

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

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WASHINGTON, D.C. 20543**

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: BATH IRON WORKS CORPORATION, ET AL.,

Petitioners v. DIRECTOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS, ETC.

CASE NO: 91-871

PLACE: Washington, D.C.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 91-871, Bath Iron Works v. the Director of  
5 the OWCP.

6 The spectators are admonished, do not talk until  
7 you get outside. The court remains in session.

8 Mr. Gillis, you may proceed whenever you're  
9 ready.

10 ORAL ARGUMENT OF KEVIN M. GILLIS

11 ON BEHALF OF THE PETITIONERS

12 MR. GILLIS: Mr. Chief Justice and may it please  
13 the Court:

14 This case involves the question of  
15 interpretation of the Longshore and Harbor Workers  
16 Compensation Act as amended in 1984, as it applies to  
17 claims by retired workers for occupational hearing loss.

18 The facts are quite simple. Mr. Brown, the  
19 plaintiff, worked for the employer, Bath Iron Works, in  
20 Bath, Maine, from 1939 until his retirement in 1972. In  
21 1985, 13 years after his retirement, he filed a claim for  
22 occupational hearing loss under the act. That claim was  
23 based upon an audiogram taken in 1983, which showed an  
24 84 percent hearing loss. That award was made under  
25 section 908(c)(13) by the administrative law judge.

1           The issue as presented is whether certain  
2   amendments to the act in 1984 applying to occupational  
3   disease claims by retirees should have been applied to  
4   determine this worker's claim, or this worker's benefit.

5           The U.S. Court of Appeals for the First Circuit  
6   below held that the occupational disease amendments in  
7   1984 were not applicable to hearing loss claims and would  
8   not affect this case.

9           Previously, the administrative law judge on the  
10   Benefits Review Board of the Department of Labor had held  
11   in this case that the occupational disease law amendments  
12   would apply for the limited purpose of determining the  
13   average weekly wage for the purpose of calculating  
14   benefits, but that they were otherwise not applicable to  
15   hearing loss claims.

16           In other cases, the Fifth and Eleventh Circuits  
17   have held that the occupational disease amendments in 1984  
18   do apply to hearing loss claims and subsequently the  
19   Department's Benefits Review Board earlier this year  
20   reversed itself and has agreed with the Fifth and Eleventh  
21   Circuits. Our position is that the amendments do apply.

22           In order to analyze the problem, it is necessary  
23   to review the statute as it existed prior to 1984 and the  
24   case law under the pre-'84 statute. Prior to the  
25   amendments, the statute provided for two basic types of

1 disability benefits.

2 The one would be a nonscheduled award, or an  
3 award for economic disability. That comes into play when  
4 the worker is disabled by injury or disease from  
5 performing his regular work. He could have received  
6 benefits for total or partial benefits which could be  
7 temporary or permanent.

8 The second basic type of award is a so-called  
9 scheduled award, found in sections 908(c)(1) through (20).  
10 That award compensates the worker for specific losses of  
11 bodily parts or bodily functions or percentages of loss.  
12 Among the types of scheduled award is a hearing loss under  
13 section 908(c)(13).

14 Early in 1984, the Benefits Review Board issued  
15 two decisions having to do with retirees claiming  
16 occupational diseases. The first was Aduddell v. Owens-  
17 Corning. In that case, the worker had developed asbestos-  
18 related disease but had retired before the disease became  
19 manifest. It was ruled that the worker was not entitled  
20 to a nonscheduled disability benefit because of his status  
21 as a retiree, the reasoning being that because he had  
22 retired he was out of the labor force and it was  
23 inappropriate to provide him with a disability benefit.

24 Less than a month later, the board decided  
25 Redick v. Bethlehem Steel, which was a claim by a retired

1 worker for benefits under section 908(c)(13), a scheduled  
2 award for hearing loss, and following Aduddell, the board  
3 held that the worker was not entitled to the award because  
4 of his status as a retiree at the time the hearing loss  
5 became manifest.

6 Against this background, Congress amended the  
7 statute in 1984 in part dealing with the problem of  
8 occupational disease claims by retirees, and our position  
9 is that those amendments were intended to apply to hearing  
10 loss claims just as to other occupational disease claims.

11 A starting point for analyzing the statute --  
12 that is, the amendments -- is section 910(i), which I'll  
13 refer shorthand as section 10(i). That section provides  
14 essentially that in occupational disease claims the time  
15 of injury for the purpose of determining the average  
16 weekly wage is the time when the occupational disease  
17 becomes manifest to the worker, when he becomes aware of  
18 it, or should have become aware of it. That is the  
19 disability. That is, when the worker becomes aware of the  
20 disability.

21 QUESTION: Now, in this case, do you concede  
22 that the hearing loss actually occurred during a time he  
23 was employed actively?

24 MR. GILLIS: I think it depends on which hearing  
25 loss you're referring to. The hearing loss of 84 percent

1       didn't occur until 1983. We have no way of knowing  
2       whether it occurred -- whether it was present at the time  
3       he retired, and that's because of the effect of aging, so  
4       that the disability that became manifest to the worker in  
5       1983 and for which he was entitled to claim in all  
6       likelihood didn't occur at the time he retired.

7                QUESTION: But some basic loss --

8                MR. GILLIS: Some of it --

9                QUESTION: Occurred --

10               MR. GILLIS: Yes. The Director has attempted to  
11       make --

12               QUESTION: Earlier.

13               MR. GILLIS: That distinction, that hearing loss  
14       due to excessive noise in an occupational setting occurs  
15       shortly after the injurious stimulus occurs.

16               QUESTION: Do you disagree with that as a --

17               MR. GILLIS: No. I agree with that basic  
18       premise --

19               QUESTION: Medical proposition?

20               MR. GILLIS: That basic theory, but I just feel  
21       it doesn't go far enough because it doesn't concentrate on  
22       the disease that becomes -- or the disability that becomes  
23       manifest later to the worker.

24               QUESTION: Yes, but we have no question before  
25       us here as to the extent to which that greater disability

1 may even be compensable. The only issue that we have is  
2 whether the hearing loss resulting from the occupational  
3 conditions was manifest in a manner in which it could or  
4 should have been perceived during the period of  
5 employment, and that is conceded, isn't it?

6 MR. GILLIS: The hearing loss wasn't manifest  
7 during the period of employment, the hearing loss wasn't  
8 manifest --

9 QUESTION: Well, the fact that he had an  
10 84 percent hearing loss at some later time presumably was  
11 not manifest earlier, but that's not the issue that we're  
12 dealing with.

13 MR. GILLIS: We're dealing with the issue of  
14 whether --

15 QUESTION: We don't even know whether he's  
16 entitled to compensation or an 84 percent hearing loss.  
17 That's not the issue in this case.

18 MR. GILLIS: That's not the issue. In fact, we  
19 would concede that he is entitled to that, because there  
20 was no offset under this statute for the effects of aging.  
21 As we pointed out in our brief --

22 QUESTION: You would concede that he is entitled  
23 to compensation for 84 percent?

24 MR. GILLIS: And the question is, under which  
25 provision of the law --

1 QUESTION: I mean, that's a generous concession  
2 for you to make, but --

3 MR. GILLIS: I guess I may be misleading in that  
4 way. What I mean to say is, he's an entitled to an award  
5 based upon that audiogram in 1983. The question is  
6 whether the compensation should have been under section  
7 908(c)(13) or under section 908(c)(23).

8 QUESTION: And whether it should or should not  
9 be depends upon which the hearing loss -- depends upon  
10 whether the hearing loss attributable to the occupational  
11 conditions -- the injury attributable to the occupational  
12 conditions occurred during the period of employment and  
13 whether that loss was manifest or should have been  
14 manifest during the period of employment. That is  
15 correct, isn't it?

16 MR. GILLIS: I guess I would change that a  
17 little to say that it depends on whether the disability  
18 that became manifest to the worker became manifest before  
19 or after the retirement.

20 QUESTION: Well, except that that, as I  
21 understand it, is not the standard. The standard is not  
22 whether it was manifest to him, the standard is whether it  
23 was either known or should have been known, and I presume  
24 that means that following exposure to conditions that  
25 would naturally harm his hearing, he could have had an

1 audiogram and discovered his disability then.

2 He loses nothing by waiting, because we have the  
3 savings clause now that the period for application is not  
4 lost, but the fact is the point at which the injury is  
5 measured doesn't depend on whether he perceived the loss  
6 as a fact or not, isn't that correct?

7 MR. GILLIS: I think that the provision under  
8 which he's compensated does depend on when the hearing  
9 becomes manifest in terms of when it's measured. A  
10 worker --

11 QUESTION: No, but I -- excuse me, I'm not  
12 making my question clear.

13 Do you concede that whether or not -- excuse me.  
14 Do you concede that the point at which the injury occurred  
15 does not depend merely on whether he perceived it but on  
16 whether he perceived or should have perceived it?

17 MR. GILLIS: I think that the time when the  
18 injury occurred, what we're referring to is the time of  
19 injury under section 910(i), and I think that depends on  
20 when the worker knows or should have known --

21 QUESTION: Should have known.

22 MR. GILLIS: Of a disability.

23 QUESTION: Okay. Okay.

24 MR. GILLIS: And my point would be that in the  
25 case of hearing loss, a worker cannot know of a

1 disability, which is an impairment measured by a hearing  
2 test, until the hearing test is taken.

3 QUESTION: But that's not how 10(i) reads. It  
4 reads, with respect to a claim for compensation for death  
5 or disability due to an occupational disease which does  
6 not immediately result in death or disability, and I  
7 understand it to be conceded that the hearing loss here  
8 immediately occurs when he's working and his ears are  
9 invaded by excessive noise, that the injury immediately  
10 results, therefore 10(i) is inapplicable.

11 MR. GILLIS: I think that the question is what  
12 disability is Congress referring to when they refer to,  
13 does not immediately result in death or disability, and  
14 our position is that the disability that's important is  
15 the disability that becomes manifest in the disability  
16 which the worker can claim. It's true that the  
17 occupational component of the hearing loss results  
18 immediately or virtually immediately.

19 QUESTION: But that's all the section talks  
20 about -- disability due to an occupational disease which  
21 does not immediately result in death or disability.

22 MR. GILLIS: But I think that the first and the  
23 third references to disability in the statute refer to  
24 something else, and that the disability should be read  
25 consistently. That is, each reference to disability

1 should be read consistently. The --

2 QUESTION: I have a problem that's a slightly --  
3 it's a threshold problem on this same section while you're  
4 on it. I don't mean to interrupt your answer to Justice  
5 Scalia, but I have trouble seeing why is this an  
6 occupational disease at all?

7 MR. GILLIS: Well --

8 QUESTION: Why isn't it an injury?

9 MR. GILLIS: Because the distinction between an  
10 injury and an occupational disease is that an injury  
11 happens because of a sudden event, where an occupational  
12 disease occurs over a long period of time, evolves over a  
13 period of time, and occurs not because of an accident or a  
14 sudden event, but because of the characteristics of the  
15 particular industry.

16 QUESTION: Are you saying that a hearing loss is  
17 an occupational disease as opposed to an accidental  
18 injury?

19 MR. GILLIS: Yes. There can be cases where a  
20 sudden event can cause hearing loss, such as an explosion.

21 QUESTION: Well, doesn't the act in 902 define  
22 accidental injury and occupational disease as two  
23 different things? I'm just having trouble applying the  
24 statute at all. If you could get over this threshold  
25 problem, I'm sure there's an answer to it. Then we could

1 pursue the question as to when it occurs.

2 MR. GILLIS: Right. The statute describes an  
3 occupational disease as arises naturally out of such  
4 employment.

5 In the case of, for example, a shipyard, the  
6 disease naturally results from the condition of  
7 employment, and we've cited in the briefs --

8 QUESTION: But there's still a difference  
9 between an occupational disease on the one hand and an  
10 injury on the other --

11 MR. GILLIS: That's correct.

12 QUESTION: And it seems to me that all that this  
13 statute does is to talk about occupational injuries, so  
14 that you're not within it anyway.

15 MR. GILLIS: When you say this statute, you  
16 refer --

17 QUESTION: 910(i).

18 MR. GILLIS: I think it's been held repeatedly  
19 that hearing loss is an occupational disease by the  
20 various circuit courts.

21 QUESTION: And they have addressed this subject  
22 specifically.

23 MR. GILLIS: Yes. Yes.

24 QUESTION: And the Director doesn't claim  
25 otherwise, does he?

1 MR. GILLIS: That's correct.

2 QUESTION: And by the way, your position is at  
3 odds with the Director's position.

4 MR. GILLIS: Correct.

5 QUESTION: Do you think that your interpretation  
6 of the statute is the only permissible one?

7 MR. GILLIS: I think it's the only plausible  
8 one, yes.

9 Moving from section 910(i), in the case where  
10 the time of injury is after retirement, section 910(d)(2)  
11 determines the average weekly wage, depending on whether  
12 it is within a year or after a year of retirement.

13 In cases in which section 910(d)(2) applies,  
14 section 908(c)(23), enacted in 1984, creates a new type of  
15 benefit for retirees who claim occupational disease, and  
16 that section must apply if section 910(d)(2) applies.

17 QUESTION: Can you tell me again why you say  
18 that the time of injury is after retirement? I'm --  
19 why --

20 MR. GILLIS: Because it is the date of  
21 manifestation -- that is, the date when the worker knows  
22 he has a disability. That is the time of injury for  
23 several purposes.

24 The legislative history makes reference after  
25 reference to its concerns with the date of manifestation

1 as being the time of injury rather than the date of last  
2 exposure.

3 QUESTION: But then 10(i) becomes circular.  
4 10(i) says with respect to a disability which does not  
5 immediately result in disability, the time -- in death or  
6 disability, an occupational disease, a disability due to  
7 an occupational disease which does not immediately result,  
8 the time of injury shall be deemed to be the date -- shall  
9 be deemed to be the date on which the employee or claimant  
10 becomes aware.

11 I mean, that's why you need that section. You  
12 wouldn't need that section if the natural order of things  
13 is that the time that an injury occurs is the time that  
14 you become aware of it. It's only 10(i) that produces  
15 that result for certain types of injuries.

16 MR. GILLIS: But without 10(i), the time of  
17 injury for average weekly wage purposes would be the date  
18 of last exposure, and the legislative history makes it  
19 clear that Congress did not want that result at all.

20 Congress wanted the time of injury to be the  
21 date of manifestation, at which time we determine the  
22 worker's wage, at which time his time for filing begins to  
23 run, and in the case where the time is after retirement,  
24 there are special provisions.

25 We have to remember that before the enactment of

1 these provisions under Redick and Aduddell, the worker  
2 whose time of injury was after retirement would have been  
3 denied benefits all together.

4 QUESTION: Let me put it -- it seems to me that  
5 you're saying 10(i) applies here because this is an injury  
6 that occurred after retirement, and then I ask you why  
7 this is an injury that recurs after retirement, and you  
8 say, because 10(i) says that it shall be deemed to be an  
9 injury that recurs after retirement, but you don't get  
10 into 10(i) to begin with unless it is an injury that  
11 occurs after retirement, so you can't appeal to 10(i) as  
12 the justification for your assertion that this injury  
13 occurred after retirement.

14 MR. GILLIS: 10(i) doesn't deal with retirement  
15 at all. 10(i) deals with the case -- this simply  
16 establishes that the time of injury is as of the date of  
17 manifestation. 10(d)(2) deals with retirement.

18 QUESTION: No, but it -- 10(i) deals with  
19 retirement inasmuch as you only qualify for 10(i) if the  
20 injury does not occur immediately -- that is, while you're  
21 still working, okay -- and I ask you why this injury  
22 didn't occur immediately, and you say, well, because 10(i)  
23 says it shall be deemed not to have occurred until you  
24 find out about it, but you don't get into 10(i) unless it  
25 did not occur immediately.

1 MR. GILLIS: In the case of any occupational  
2 disease, the disability can occur while the worker is  
3 still working. You can develop asbestosis while you're  
4 still working. Well, you're still under 10(i). Your time  
5 of injury is simply the date of manifestation. If that  
6 then happens to be after --

7 QUESTION: Yes.

8 MR. GILLIS: Retirement, you're in 10(d)(2).

9 QUESTION: That is because asbestosis is not a  
10 disease which immediately results in disability, but I  
11 thought that it had been conceded here that the hearing  
12 disability occurs immediately.

13 MR. GILLIS: Again, we have to refine that to  
14 mean -- to determine whether we're talking about a  
15 disability that the worker can claim, and the disability  
16 that later becomes manifest on the one hand, or just the  
17 occupational component of the disease, which may not be  
18 manifest to the worker.

19 I think the real question is did Congress intend  
20 to make this distinction between long latency diseases and  
21 other types of occupational diseases. Although it is an  
22 interesting distinction to draw, there's no evidence that  
23 Congress was even aware of the distinction or intended to  
24 make the distinction in excluding hearing loss from  
25 910(i).

1           The legislative history makes it clear that  
2 Congress was aware of Redick --

3           QUESTION: But you do concede that in medical  
4 terms anyway the hearing loss, the compensable hearing  
5 loss that we're talking about, occurred before retirement.  
6 The physical injury occurred before retirement.

7           MR. GILLIS: The --

8           QUESTION: The damage to the ear --

9           MR. GILLIS: Caused by the employment, but not  
10 the compensable hearing loss which you made reference to.  
11 The compensable hearing loss is the entire hearing loss,  
12 which may have an aging component as well.

13          QUESTION: Okay. If the employer -- this is a  
14 side question, but if the employer can establish that a  
15 portion of the hearing loss is due solely to aging,  
16 nothing to do with the employment, must the employer  
17 compensate the employee for that age-related damage?

18          MR. GILLIS: Yes. Yes, and that's why I think  
19 the distinction is important.

20          QUESTION: Well, you don't deny, do you, that if  
21 following the date of his first exposure to noise he said  
22 I wonder if I had a hearing loss, and he went to -- what  
23 is it, an audiologist, and had his hearing measured, and  
24 the finding was that he had suffered a 5 percent hearing  
25 loss and he could show that that was attributable to the

1 noise, you don't deny that that would have been  
2 compensable right then and there, do you?

3 MR. GILLIS: That would be compensable, yes.

4 QUESTION: Okay.

5 MR. GILLIS: I agree with that.

6 As I mentioned, the court -- the Congress was  
7 aware of Redick and had to do -- and wanted to do  
8 something about it, and if section 910(i) does not apply  
9 to hearing loss claims, then there's nothing else in the  
10 statute that would change the result of Redick.

11 QUESTION: Well, except that there -- Redick  
12 is -- or the desire to respond to Redick is satisfied  
13 simply by extending the date within which claim may be  
14 made, isn't that true?

15 MR. GILLIS: I don't believe so, because  
16 Redick -- the claimant in Redick was not denied benefits  
17 because he had filed his claim late under section 913 or  
18 because he gave notice late under section 912. Mr. Redick  
19 was denied benefits simply because he was a retiree, so --  
20

21 QUESTION: But without an extension of the time  
22 within which claim would have been made, he would have  
23 been out anyway, wouldn't he, so Congress could have said  
24 this will satisfy the problem of allowing Redick --  
25 allowing Redicks of this world to come in and make their

1 claim, and because we assume that the injury is complete  
2 at the date at which it occurs, there will be no problem  
3 for them.

4 MR. GILLIS: It's not clear whether Mr. Redick  
5 would or would not have had a problem with notice in the  
6 statute of limitations if he would had gotten over the  
7 retiree provisions. I don't believe there's anything in  
8 Redick that tells us that.

9 It's very arguable that if he had given notice  
10 and had filed his claim very quickly after he got his  
11 audiogram after he retired, he would have been all right  
12 under those provisions. I don't think we know that, and  
13 so that change doesn't necessarily do anything about  
14 Redick.

15 QUESTION: May I just ask you a question? You  
16 say he was -- in the -- I haven't read the Redick case. I  
17 thought I understood it from the briefs. But you say he  
18 was denied compensation simply because he was a retiree  
19 and not --

20 MR. GILLIS: Right.

21 QUESTION: Right. Now, supposing he had had a  
22 claim for a loss of leg, or loss on one of the other  
23 scheduled benefits which he didn't file until after he was  
24 a retiree. Would he have lost his benefit?

25 MR. GILLIS: No, I don't believe so, because

1 his --

2 QUESTION: Then why are they different?

3 MR. GILLIS: Condition arose before retirement.

4 QUESTION: Well, but why is that -- why is the  
5 hearing loss claim different if it arose before  
6 retirement, if he in fact -- you know, the noise around  
7 the place caused him to lose some hearing?

8 MR. GILLIS: I guess the question that you're  
9 asking is, was Redick wrongly decided?

10 QUESTION: Yeah, I think Redick may well have  
11 been wrongly decided.

12 MR. GILLIS: It very well may have been, and I  
13 think the important point is not whether it was or it was  
14 not, or whether it was fair or unfair, but the question  
15 is, what did Congress intend to do in light of Aduddell  
16 and Redick?

17 QUESTION: Well, of course, they did at least  
18 take care of the cases like asbestosis, or however you  
19 pronounce it, where the injury does not really manifest  
20 itself until 2 or 3 years later, and they may have thought  
21 hearing loss was the same, but maybe they're wrong about  
22 hearing loss, and maybe hearing loss does -- you know, is  
23 an injury before retirement and therefore should be  
24 treated like a loss of leg.

25 MR. GILLIS: And the real question is whether

1 Congress thought that hearing loss was different -- not  
2 whether it is or it isn't, but what Congress intended.

3 QUESTION: Well, is that the case? I mean,  
4 if -- you know, if Congress says in a statute that X is  
5 true, or X will be the result whenever Y is true, thinking  
6 that Y is true in some situations where in fact it isn't  
7 true, we rewrite the statute to say that X is the result  
8 even where Y is not true because Congress thought that Y  
9 was true?

10 MR. GILLIS: I think the --

11 QUESTION: I don't think we do that.

12 MR. GILLIS: I think the congressional intent  
13 has to be followed unless there's some constitutional  
14 problem with it. I think it --

15 QUESTION: Even if it's contrary to the language  
16 of the statute?

17 MR. GILLIS: Well, what we're trying to  
18 determine is what Congress intended with the language of  
19 the statute.

20 QUESTION: Oh, but that's quite different what  
21 you said -- I thought you were saying even if Congress put  
22 it incorrectly we're bound to follow -- to do what  
23 Congress thought it was doing even if it ended up doing  
24 something else. You don't support that.

25 MR. GILLIS: The point I'm trying to make is

1 that Congress did not intend to draw a distinction between  
2 hearing loss and other occupational diseases along the  
3 lines that the Director suggested, and the reason I say  
4 that is that first Congress intended to do something about  
5 Redick.

6 Secondly, Congress repeatedly in the legislative  
7 history mentions the problem that the disability from  
8 occupational diseases do not become manifest until  
9 oftentimes long after the injurious exposure occurs.

10 Hearing loss is that type of disease. It  
11 doesn't become manifest until the worker happens to have  
12 his hearing tested, and that could be either before or  
13 after retirement.

14 QUESTION: Well, just as a practical matter, you  
15 know, if I'm exposed to something that causes me to lose  
16 my hearing and I find I used to be able to hear Justice  
17 Blackmun quite well when he whispered to me, but now I  
18 can't hear him at all, I don't need a hearing test to tell  
19 me that I've lost my hearing, do I?

20 MR. GILLIS: Well, you may feel subjectively  
21 that you've lost your hearing, but you may not have what a  
22 hearing test would show is an AMA percentage of hearing  
23 impairment.

24 QUESTION: Well, so you say the only way that  
25 something -- a disease or injury can manifest itself is if

1 there's some medical test that is performed to show it?

2 MR. GILLIS: In the case of hearing loss, I  
3 would.

4 QUESTION: Well, what if I break my arm. That  
5 manifests itself rather dramatically, doesn't it, without  
6 necessarily going to a hospital and having an X-ray?

7 MR. GILLIS: I agree with that, but -- and you  
8 would know your disability if you couldn't work, but here  
9 we're dealing with injuries as opposed to an occupational  
10 disease that evolves over time, and again I think that the  
11 date of manifestation and hearing loss is when the hearing  
12 is tested and an AMA disability can be determined.

13 QUESTION: Mr. Gillis, can I follow up on a  
14 question that Justice O'Connor asked you? You  
15 acknowledged in response to her question that the hearing  
16 loss occurs immediately at the time of employment when  
17 the -- and is it not also true, or is it conceded that it  
18 does not get any worse? If you lost 15 percent, you've  
19 lost 15 percent, and it stays 15 percent. Now, you may  
20 only notice it later, but it doesn't progressively  
21 increase.

22 MR. GILLIS: The occupational component of it  
23 doesn't.

24 QUESTION: Well -- which is to say you may have  
25 hearing loss from some other causes as well.

1 MR. GILLIS: That can continue after, for  
2 example, a retirement.

3 QUESTION: Oh, sure. I mean --

4 MR. GILLIS: Particularly aging.

5 QUESTION: Somebody else can shoot a gun in your  
6 ear or something like that, and you'd lose your hearing,  
7 but the effect of the occupational activities that caused  
8 your hearing loss does not increase afterwards. It occurs  
9 at once, and that's the end of it.

10 MR. GILLIS: I agree with that statement, yes.

11 If there are no further questions at this time I  
12 would reserve my remaining time.

13 QUESTION: Very well, Mr. Gillis.

14 Mr. Lupton, we'll hear from you.

15 ORAL ARGUMENT OF RONALD W. LUPTON

16 ON BEHALF OF THE RESPONDENT EMPLOYEE

17 MR. LUPTON: Mr. Chief Justice, and may it  
18 please the members of the Court:

19 Unlike Mr. Gillis, who represents Bath Iron  
20 Works, and Mr. White who represents the Director,  
21 Department of the -- a portion of the Department of Labor,  
22 I represent a single individual, Mr. Ernest Brown. My  
23 main point in being here today is to argue that Mr. Brown  
24 should be allowed to keep his award.

25 It is my understanding that the Director

1     concedes that he should be allowed to keep the award which  
2     was given to him by the administrative law judge many  
3     years ago, subsequently affirmed by the Benefits Review  
4     Board. The court below, the First Circuit, found on the  
5     final page of its opinion that the issue of whether or not  
6     Mr. Brown's benefit should be recalculated has been  
7     waived.

8             So my initial point would be that the matter of  
9     the amount to which Mr. Brown is entitled has been finally  
10    determined -- it is not questioned before this Court -- so  
11    that in the event the Court adopts the position of the  
12    First Circuit, or adopts the position which was formally  
13    held by the Benefits Review Board, Mr. Brown is allowed to  
14    keep the benefits which he has already been awarded.

15            QUESTION: I didn't understand the waiver to be  
16    quite as broad as you say.

17            I think what they said was that if you use the  
18    calculation based on sub-paragraph 13, there's no change,  
19    because the fact that it's gone from whatever it might  
20    have been at the date of retirement to 82 percent  
21    shouldn't change that calculation, because we don't know  
22    what it was at retirement, but they are arguing that if  
23    you use section 23 you'll get a different answer --

24            MR. LUPTON: That is correct, you will get a --

25            QUESTION: And that's not waived.

1 MR. LUPTON: You will get a very different  
2 answer.

3 QUESTION: Yes.

4 MR. LUPTON: But the specific issue of whether  
5 the case should be sent back for a recalculation of this  
6 individual's award has been held to have been waived by  
7 the First Circuit.

8 QUESTION: Under that section, under 13, not  
9 under 23. I mean, I don't understand. Are you saying it  
10 doesn't matter how we come out in this case, your client's  
11 going to come out with just as much money?

12 MR. LUPTON: That's correct.

13 QUESTION: What are you here for, then?

14 MR. LUPTON: Because --

15 QUESTION: I don't understand.

16 MR. LUPTON: I'm sorry. Because the specific  
17 issue of whether or not this individual's benefits should  
18 be recalculated in this particular case was waived.

19 QUESTION: Do we have a case of controversy  
20 before us if it's a matter of indifference to your client?

21 MR. LUPTON: If the Court accepts that  
22 argument -- the waiver argument.

23 If, however, the Court adopts the schedule  
24 adopted by the First Circuit, if it upholds the First  
25 Circuit, benefits -- and benefits are recalculated, the

1 amount to which my client is entitled will be  
2 approximately one half of what he has already received.

3 If the Court accepts the position which was  
4 formerly held by the Benefits Review Board, it will  
5 effectively reduce the amount of compensation to which  
6 he's entitled by about one third, so we certainly have a  
7 case of controversy if the Court decides that these  
8 benefits should be recalculated.

9 On the issue of which particular system Congress  
10 intended to use in this matter, let me first address the  
11 position taken by the Director. The Director says that  
12 the retiree amendments which Congress enacted in 1984  
13 simply do not apply, and we get back again, as the Court  
14 did earlier in Mr. Gillis' argument to section 10(i).

15 10(i) applies only if the disease does not  
16 immediately result in disability. The Director argues  
17 that because there is an immediate injury, that is, when  
18 the worker is exposed to noise he has an immediate injury,  
19 section 10(i) does not apply.

20 If the Court reviews the definition of  
21 disability which is contained in the statute -- and  
22 remember, 10(i) only applies if the disability does not  
23 immediately occur. The definition of disability states  
24 that there must be a loss of wage-earning capacity.

25 QUESTION: Well, that's not true if it's a

1 scheduled -- if it's scheduled, isn't it?

2 MR. LUPTON: That's correct, Your Honor, but for  
3 the purposes of section 10(i), which doesn't refer to  
4 scheduled awards, it simply says in the case of an injury  
5 which does not immediately result in disability, then you  
6 have to go and read the section which defines disability,  
7 section 210. Disability is defined as a loss of wage-  
8 earning capacity, or, for retirees, as a permanent  
9 impairment assessed under the guides of the American  
10 Medical Association.

11 Under no theory, or under no facts in this case,  
12 did Mr. Brown's hearing loss immediately result in a  
13 disability. First, he continued to work throughout his  
14 entire working life and retired in 1972, voluntarily for  
15 reasons totally unrelated to his hearing loss. He had no  
16 disability in that sense.

17 Secondly, the treatises cited by the Director  
18 show that hearing loss progresses over time. There is an  
19 initial injury which continually gets worse. It doesn't  
20 simply happen, as if someone put a gun next to your ear  
21 and pulled the trigger. This type of occupational noise-  
22 induced hearing loss as a medical proposition takes place  
23 over time.

24 The record reflects, in fact, that Mr. Brown had  
25 a 40 percent hearing loss in 1954. There is no evidence

1 in the record that that 40 percent hearing loss caused any  
2 impairment to his wage-earning capacity, and in fact, as I  
3 mentioned earlier, he continued to work for 18 more years.

4 Under the Guides to the Evaluation of Permanent  
5 Impairment, published by the American Medical Association,  
6 hearing loss again -- occupational noise-induced hearing  
7 loss -- does not immediately result in a disability. The  
8 Guides to the Evaluation of Permanent Impairment say that  
9 you do not have an injury, a permanent impairment, until  
10 the hearing loss has progressed in the critical  
11 frequencies to a point where you have lost an average of  
12 25 decibels of your hearing.

13 So under no -- not under the facts of this case,  
14 nor under the medical opinions, nor under the phrasing of  
15 the statute, did Mr. Brown's hearing loss immediately  
16 result in an injury. The case does fall within section  
17 10(i).

18 The question then is, having once fallen within  
19 section 10(i), you then fall within what had been  
20 characterized as the retiree amendments in section  
21 10(d)(2). Those amendments talk about whether -- at what  
22 point, rather, the hearing loss or the disability  
23 manifests itself? Does it manifest itself within 1 year  
24 of retirement or after 1 year of retirement?

25 Section 10 is nothing other than Congress'

1 direction as to which wage is to be used. Once all the  
2 other decisions in the case have been made, the court or  
3 the administrative body has to look at whether or not  
4 notice was filed in time, whether or not the claim was  
5 formally filed in time, whether or not the individual has,  
6 in this case a disability caused by noise, and then, after  
7 making all those findings, it simply goes to section 10  
8 and says, what can we pay this individual? What date do  
9 we use to calculate his average weekly wage? That's all  
10 section 10 is.

11 I would advocate in this particular case that  
12 the Court adopt a position which was utilized by Justice  
13 O'Connor in Perini North River. In that particular case,  
14 the Court looked at the statute prior to, there, the 1972  
15 amendments, to see if an individual was covered. It  
16 reviewed the 1972 amendments and made a decision that the  
17 individual in that case would have been covered prior to  
18 the 1972 amendments.

19 Justice O'Connor then analyzed the legislative  
20 history in the wording of the statute and made a  
21 determination that Congress meant to expand coverage under  
22 the 1972 amendments and included that claimant.

23 Justice Stevens dissented in that case saying  
24 simply, if you read the statute -- which is essentially  
25 what the employer in this case says -- if you read the

1 statute, you are forced to come to the position advocated  
2 by the employer.

3 Justice Stevens took that position in dissenting  
4 in Perini and said, if you read the statute as claimed,  
5 this man is not covered. However, the Court did review  
6 the law prior to the '72 amendments, reviewed the  
7 legislative history, and went on to decide the individual  
8 was covered.

9 If you take the same approach in this case, you  
10 will see that Mr. Brown could have been compensated prior  
11 to the 1984 amendments for his hearing loss. There was no  
12 need for the so-called retiree amendments which we're  
13 talking about in this case to have been enacted in order  
14 for him to have been compensated.

15 You will also see that hearing loss cases had  
16 historically been treated differently from other  
17 occupational disease cases under the act. Hearing loss  
18 cases are the only scheduled occupational disease.

19 Mr. Gillis and the Court was discussing Redick  
20 earlier. In that case, the Court decided, since Mr.  
21 Redick filed his claim following retirement, at which  
22 point he was not working and therefore suffered no wage  
23 loss, he could not then be compensated because he had no  
24 wage loss. He had no loss of earning capacity.

25 The retiree amendments were enacted to deal with

1 that sort of situation. Mr. Brown could have been  
2 compensated prior to those amendments because case law  
3 established that the date of manifestation was his date of  
4 injury for the purposes of filing notice, for the purposes  
5 of filing his claim, and for the purpose of determining  
6 his average weekly wage.

7 It also established in Mr. Justice Stevens'  
8 opinion in Potomac Electric, written in 1980, that hearing  
9 loss is a scheduled award. Congress has presumed that the  
10 individual has a loss of wage-earning capacity simply if  
11 the injury is a hearing loss.

12 If you look at that decision and then look at  
13 Redick, you can see that Redick is plainly wrong because  
14 the Benefits Review Board, completely ignoring Potomac  
15 Electric, said we can't compensate this gentleman because  
16 he has no loss of wage-earning capacity. They simply  
17 didn't review the law and see that was not part of the  
18 case. Because hearing loss claims have always been the  
19 only statute under the schedule, there is a presumed loss  
20 of earning capacity.

21 A review of the 1984 amendments, which consumed  
22 4 years' worth of hearings, a review of the House  
23 amendments and the House proposals, and the review of the  
24 conference committee to see what ultimately came out, will  
25 show that hearing loss cases have been treated differently

1 than other occupational disease cases, that Congress had  
2 no need to be concerned with hearing loss cases  
3 specifically because they could have been compensated  
4 without the '84 amendments, that Congress was really  
5 working on compensating individuals who suffer from other  
6 types of long latency occupational diseases.

7 I agree for the most part with the position  
8 taken by the director. The key difference is, I advocate  
9 the hybrid system which was until very recently utilized  
10 by the Benefits Review Board.

11 Basically, that system says hearing loss  
12 claimants who file after retirement are lumped in with  
13 other retirees for many purposes -- for the purpose of  
14 when they have to file their notice, for the purpose of  
15 when they have to file their claim, for the purpose of  
16 determining their average weekly wage.

17 However, because hearing loss has historically  
18 been treated differently, when you come to calculate their  
19 benefits, they receive benefits under section 8(c)(13),  
20 which is a nonretiree provision of the statute. It  
21 results for the most part in the employee receiving what  
22 he would have received had he filed his claim prior to  
23 retirement.

24 QUESTION: Well, I take it that in subdivision  
25 13 dealing with hearing that it's a permanent partial

1 disability, isn't it?

2 MR. LUPTON: It is, Your Honor, yes.

3 QUESTION: So it is a disability, even though it  
4 doesn't result in any proved loss of earnings.

5 MR. LUPTON: It can, obviously. If the hearing  
6 loss progresses to a point, you can have, but --

7 QUESTION: Well, I know, but you don't have to  
8 prove it to get this compensation under 13.

9 MR. LUPTON: That's correct.

10 QUESTION: You say it's just because it's  
11 presumed.

12 MR. LUPTON: It is presumed. The Court held in  
13 Potomac Electric that it is presumed.

14 When Congress set forth the schedule, sections  
15 8(c)(1) through (20), they were saying that -- Congress  
16 said if you have an injury which fits into this schedule  
17 you do not have to demonstrate you actually lost earning  
18 capacity or lost wages. That is presumed. You will  
19 receive the amount set forth --

20 QUESTION: Well, whether it's presumed or not,  
21 if you get a toe cut off, whether you just go right on  
22 doing your job and everybody agrees that you're just as  
23 good as you ever were, you're earning just as much and you  
24 get salary increases or wage increases, you just don't  
25 have to prove that there's any loss --

1 MR. LUPTON: That's correct.

2 QUESTION: And the statute doesn't provide for  
3 there being any loss.

4 MR. LUPTON: The statute awards you benefits --

5 QUESTION: Yes.

6 MR. LUPTON: For that loss. It makes it easier  
7 for you.

8 QUESTION: Yes, yes.

9 MR. LUPTON: You don't have to prove it.

10 QUESTION: It's not too bad an idea to give  
11 somebody some money for getting a toe cut off --

12 MR. LUPTON: I agree, and that's why I say --

13 QUESTION: And there's nothing wrong with saying  
14 you've lost some hearing on the job, we're going to pay  
15 you for it.

16 MR. LUPTON: Absolutely. What I advocate is a  
17 system which would not reduce the award given to an  
18 employee who files his claim for hearing loss after  
19 retirement to meaningless levels.

20 In my particular case, what will happen is the  
21 difference between --

22 QUESTION: Well, suppose the day before he  
23 retired he had an audiogram and said I've lost hearing.

24 MR. LUPTON: Fine.

25 QUESTION: Well, he's only going to get what 13

1 says he gets.

2 MR. LUPTON: That's correct.

3 QUESTION: But a day after he retires --

4 MR. LUPTON: Under either of the other two  
5 theories he will receive less, especially under the theory  
6 advocated by the employer --

7 QUESTION: Well --

8 MR. LUPTON: Because he will receive a small  
9 amount of money weekly for the balance of his life as  
10 opposed to the award under section 13.

11 QUESTION: Well, I know, but why should it be  
12 different the day after he retires than the day he  
13 retires?

14 MR. LUPTON: I don't believe it should, Your  
15 Honor, and that's my point.

16 QUESTION: Well, it isn't. You want to use this  
17 scheme that the Benefits Review Board was using.

18 MR. LUPTON: And that's -- that is -- if I can  
19 use your term, that is the scheme they adopted. The  
20 scheme they adopted was to put him back into section 13 so  
21 he'd be compensated as though he had filed his claim  
22 before he retired.

23 QUESTION: Thank you, Mr. Lupton.

24 MR. LUPTON: Thank you.

25 QUESTION: Mr. Wright, we'll hear from you.

1 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

2 ON BEHALF OF THE FEDERAL RESPONDENT

3 MR. WRIGHT: Thank you, Mr. Chief Justice, and  
4 may it please the Court:

5 The Government agrees with the position adopted  
6 by the First Circuit in this case, and it said that  
7 subsection 13, the provision in the schedule that  
8 specifically applies to hearing loss cases, is the  
9 provision that should apply here, and we agree, Justice  
10 White, the result of that is that the hearing loss award,  
11 whether or not the claim is filed while you're working or  
12 after you're working, would be the same.

13 The employer in this case argues that subsection  
14 23 should apply instead of the hearing loss provision and  
15 the employee should get less if he's retired. The  
16 employee in this case has endorsed the scheme that the  
17 Benefits Review Board came up with and has since  
18 abandoned, under which the employee would actually get  
19 more if the claim was filed after the employee retired.  
20 The Benefits Review Board's hybrid approach combines  
21 certain favorable aspects of subsection 23 and certain  
22 favorable aspects of subsection 13 to maximize the award.

23 In his opinion for the First Circuit, Chief  
24 Judge Briar put his finger on the key statutory provision  
25 and the key fact in this case. The key statutory

1 provision is section 10(i). That's the provision that  
2 says that the rules that Bath Iron Works seeks to apply  
3 are applicable only to disabilities, quote, due to an  
4 occupational disease which does not immediately result in  
5 disability, unquote.

6 QUESTION: Well, you agree, I take it -- or do  
7 you? -- that loss of hearing is an occupational disease.

8 MR. WRIGHT: We have not challenged that,  
9 Justice Kennedy, and I should admit that the medical  
10 treatise on which we rely refers to occupational hearing  
11 loss as a disease. You are correct in saying that the way  
12 it occurs it frankly sounds an awful lot like an injury.

13 The way occupational hearing loss occurs is that  
14 the sound waves generated by a loud noise batter the nerve  
15 endings in the inner ear and immediately cause them to  
16 become inflamed, which leads to an immediate loss of  
17 hearing. It's an assault which in many other cases would  
18 of course be considered an injury, but we have not argued  
19 about the word disease here, we've instead focused on  
20 occupational disease which does not immediately result in  
21 disability.

22 QUESTION: Well, it's -- yes. Now, what do you  
23 do about the fact that the definition of disability seems  
24 to be tied to loss of wages and so long as the person's in  
25 the same job, he has not immediately suffered any loss of

1 wages?

2 MR. WRIGHT: Well, our answer to that is, this  
3 Court noted in Pepco and has long been the rule, and I do  
4 not believe is challenged by any party to this case, is  
5 that scheduled injuries automatically call for recovery.  
6 That's always been the rule.

7 QUESTION: And loss of earnings is assumed.

8 MR. WRIGHT: The loss of earning is presumed.

9 QUESTION: Which means that it's a disability.

10 MR. WRIGHT: That's right.

11 QUESTION: So the definition of disability  
12 really is not -- I guess it isn't -- 8(c)(13) doesn't seem  
13 to use disability in the definitional sense either,  
14 because it says in the case of disability partial in  
15 character but permanent in quality. Now, they're not  
16 talking about a loss of wages that is partial in character  
17 but permanent in quality. They're talking about an injury  
18 that is --

19 MR. WRIGHT: They're talking about a loss of  
20 hearing which occurs immediately. It would be nicer if  
21 there were something in the statute that said, by the way,  
22 everyone has always been correct that scheduled  
23 injuries --

24 QUESTION: Well --

25 MR. WRIGHT: Are presumptive of disability.

1 QUESTION: Section -- subsection (c)  
2 describes -- is dealing with what itself calls permanent  
3 partial disability.

4 MR. WRIGHT: It says that hearing loss is  
5 permanent partial disability.

6 QUESTION: Yes, so they're all disabilities.

7 MR. WRIGHT: I agree that that's right. If you  
8 just looked at the definition of disability in section  
9 2(10), it doesn't make that as clear as it might, but no  
10 one challenges that as long --

11 QUESTION: Whatever, but I would think (c) at  
12 least says that all of these listed items are  
13 disabilities.

14 MR. WRIGHT: If you've suffered a loss of  
15 hearing, you've suffered a disability whether or not your  
16 earning capacity has gone down. We agree, and everyone  
17 else does.

18 So the key provision in section 10(i), the key  
19 fact in this case, is that occupational hearing loss does  
20 not have a latency period. To the contrary, as should be  
21 clear by now, occupational hearing loss occurs  
22 simultaneously with exposure to excessive noise, and it  
23 does not get worse after the noise goes away.

24 Bath Iron Works concedes that this is so, said  
25 so here today, at page 8 of its brief it states, quote, it

1 is true that occupational loss of hearing is immediate  
2 because it does not progress following exposure to noise,  
3 unquote. That is correct. We agree with that.

4 When you put section 10(i), due to an  
5 occupational disease which does not immediately result in  
6 disability, together with that fact, that occupational  
7 hearing loss occurs immediately, then it is evident that  
8 subsection 23, the special retiree rules that Congress  
9 adopted in 1984, do not apply.

10 What applies instead is the schedule, subsection  
11 13, which specifically covers hearing loss. It's a rather  
12 unsurprising conclusion, frankly, that the hearing loss  
13 provision should apply in this hearing loss case.

14 Occupational hearing loss is different than  
15 asbestos-related diseases, and perhaps it's helpful to  
16 consider that in understanding subsection 23.

17 Asbestos fibers actually remain in the lungs and  
18 10 or 20 years after the exposure to asbestos is removed,  
19 they may then develop into cancerous growths of  
20 mesothelioma, or they may then destroy enough of the lung  
21 that a worker has asbestosis, but the asbestos fibers stay  
22 in the lungs and continue to do damage.

23 When the worker is removed from the exposure to  
24 excessive noise on the job he suffers no further loss from  
25 that exposure.

1           In its opening brief at page 16, Bath Iron Works  
2     recognized that this Court could decide the case by  
3     looking no farther than the words of section 10(i), but  
4     advised the Court not to adhere closely to what Congress  
5     has written. It instead urges the Court to treat  
6     occupational hearing loss like asbestos-related diseases,  
7     because Senator Hatch mentioned Redick, the Benefits  
8     Review Board decision involving hearing loss, along with  
9     two asbestosis cases decided by the board and said that  
10    they represented inequitable policy.

11           As Chief Judge Briar said, and again we agree  
12    completely with his opinion for the First Circuit, Bath  
13    seeks to prove far too much on the basis of far too  
14    little. Senator Hatch's disparagement of Redick is hardly  
15    a sufficient basis on which to rewrite the statute.

16           In any event, we agree that Redick was  
17    inequitable, and we think the problems with that decision  
18    are -- have been solved and are easy to solve. First,  
19    Congress adopted in 1984 at the same time it adopted the  
20    stack of rules in subsection 23, a special rule in hearing  
21    loss cases which is in subsection 13(d), which provides  
22    that the time to file a claim for hearing loss doesn't run  
23    until the audiogram report has been received, so there's  
24    no danger of workers losing the ability to bring these  
25    claims.

1           QUESTION: Could I ask you a question about that  
2 right at that point? Some of the briefs point out the  
3 fact that as a person ages the hearing tends to decrease,  
4 so that if you wait 5 or 10 years for your audiogram I  
5 presume you get a higher percentage of hearing loss than  
6 if it had been taken immediately upon retirement.

7           Does the statute contemplate, in your view, that  
8 the compensation shall be measured by what the audiogram  
9 shows or what the actual hearing loss at the time of  
10 leaving employment was?

11          MR. WRIGHT: In our view -- and this gets a  
12 little complicated, but in the case you described I  
13 believe the entire hearing loss would probably be  
14 compensated. If the employee can prove an occupational  
15 hearing loss, and of course there has to be an  
16 occupational hearing loss --

17          QUESTION: Right.

18          MR. WRIGHT: For the employer to be liable, and  
19 it's then not possible to separate out the age-related  
20 hearing loss from the occupational hearing loss, then an  
21 award for the entire hearing loss is what is normally  
22 proper.

23          We have suggested in our brief that if an  
24 employer would give an exit audiogram and freeze the  
25 amount of occupational hearing loss, that we don't -- that

1 it is the position of the director that the employer  
2 should not be liable for any subsequent age-related  
3 hearing loss.

4 I should note in this connection that OSHA has  
5 published regulations mandating exit audiograms in  
6 especially noisy injuries. This is recent, but it may  
7 well solve some of these important problems in the future.

8 As I've said, I think section 10(i) is quite  
9 clear here. Let me just state that if there were any  
10 question about that, deference would be appropriate. In  
11 1985, 1 year after the relevant amendments, the Secretary  
12 of Labor promulgated a regulation which we've reprinted at  
13 the very last page of the appendix to our brief.

14 The question was whether hearing loss claims  
15 should be treated like other accidental injuries listed in  
16 the schedule or whether they should be treated like  
17 asbestosis in terms of when you have to file your notice.  
18 It's 30 days in the case of accidental injuries and a year  
19 in the case of asbestosis. The Director said quite  
20 clearly 30 days, hearing loss is like an accidental  
21 injury.

22 But this isn't really a deference case. While  
23 the provisions of this act are complex. As Chief Judge  
24 Briar concluded, when you come right down to it, it  
25 actually says something fairly simple: when an employee

1 sustains a disability after retirement as the result of a  
2 latent disease, the special rules in subsection 23 apply.  
3 In a hearing loss case, where the injury occurs  
4 immediately, subsection 13 applies.

5 Thank you.

6 QUESTION: Thank you, Mr. Wright.

7 Mr. Gillis, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF KEVIN M. GILLIS

9 ON BEHALF OF THE PETITIONERS

10 MR. GILLIS: I wanted to cover the reasons why  
11 in my view the Director's interpretation of the statute is  
12 implausible. First, as mentioned earlier, the Director  
13 draws a distinction and tries to make that distinction  
14 important to the intent of Congress where there's no  
15 evidence that Congress intended the distinction to be  
16 important.

17 There's no discussion in the legislative history  
18 with respect to the fact that hearing loss is somehow  
19 different than asbestosis. Congress was concerned with  
20 the latency -- or, with the delay in time between exposure  
21 and manifestation, and hearing loss has that same delay.

22 Secondly, if Congress had intended after the '84  
23 amendments for all hearing loss claims for retirees and  
24 nonretirees to be treated under section 8(c)(13), there  
25 would have been language in 8(c)(13) to say that.

1 8(c)(13) says nothing about retirement.

2 Third, if Congress had intended to exclude  
3 hearing loss claims from applicability from section  
4 8(c)(23), the language of 8(c)(23) would be much  
5 different. The introductory phrase in section 8(c)(23)  
6 is, notwithstanding paragraphs (1) through (22).  
7 Obviously, (1) through (22) includes (13).

8 If Congress had intended to exclude hearing loss  
9 claims from subsection (23), different language such as,  
10 notwithstanding paragraphs (1) through (12) and then (14)  
11 through (22) could have been used. Instead, the opposite  
12 language is used. That is, section 8(c)(13) is included  
13 in the language of 8(c)(23).

14 Finally, the logical conclusion of the  
15 Director's argument -- that is that section 910(i) is  
16 inapplicable to hearing loss claims -- would take us back  
17 to the principle that the average weekly wage is  
18 determined at the time of last exposure, and that is  
19 clearly not the intent of Congress and was mentioned  
20 several times by Congress.

21 I also wanted to comment on the question of the  
22 hybrid approach at one time used by the Benefits Review  
23 Board. Our position on that is there is simply no basis  
24 in logic in terms of interpreting the statute to arrive at  
25 that approach.

1           If section 910(i) is applicable, then section  
2   910(d)(2) can be applicable. If section 910(d)(2) is  
3   applicable, section 8(c)(23) has to be applicable.  
4   There's just no way around it, and that's why that  
5   approach has been discredited at this point and there is  
6   no authority for that approach.

7           With respect to the question of waiver, I wanted  
8   to briefly discuss that. Justices Stevens and Scalia  
9   touched on that. The waiver was with respect to the  
10  calculation of the average weekly wage. That was  
11  mentioned in dicta by the First Circuit. We have not  
12  waived the issue of whether section 8(c)(23) applies.

13          The waiver was very limited. We're not trying  
14  to have the average weekly wage recalculated or recoup any  
15  benefits based on that. It was a very limited waiver, not  
16  a waiver of the entire argument.

17          CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gillis.  
18  The case is submitted.

19          (Whereupon, at 12:00 noon the case in the above-  
20  entitled matter was submitted.)  
21  
22  
23  
24  
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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Paul H. H. Works Corp. ✓  
Director, Office of Workers Comp. Prog.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Mari Federico

(REPORTER)