice O'Connor, the submission that we're making here today is that the claim in clear text of section 33 determines the outcome of the case.

QUESTION: Well, the Director never read the text before, in the past, in arguing so ably in the lower courts for the other view?

MR. DREEBEN: Of course the Director read the text, consulted the text. In light of the rejection of the Director's position by the en banc court in the Fifth Circuit and further consideration of it, we are persuaded that Congress has spoken to this issue.

QUESTION: Well, are you going to address the potentially devastating effect on thousands of people who reached settlements at a time when the Government was arguing for their position?

MR. DREEBEN: Yes, Justice O'Connor. The first point on retroactivity that I would like to make is that section 33(g) does not override principles of res judicata.

QUESTION: Mr. Dreeben, would you speak up a little bit? It's hard to hear you.

MR. DREEBEN: To the extent that a case has gone to judgment and has not been appealed by an employer to a court, that case will not be affected by the Court's ruling here today. I think that would follow from --

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QUESTION: Even with respect to future medicals?

MR. DREEBEN: Yes, I think even with respect to future medicals. The issue would become final, the parties will have had an opportunity to litigate it. If they choose not to seek judicial review they are bound by a decision to that effect. That's the Court's holding in Seven v. Pittston Coal from a couple of terms ago. So I do not think that the retroactive reach of this Court's decision has any effect on final judgments.

QUESTION: Yes, but what about cases where compensation was being paid independently of a judgment?

MR. DREEBEN: Cases that, in which compensation was being paid voluntarily are governed by the statute. The statute --

QUESTION: There may be a lot of those.

MR. DREEBEN: I think that there are going to be a lot of those, that's correct.

QUESTION: And even on the ones where there's a judgment your position is different, differs from that of the respondent.

MR. DREEBEN: I don't know what the respondent's position is on cases that have gone to judgment, but our position is that those cases are governed by res judicata.

The cases that have been alluded to in petitioner's brief, the thousands of cases, are primarily

occupational disease cases in which employees have been exposed to asbestos or other disabling materials on the work place and have sought both third-party recoveries and compensation. In a lot of those cases the third-party claims have gone forward while the compensation proceedings have been stayed, and many of those have been settled by the employees.

Our position, I think it does coincide with what the private respondents said about that, many of those employees will not have been disabled at the time they reach their third-party settlement, and for that reason in our view are not persons entitled to compensation under the statute. So those people will also not be affected by the Court's ruling today.

In addition, we think that there are settlements that will not be for more than the compensation, that will be for more than the compensation due in the gross amount and less for the, than the compensation due in the net amount. Those settlements also will not be affected.

So the long and short of it is there are many individual factual questions that apply in the so-called thousands of cases that have arisen, and it has been the Director's position that those cases should be held pending this Court's decision, and then they should be resolved on a case-by-case basis on their individual

facts. We do not anticipate necessarily that there are going to be thousands of cases in which there was detrimental reliance on the Director's views.

In our view the --

QUESTION: Just to finish that off, you wouldn't make a distinction between pre and post-1984? You think even before the revision of subsection (g) the statute still meant what you now say it means?

MR. DREEBEN: I think it's a closer question, Justice Scalia, as to what the statute clearly meant prior to the 1984 amendments, and we would have no disagreement if this Court concluded that pre-1984 the Director's position was permissible, but in light of the 1984 amendments it was not permissible. The 1984 amendments do furnish the clearest evidence that Congress intended the coverage of the --

QUESTION: Well then you're saying the enactment of (g)(2) changed the meaning of what was previously (g) and then now (g)(1), or at least arguably did so.

MR. DREEBEN: I think that is an arguable reading of what Congress did, because the --

QUESTION: So the language of (g) wasn't really all that clear, but it became clearer after (g)(2) was added.

MR. DREEBEN: Well, for a number of reasons I

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think in fact the coverage of the term person entitled to compensation was pretty clearly more broad than the position that the Director had taken prior to 1984, but I would not disagree with a reading of the statute that said before 1984 there may be some room for ambiguity. But there certainly is no room for ambiguity after 1984. That, I think that's a possible distinction even though there is evidence that person entitled to compensation was broader before.

Of course section 33(g)(1) is not qualified in the way that the petitioner has read it and the way that the Board of Benefits Review previously read it. 'It states that if a person entitled to compensation settles a claim against a third party for less than the Longshore Act compensation, the employer is liable for the deficiency amount only if written approval is obtained.

Now the petitioner contends that this means that approval is required only when the employee is being paid benefits by the employer, either voluntarily or pursuant to an award. The statute doesn't say that. It uses the unqualified phrase person entitled to compensation. And that phrase is used elsewhere in the statute, it is used at least twice else in section 33 itself.

In section 33(a) Congress established the rule that a person entitled to compensation does not have to

elect between receiving a compensation remedy and pursuing a third-party action. And that provision is surely not limited to an employee who is actually receiving compensation. It applies to anyone who wants to bring a third-party suit whether or not they're receiving compensation.

Subsection (f) of section 33, which is a parallel section to subsection (g), uses the introductory phrase if the person entitled to compensation institutes proceedings, and it goes on to provide the rule that if the person entitled to --

QUESTION: Doesn't your opponent say that is a cross reference to (b) which in turn is (inaudible.)

MR. DREEBEN: Actually the cross reference to (b) doesn't prove that much, because what (b) does is function as a statute of limitations provision in effect. It says that if the person entitled to compensation does receive benefits and doesn't sue within 6 months the claim reverts to the employer. But it doesn't prohibit the person entitled to compensation from suing before receiving benefits. That's what (a) stands for.

QUESTION: The people referred to in (b) are all people receiving compensation.

MR. DREEBEN: By definition, the people who reach the outer limit of their right to sue are in that

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category. But the people covered by subsection (f) aren't in that category. The Benefits Review Board has actually held that under subsection (f) if you receive a third-party recovery as an employee and then seek compensation, the credit rules that are described in subsection (f) still apply even though you weren't receiving compensation at the time you brought and settled the third-party action.

And subsection (g) is really an exception to the credit rule of subsection (f). Subsection (f) says the employer shall be liable for deficiency compensation in certain circumstances. Subsection (g), which uses the same phrase, person entitled to compensation, says the employer shall not be liable for deficiency compensation in certain circumstances.

QUESTION: Mr. Dreeben, can you explain why (g)(2) uses the word employee but elsewhere in the statute it's personal, person entitled to compensation? Is that just a drafting error?

MR. DREEBEN: I think it's less than precise drafting going on there, Justice O'Connor. If you look at subsection (i) of section 33, which is reprinted on page 5a of the Appendix to our brief, the phrase employee is used in that section as well. I don't think Congress intended anything by it.

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In fact if you took employee completely literally in section (g)(2) it would mean that if a survivor obtained a judgment for more than the amount of compensation the survivor would not even have to give notice to the employee, the employer, and that would make no sense because then the employer would be entirely deprived of notice of a judgment that would extinguish its compensation liability.

QUESTION: Mr. Dreeben, is it, number one, possible or does it happen with any frequency that there are more than one third person, there will be maybe a principal third person who has a potential for liability but some very collateral third persons that might make small settlements? Does that ever, does that occur?

MR. DREEBEN: It happens most often, Justice Kennedy, in the occupational disease context where in fact an employee might work for several different employers and be exposed to asbestos or coal dust over a number of years and therefore have a number of potential defendants all of whom might be liable for causing part of the injury.

QUESTION: And so settlement with any one of those third persons would, under your view, preclude, the unauthorized settlement would preclude obtaining benefits from any employer?

MR. DREEBEN: If in fact the employee is

entitled to compensation at the time he makes the settlement, which presupposes that the employee is in fact disabled. A lot of these cases arise before the employee is disabled and unable to work, and in our view settlements by a person in that position are not covered by the approval requirement in (g)(2).

QUESTION: Because the person is not entitled to compensation?

MR. DREEBEN: That's correct. Until you're disabled you haven't satisfied the statutory requisites that would entitle you to receive compensation if you went ahead and applied for it. If you apply for it and you're not disabled you're not going to get compensation. And I think that means that you are not entitled to compensation at that time.

QUESTION: So if you collect from the third party soon enough you can collect from both him and the employer?

MR. DREEBEN: Well, the employer would be able to get a credit. The act presupposes that there would be no double recovery.

QUESTION: Why does it presuppose that? I mean, if you're --

MR. DREEBEN: Well, the act --

QUESTION: If you're still using it, (f) covers

the person entitled to compensation, and if you use your theory that you're not a person entitled to compensation until the disability shows up, if he gets the money before the disability shows up it seems to me he could keep that and get it from the employer as well.

MR. DREEBEN: Well, he eventually becomes a person entitled to compensation at the time that he seeks Longshore Act benefits, and (f) is not written so as to exempt a person who is actually entitled to compensation from the credit rules of this section.

QUESTION: So then person entitled to compensation in some instances is not equivalent to employee?

MR. DREEBEN: That's correct. That's correct. A person entitled to compensation has to go a little bit further and satisfy the requirements of being disabled and having a claim under the act. An employee, of course, covers everyone who works for the employer. But I don't think that in this section, 33, or in the Longshore Act generally Congress was attempting to draw that sort of distinction.

The act uses a number of terms to refer to people who are eligible for benefits. It uses employee, it uses claimant, it uses person entitled to compensation. And I think that reflects the accretion of a number of

amendments over the years and different draftsmen who were looking at the act.

The original purpose that Congress had in mind of requiring approval was to protect the employer against the possibility that a settlement might be for too little, and that purpose is applicable whether or not the employee is receiving benefits at the time that he effectuates the settlement. So the reading of person entitled to compensation that the Fifth Circuit gave is consistent with the over-arching purpose that Congress had in mind in enacting the approval requirement.

In fact when the approval requirement was first added to the original version of the statute in 1927 because an employee had to elect between receiving compensation and pursuing tort, a person entitled to compensation could not be receiving Longshore Act benefits at the time he settled the third-party suit. You had to bring the third-party suit at a time when you were not receiving benefits. So the original meaning of the word is consistent with the position that we are advocating here today.

It is true that there are potential hardships that can result for employees under the reading of the statute the Fifth Circuit gave --

Thank you.

QUESTION: Thank you, Mr. Dreeben.

Mr. Frischhertz, you have a minute remaining.

REBUTTAL ARGUMENT OF LLOYD N. FRISCHHERTZ

ON BEHALF OF THE PETITIONER

MR. FRISCHHERTZ: Your Honor, the Court in Palace in 1983 interpreted section (b), person entitled to comp, to mean someone receiving comp under an order. Congress -- that, amended '84, in 1984, and refers section (1) to the situation where a person is entitled to compensation, whether it's the Palace interpretation of section (b) that transfers to (f) or whether includes paying compensation, and it added the notice provision.

In the legislative history on the committee, the conference of committee, the Senate bill reflects that there is to be notice. It doesn't state -- prior in the legislative history it states something different, but in the conference of committee it says the Senate bill termination of liability for payment of compensation or medical benefits if the employee fails to notify the employer of any settlement obtained from a judgment rendered against a third party. In any case where the special fund will be liable for payments, the fund has a lien on the proceeds.

That clearly shows that Congress wanted to take and codify O'Leary in (1) and provide for notice for

employees who are not receiving compensation.

QUESTION: Thank you, Mr. Frischhertz.

MR. FRISCHHERTZ: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:15 p.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)