

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, DEPARTMENT OF LABOR, Petitioner
v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK
COMPANY, ET AL.

CASE NO: No. 93-1783

PLACE: Washington, D.C.

DATE: Monday, January 9, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DIRECTOR, OFFICE OF WORKERS' :

4 COMPENSATION PROGRAMS, :

5 DEPARTMENT OF LABOR, :

6 Petitioner :

7 v. : No. 93-1783

8 NEWPORT NEWS SHIPBUILDING AND :

9 DRY DOCK COMPANY, ET AL. :

10 - - - - -X

11 Washington, D.C.

12 Monday, January 9, 1995

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.

16 APPEARANCES:

17 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Petitioner.

20 LAWRENCE P. POSTOL, ESQ., Washington, D.C.; on behalf of
21 the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 93-1783, the Director of the
5 Office of Workers' Compensation Programs v. the Newport
6 News Shipbuilding and Dry Dock Company.

7 Ms. Brinkmann.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE PETITIONER

10 MS. BRINKMANN: Mr. Chief Justice and may it
11 please the Court:

12 This case concerns the standing of the Director
13 of the Office of Workers' Compensation Programs to seek
14 judicial review of rulings by the Benefits Review Board of
15 claims under the Longshore & Harbor Workers' Compensation
16 Act.

17 The Director has standing to seek court-of-
18 appeals review as a person adversely affected or aggrieved
19 by a final board ruling under 33 U.S.C. 921(c).

20 The Director is charged with a myriad of duties
21 under the act. Incorrect board rulings adversely affect
22 her ability to carry out those duties consistent with her
23 interpretation of the act when that interpretation differs
24 from the board ruling.

25 QUESTION: Is it true, Ms. Brinkmann, that both

1 the Director and the board are located within the Labor
2 Department?

3 MS. BRINKMANN: Yes, Your Honor, it is. It's
4 somewhat analogous to the situation of the Occupational
5 Safety & Health Review Commission, which came before the
6 Court in Martin.

7 Although that Commission was an independent
8 Commission, it was a situation in which Congress had taken
9 the adjudicatory authority for a program and vested it
10 somewhere other than where the administrative and
11 enforcement authority was. As in this case, the
12 administrative and enforcement authority are vested in the
13 Director, where the adjudicative authority is vested in
14 the Commission.

15 QUESTION: And are both -- are all of them
16 appointees of the Secretary?

17 MS. BRINKMANN: Yes, Your Honor, but in this
18 particular case, it's different than what one might think
19 is a traditional agency structure in that it's not a
20 unitary structure, and that the administrator and enforcer
21 of the act cannot overrule the Benefits Review Board
22 decisions. That's why we believe it's analogous to the
23 situation before the Court in Martin.

24 QUESTION: Now, can the Secretary change rules
25 if a situation arises in the board's interpretation that

1 the Secretary doesn't like?

2 MS. BRINKMANN: Yes --

3 QUESTION: Rulemaking is possible?

4 MS. BRINKMANN: Yes, Your Honor, but --

5 QUESTION: And I assume the Secretary relies on
6 the Director for advice on those matters?

7 MS. BRINKMANN: Yes, Your Honor. We don't
8 believe, however, that that adequately protects the public
9 interest, which the Director is vested and charged with
10 carrying out under the act.

11 QUESTION: Well, do you think the other person
12 would have standing to appeal? For instant, the
13 President, or the chairman of the Senate committee that
14 oversees these matters in the Congress? Would they also
15 have an interest in seeing how it's carried out, and have
16 standing to appeal, do you suppose?

17 MS. BRINKMANN: I don't believe so, Your Honor.
18 The Director's vested interests were imposed, or she was
19 charged with those through the act of Congress under
20 section 939. The Secretary and her delegate, the
21 Director, is charged with administering and enforcing the
22 act --

23 QUESTION: Well, in the proceeding below, I
24 guess your position was sustained on standing with regard
25 to the effect on the special fund, and as to that, that's

1 not before us.

2 MS. BRINKMANN: No, Your Honor.

3 QUESTION: It's not clear to me why the
4 Secretary is a person. Why is the Secretary a person
5 under the act?

6 MS. BRINKMANN: Well, Your Honor, we believe
7 that the Secretary is an individual, and as -- in the
8 authority that we've cited in our brief, Government
9 officials can be considered persons depending on the
10 context of the statute. This was not a basis that any of
11 the courts of appeals or the parties below raised as a
12 challenge, and it has never been viewed as such, that she
13 would be excluded from that.

14 QUESTION: But the only reason she is suing is
15 in her official capacity, in which case she's really no
16 different from the agency, and the agency doesn't have --
17 the agency isn't defined as -- in the statute --

18 MS. BRINKMANN: Your Honor, the --

19 QUESTION: -- as being a person.

20 MS. BRINKMANN: -- the Director has particular
21 duties under the statute to further public purposes under
22 the act that the court of appeals didn't recognize. The
23 court of appeals had much too narrower a view of the
24 Director's responsibilities under the act.

25 QUESTION: But those responsibilities derived

1 from the prerogatives and the interests of the agency, and
2 it seems to me that the Secretary is in no different
3 position than the agency is.

4 MS. BRINKMANN: Your Honor, the Secretary and
5 the delegate, the Director, is a Government official
6 acting on behalf of the agency, but she is not an official
7 that is permitted to overrule the board ruling, so in her
8 role as the policymaker under the act, she is vested with
9 the right and the ability to seek judicial review of board
10 rulings if she disagrees with them.

11 QUESTION: But again, only by reason of her
12 official connection to the agency.

13 MS. BRINKMANN: Yes, Your Honor, but we don't
14 believe a person excludes that. Under that rationale, a
15 person in the structure of those definitions would also
16 exclude employer, and not permit an employer --

17 QUESTION: No. No, because that includes
18 corporation.

19 MS. BRINKMANN: But an employer is elsewhere
20 defined in that section, also. We just think that the
21 fact there's a separate provision explaining that the
22 Secretary of Labor that is referred to when the term
23 "Secretary" is used doesn't undermine the fact that the
24 Secretary is included as a person.

25 QUESTION: Well, it isn't that that undermines

1 it, it's the fact that the definition is strikingly
2 different from the definition in the Administrative
3 Procedure Act, which has a similar provision about who has
4 standing, and the language is almost the same, any person
5 adversely affected or aggrieved may obtain review, and
6 "person" is defined in the Administrative Procedure Act
7 similar to the definition here, except it goes on to
8 include public or private organization.

9 MS. BRINKMANN: Well, Your Honor, I think that
10 in order to assess the Director's standing, it's important
11 to focus on the structure of the Longshore & Harbor
12 Workers' Compensation Act and the history of it. At the
13 time that the board was created, these provisions was
14 created, it had been the longstanding recognition that the
15 Director did have standing to appeal from the district
16 court to the court of appeals.

17 In 1972, when these provisions were added, all
18 that Congress did was replace the district court's role
19 with the board's role, and there's no indication in the
20 text or structure of the act that there was any intent to
21 change the fact that the Director had standing to seek
22 court of appeals review of that ruling.

23 QUESTION: It's a strange -- your argument is
24 simply because the Secretary has policymaking concerns and
25 policymaking interests, the Secretary is a person

1 adversely affected.

2 Let's take a case in which an employer and
3 employee get involved in a contract dispute under State
4 law, and the employer wins on the ground that -- the
5 decisional ground is that the National Labor Relations Act
6 preempts the contractual question. Do you think that the
7 Labor Board, even though it was not a party to that
8 private contractual dispute, would have standing to
9 appeal? That's a -- it's an awfully broad interpretation
10 of when public officers have authority to go into court
11 and continue litigation in which they are not personally
12 at all involved.

13 MS. BRINKMANN: Your Honor, if I may, I think I
14 have about three answers to that question.

15 QUESTION: Okay. Give me the best one first.

16 (Laughter.)

17 MS. BRINKMANN: First of all, are our position
18 is on the interest that -- how Congress vested the
19 Director with standing is not limited to the fact that
20 she's a policymaking authority. She is the Government
21 official that's charged with ensuring that the act is
22 lawfully administered.

23 Part of that interest is ensuring that claims
24 are correctly determined under the act, and that is so
25 because underlying this act are public purposes, both

1 through the nature of a Workers' -- Workmans' Compensation
2 Program through the structure of the act, and the fact
3 that employers and employees don't have incentives to
4 protect those.

5 QUESTION: Well, why is that different from the
6 Labor Board?

7 MS. BRINKMANN: In this case, Congress set up
8 this statute, set up the statutory scheme and designated
9 the Secretary as the person to play that role. The public
10 purpose is including not just providing compensation to an
11 injured or maritime worker, but ensuring that that payment
12 comes from the industry fund so that the burden isn't
13 placed on other public disability benefits for private
14 charities, and also that payment serves as an incentive to
15 the employer.

16 QUESTION: Do you rely to any extent in this
17 respect to her role as the person who proposes a
18 compensation award? In answering Justice Scalia's
19 question about, is there something different from just any
20 agency that's interested in the sound enforcement of the
21 law, does she have an initiating role? Does she
22 participate in this proceeding in a way that doesn't
23 happen in other agencies?

24 MS. BRINKMANN: Yes, there are many provisions
25 throughout the statute that provide for the Director to

1 have a specific role, in particular, the Director is
2 charged with responsibility under section 939 with
3 assisting claimant in the process and with assisting
4 claimants in obtaining services such as rehabilitation
5 services.

6 QUESTION: In the proceeding, is what Justice
7 Ginsburg is asking about. In the proceeding before the
8 board, does she play a part?

9 MS. BRINKMANN: Yes, Your Honor. I think we
10 have to step back all the way to the initiation of the
11 proceeding. In fact, under this statutory scheme,
12 employers are obligated to make payment even without an
13 award being entered. If it's not controverted under
14 914(a), the employer has to pay even without an award.

15 At that stage, under 914(h) the Director has the
16 authority to sua sponte initiate an investigation into
17 that payment even if it's not controverted and there's no
18 dispute about it. On her own, she has the initiative to
19 go in and investigate that to see if it's in compliance
20 with the --

21 QUESTION: Even if it's not controverted, or
22 only if it's not controverted?

23 MS. BRINKMANN: In either case. Under another
24 provision --

25 QUESTION: Well, wait. Now, if it is

1 controverted, she has no authority, does she?

2 MS. BRINKMANN: Yes. Under 919, then, if it's
3 controverted, the notice is filed with the Director and
4 she is charged with an informal resolution period which
5 she meets with the employer and the employee and attempts
6 to achieve a resolution, and --

7 QUESTION: But not as an advocate, as an
8 impartial adjudicator, presumably.

9 MS. BRINKMANN: The regulations make clear that
10 at that stage she is charged with informing that as to --
11 with her expertise under the scheme about the rigid
12 framework for compensation under this scheme. Congress
13 set up a very clear mechanism for calculating the amount
14 of compensation that a worker is entitled to under this
15 scheme. That's her role at that stage. Then, it is
16 referred -- if an informal resolution is not achieved,
17 it's referred to an ALJ for a hearing.

18 I should also point out, if it's settled, the
19 parties cannot settle without the approval of the Director
20 or the ALJ. Congress also prohibits claimants from
21 waiving their rights to claim.

22 QUESTION: Could she appeal on the part of the
23 employer, as well?

24 MS. BRINKMANN: Yes.

25 QUESTION: Suppose the employer loses below, you

1 could appear --

2 QUESTION: Yes, Your Honor, and in fact in the
3 O'Keefe case, which was a case that ultimately came to
4 this Court through the Rasmussen case, the Director has
5 proceeded -- I wouldn't say necessarily on behalf of the
6 employer or on behalf of the employee at that point. She
7 is pursuing the public's interest in ensuring that the
8 correct compensation is paid, so that employers don't have
9 to pay too much.

10 That also is inconsistent with the aims of this
11 Workers Compensation Program that was set up to ensure
12 that there were certainties and availability of awards for
13 injured workers at the same time eliminating other legal
14 rights of workers to sue.

15 QUESTION: What if the employee chooses not to
16 sue? Let's assume an employee who's entitled, in the
17 Secretary's view, to compensation. The employee chooses
18 not to litigate at all. Could the Secretary initiate
19 litigation on that employee's behalf?

20 MS. BRINKMANN: Again, going back to the
21 different phases, if there was an employer who was
22 obligated to make an award, and was making an award, and
23 the employee was satisfied with that but the employer
24 thought -- the director thought that it was not an --
25 under 1914(h), she couldn't invest -- initiate

1 investigations, no.

2 At that point, the claimant and the employer
3 usually come in and there's informal resolution, and that
4 may lead to a settlement, that may -- to an award that the
5 Director can then issue, or the claimant --

6 QUESTION: But it doesn't. Let's assume it
7 doesn't. The employer listens and says, Secretary, I
8 think you're wrong, I'm not going to pay any more than
9 this, and the employee, a very complaisant kind of a
10 person, says, that's okay with me. I don't really want
11 any more. Can the Secretary initiate a suit before the
12 board on the --

13 MS. BRINKMANN: Your Honor, that's not a
14 situation that has arisen, and we're not aware of the
15 Director doing a claim -- initiating a claim on her own.
16 For the most part --

17 QUESTION: But it seems to me strange that if
18 the employer does go, gets a judgment from the board and
19 says, it's good enough for me, she can take an appeal, but
20 she can't go into the board in the first place, if he
21 chooses not to go before the board. That's very strange.

22 MS. BRINKMANN: Your Honor, to the extent -- I
23 think most of the situations that you're referring to
24 would be characterized as settlements that would require
25 the approval of the Director if there was any kind of

1 monetary payoff.

2 The act frankly is structured to prohibit
3 collusion between employers and employees, for example,
4 and this is why the employers and employees --

5 QUESTION: May I interrupt for a minute? I'm
6 not sure I understand your answer to Justice Scalia's
7 question. You say they don't do it. Could they do it?
8 Could the Director initiate a proceeding in the situation
9 he posits, in your view?

10 MS. BRINKMANN: I can think of a situation in
11 which that may be possible. As I said, Your Honor, that
12 issue has not been litigated, and that frankly has not
13 arisen as a practical matter, but, for example --

14 QUESTION: But I still am curious, you know,
15 what your construction of the statute is with regard to
16 the power of the director to do it if she wants to.

17 MS. BRINKMANN: I think that, for example, in a
18 situation where an employee was preferring to obtain
19 disability insurance benefits under the Social Security
20 Administration Program, for example, in lieu of pursuing
21 that, the Director would have an interest in the lawful
22 administration of this act certainly by initiating an
23 informal investigation.

24 And then at the point if there was still a lack
25 of initiative by the claimant to view that as a settlement

1 under the act that was not adequate and not approve it and
2 commence proceedings under that authority --

3 QUESTION: Practically, how would she even know
4 about it if the claimant doesn't even initiate a claim?

5 MS. BRINKMANN: There are all kinds of
6 obligations on the employer and the employee --

7 QUESTION: To report.

8 MS. BRINKMANN: -- to notify -- yes. Yes. It's
9 a very rigid reporting scheme and compensation scheme, and
10 the Director is involved in that throughout, and --

11 QUESTION: Is there any scheme like this --
12 apart from the Black Lung Benefits Act, in all of Federal
13 claims, is there any other regime quite like this, with
14 this split, and -- well --

15 MS. BRINKMANN: Not that -- we believe that
16 OSHRC and the Mine Safety Health Review Commission are the
17 most analogous situations, although we concede those are
18 different because their mission is wholly independent.

19 QUESTION: And the Secretary appears all the
20 time. Doesn't the agency there have prosecutory authority
21 before the independent commission?

22 MS. BRINKMANN: Your Honor, the Director also
23 has enforcement authority for boards here. The only
24 difference is, unlike those, here the Secretary, the
25 Director enforces the award in district court.

1 QUESTION: Not enforcing. I'm talking about
2 litigating, going in to initiate an action against the
3 employer.

4 MS. BRINKMANN: Your Honor, Workers'
5 Compensation schemes were set up to try and --

6 QUESTION: But am I not correct that these other
7 schemes that you're appealing to as being the same thing
8 are schemes in which the Secretary or the agency goes in
9 before the Commission as an aggressor, as a postulant, to
10 seek relief?

11 MS. BRINKMANN: That's certainly one of the
12 roles that the Secretary --

13 QUESTION: Which is not a role that at least has
14 been played here. Whether it might be or not, it hasn't
15 been.

16 MS. BRINKMANN: Your Honor, we believe, however,
17 when we look at standing, when you look at the
18 responsibility that the Secretary has been charged with
19 under this act, for example, approving settlement,
20 fostering informal resolution, entering awards, in the
21 informal resolution process the Director does have
22 authority to enter award.

23 Also, if there's a request for modification for
24 an award, the Director has the authority to enter awards,
25 so there are certain situations in which the Director does

1 have that type of authority, and considering the overall
2 structure of this and the public goals that underlie the
3 act, it's only the Director that has the incentive to
4 further those interests. The Congress expressly
5 recognized that by precluding the employer or employee
6 from settling it, from waiving claims --

7 QUESTION: I don't know why you say it's only
8 the Secretary. Why doesn't the employee have the
9 interest? I mean, you have the classic situation in all
10 of these cases where one person is owed money, and you
11 would normally expect that person to be -- to have a keen
12 enough interest to get the money.

13 MS. BRINKMANN: Well, Your Honor, for example,
14 if I go back to the situation where the employee also has
15 an opportunity to receive compensation through the Social
16 Security disability insurance, Workers' Compensation is
17 offset to that relief, so there's no benefit if the
18 employee can get this money from somewhere else, or from a
19 private charity, perhaps. If an employer wants to set up
20 some kind of private charity to avoid this rigid
21 framework, that's prohibited by this act.

22 That is the exact purpose, the effect that
23 Congress was intending to preclude by setting up this
24 framework so that the industry was charged with paying for
25 these injuries according to a rigid schedule. At the same

1 time employees had to surrender rights, and -- to further
2 the safety incentives placed on the employer. That's I
3 think a very unique aspect of the public interest that
4 must be furthered by a Government official under the
5 Workers' Compensation scheme.

6 QUESTION: Is there any difference in looking at
7 standing, that here we're dealing with a Government
8 enforcer, an article II entity, as distinguished from --
9 from your brief, I gather you're treating this just like
10 citizens' standing. Do you get anything extra because
11 this is an Article II official?

12 MS. BRINKMANN: Absolutely, Your Honor. We do
13 cite several cases in our brief concerning the Government
14 official's standing to enforce public duty. For example,
15 on page 15, one of the cases we cite is the SEC v. United
16 States Realty & Improvement Company.

17 That was a situation in which the SEC went into
18 bankruptcy court to further the public interest in
19 ensuring that the proper bankruptcy proceeding was
20 followed. They moved to dismiss the proceeding that had
21 already done, arguing that they should have been
22 proceeding under another provision, and the Court upheld
23 the SEC's position to, standing to intervene in that case,
24 and the standing to appeal when they lost.

25 We believe that that's an analogous situation

1 here, and when Government officials are enforcing the
2 public duties that Congress has charged them with
3 enforcing and administering, that that is a different
4 situation than just a private party attempting to
5 establish standing.

6 QUESTION: And you take the position that the
7 Director has standing to appeal here even if the employee
8 opposes it and might stand to lose benefits as a result of
9 the appeal?

10 MS. BRINKMANN: We believe -- yes, Your Honor.
11 We believe that if the Director believes that the board
12 erroneously charged the employer too much under the,
13 again, the rigid scheme set up for calculating
14 compensation, yes, it is furthering the public interest to
15 appeal that determination.

16 QUESTION: Well, you know, if we disagree and
17 think that under the language and scheme of this statute
18 that there is no standing in this situation, what are the
19 practical results of it? Can't the Director ultimately
20 see to it that the policies are carried out by other
21 means?

22 MS. BRINKMANN: Your Honor, frankly, because of
23 the unique structure that Congress set up, this Commission
24 is a creature of Congress, not a creature of agency as in
25 most other instances. Congress set up this Benefits

1 Review Board, and the Secretary does not have authority to
2 overrule those rulings. Review of that goes to the court.

3 QUESTION: Who appoints the members?

4 MS. BRINKMANN: The Secretary.

5 QUESTION: I still have exactly the question
6 that Justice O'Connor had. That is, there is an employer,
7 and an employee, and there's some transfer of money. The
8 employer doesn't care. He's satisfied. The employee is
9 satisfied. He doesn't care.

10 In any case in which in any money whatsoever
11 that belongs to the public would be at stake, and there
12 are because of the funds, there is standing, so we're not
13 talking about that. In any future case, where the law is
14 wrong according to the Secretary, you can always file an
15 amicus brief. She may be a party.

16 So what is the practical difference? What do
17 you care if, in fact, in one case where nothing is at
18 stake for the Government, except maybe the board got it
19 wrong, what difference does it make to anyone --

20 MS. BRINKMANN: It makes a difference --

21 QUESTION: -- practically?

22 MS. BRINKMANN: It makes a difference if, in the
23 same reason as settlement, that both parties agree to but
24 the Director disapproves makes a difference.

25 QUESTION: Why?

1 MS. BRINKMANN: Because there's certain public
2 interests underlying it.

3 QUESTION: What?

4 MS. BRINKMANN: That it is the industry that
5 should be charged to compensate according to a rigid
6 scheme.

7 For example, Your Honor, if in every case the
8 employer was willing to pay 80 cents on the dollar, that
9 would be something that would completely undermine
10 Congress' purpose.

11 QUESTION: Well, if the employer wants to pay
12 80 cents --

13 MS. BRINKMANN: At the same time, every employee
14 might be willing to accept --

15 QUESTION: Sorry. Then let's take that example.
16 Let's suppose an employer wants to pay 80 cents, and the
17 employer says, great, the employee says, great, neither of
18 them care whatsoever. No public money is at stake. In
19 any future case where the law generally is at issue, you
20 can file an amicus brief. All right, how does that hurt
21 anybody or anything?

22 MS. BRINKMANN: Congress intended that the
23 Director have the authority to ensure that the
24 compensation award is adequate and not subject -- not a
25 result of duress by giving her the express approval to

1 reject settlements under section 908(i). That is the type
2 of --

3 QUESTION: She can reject a settlement even
4 though both parties are satisfied with it?

5 MS. BRINKMANN: Yes.

6 Also, Justice Breyer, under your scenario, the
7 issue eludes judicial review forever. It's only according
8 to happenstance, to await a private litigant to have the
9 incentive to go to judicial review of the incorrect
10 interpretation of the act that the Secretary is charged
11 with administering and enforcing.

12 QUESTION: Isn't your strongest argument that -
13 - not that the Secretary's interest is in seeing that the
14 right amount is paid, but in something you alluded to a
15 moment ago, and that is, if the Secretary cannot ensure
16 that the right amount is paid, the Secretary ultimately
17 has no basis for, or the Government has no basis in its
18 own right to induce employers to follow safety standards?

19 Is the ultimate goal that your argument appeals
20 to the safety standard argument rather than compensation,
21 as such?

22 MS. BRINKMANN: Certainly, Your Honor, we
23 believe that the safety incentive was a strong underlying
24 purpose of the act, and part of that is also to make sure
25 that it is the industry and not some other public benefit

1 program or private charity that is burdened.

2 QUESTION: Okay. How do we assess the
3 significance of the Secretary's lack of standing in
4 ultimately imposing safety standard? Aren't there other,
5 more direct ways to impose appropriate safety standards?

6 MS. BRINKMANN: Certainly there are, but we're
7 looking at what Congress did, and what Congress -- what
8 responsibilities Congress charged the Secretary with, and
9 that's usually with standing because of those
10 responsibilities. The fact that Congress may also have
11 pursued other means for achieving the same result doesn't
12 undermine the fact that in this particular case that's
13 what Congress intended.

14 I can also provide a very specific example of
15 another role of the Secretary's that would be undermined
16 by this particular situation. Under 939(c) she's directly
17 charged with assisting claims to obtain rehabilitation
18 services. As it stands under the board's incorrect
19 interpretation of the act, the Secretary is put in the
20 position of being able to -- not being able to recommend
21 pursuit of rehabilitation services consistent with her
22 view of it, which would permit a claimant to continue to
23 receive total disability benefits during that period,
24 where the board's ruling would cut that back to partial
25 disability benefits retroactively in this case.

1 If I may, Your Honor --

2 QUESTION: Could I ask --

3 QUESTION: Wait, just before you sit down, I'd
4 like -- I mean, you're talking about what Congress wanted.
5 The words "adversely affected or aggrieved" are words of
6 art, aren't they? They come out of Sanders Brothers.
7 They underlie the APA, and there's no case which I'm aware
8 of in which those words were interpreted to protect an
9 interest simply in seeing that the law is properly
10 administered, or properly interpreted.

11 MS. BRINKMANN: Your Honor --

12 QUESTION: I don't know of any others. So if
13 we're looking at what Congress intended, wouldn't we
14 follow those words as words of art with a long meaning?

15 MS. BRINKMANN: I think it's crucial at that
16 point, Your Honor, to look at the status of this program
17 prior to the amendment of 1972. The case that we cite in
18 our brief makes clear under Glen Falls, there was no
19 dispute --

20 QUESTION: Before, I take it, the Secretary was
21 in district court, why? Defending an order?

22 MS. BRINKMANN: Yes, Your Honor.

23 QUESTION: Defending an order.

24 MS. BRINKMANN: But she was permitted without
25 question to appeal to the court --

1 QUESTION: Well, of course. Was it her -- whose
2 order was it? I may have that wrong. Whose order was it?

3 MS. BRINKMANN: The deputy commissioner was
4 named --

5 QUESTION: Fine. Well --

6 MS. BRINKMANN: -- as the respondent.

7 QUESTION: Well then, that's the difference.

8 MS. BRINKMANN: But Your Honor, in 1972, it's
9 clear that what Congress wanted was to have the Director
10 play a increased role in the adjudication process. This
11 would be cutting her back and tying her hands, in effect,
12 and we believe that's inconsistent with the structure and
13 history of the act.

14 If I may, Your Honor, I'd like to save the
15 remainder --

16 QUESTION: Very well, Ms. Brinkmann.

17 Mr. Postol, we'll hear from you.

18 ORAL ARGUMENT OF LAWRENCE P. POSTOL

19 ON BEHALF OF THE RESPONDENTS

20 MR. POSTOL: Mr. Chief Justice, and may it
21 please the Court:

22 If I could follow up on Justice Breyer's
23 question, because I think it's a key point, and that is,
24 before the 1972 amendments, the Secretary of Labor never
25 appealed her own agency decision. The only time the

1 Secretary of Labor would go from the district court to the
2 court of appeals was to defend her agency's decision,
3 which she can do now.

4 If at the court of appeals the agency decision
5 is thrown out, then, of course, as a respondent, the
6 agency is allowed to go petition this Court, but at no
7 time for the first 45 years of the Longshore act -- and we
8 did a LEXIS search -- never did the Secretary of Labor
9 ever challenge her own decision, and that's to be
10 expected.

11 The way the set-up was, you need an injunction
12 against the Deputy Commissioner to challenge the Deputy
13 Commissioner's decision. The Secretary of Labor never
14 sought an injunction against her own employee. That was
15 the picture that Congress saw in 1972. There was no
16 direct -- the Department of Labor never challenged its own
17 decision. Just like every other agency in this town,
18 there is no precedent for an agency challenging its own
19 decision.

20 All the Congress did in 1972 was, they said,
21 look, we don't like the idea that the Deputy Commissioner
22 does administrative paperwork, tries to bring the parties
23 together informally, and then there's also the judge, the
24 adjudicator, so they said, we've got a better idea.
25 Deputy Commissioner, you just do administrative work, try

1 to bring the parties together, but the decisionmaker, the
2 adjudicator, will now be replaced. Instead of the Deputy
3 Commissioner, it will be the administrative law judge, and
4 ultimately the Benefits Review Board.

5 QUESTION: Mr. Postol, let me get this straight.
6 You say that if the board's decision is disagreed with by
7 one of the parties before the board, and that party goes
8 to court, and the court reverses the board, the board
9 would then be able to appeal --

10 MR. POSTOL: Well, the agency --

11 QUESTION: -- to us?

12 MR. POSTOL: -- whether it's --

13 QUESTION: The agency would be able to appeal,
14 even though the private individual is content with the
15 court of appeals?

16 MR. POSTOL: Well, under appellate rule 15, the
17 agency is a respondent, and theoretically a respondent --
18 theoretically a respondent --

19 QUESTION: The agency is a respondent? How can
20 the agency be a -- the agency wasn't a party below.

21 MR. POSTOL: Under appellate rule 15, when there
22 is an appeal of an agency decision, the agency is a
23 respondent. Whether it's the Benefits Review Board, or
24 the Director, whoever the agency wants to name is a
25 respondent.

1 QUESTION: Gee, I thought that meant when
2 there's an appeal -- this is not an appeal of an agency
3 decision, it's an appeal of the decision of the court of
4 appeals.

5 MR. POSTOL: Well, you could --

6 QUESTION: But you -- you're sure about that,
7 then.

8 MR. POSTOL: No, I'm -- I'm not.

9 QUESTION: Well --

10 (Laughter.)

11 MR. POSTOL: I think -- I think rule -- I think
12 that is in support of Rule 15. I think Your Honor is
13 correct in the sense that Congress never envisioned its
14 agency being a litigant, and so I guess you could say the
15 congressional --

16 QUESTION: I mean, you're -- it seems to me the
17 structure you're proposing is even stranger than the one
18 the Secretary is proposing, that the Secretary can come in
19 at one level but not at the earlier level.

20 MR. POSTOL: I don't think so, Your Honor. Let
21 me explain why. I think it is one thing to say the agency
22 has a right to defend its own agency decision. I don't
23 think that is a novel concept. Agencies do it all the
24 time. Now, whether in the Longshore act, where two
25 private parties fight it, Congress ever envisioned that

1 the agency would agree to go up to defend some decision.
2 Maybe you could come to the conclusion Congress never
3 envisioned that.

4 But I think one thing is certain. The agency --
5 that Congress never envisioned an agency appealing its own
6 decision, and I think if you look at the situation in
7 1972, that becomes clear, because in the first 45 years
8 the agency never appealed its own decision.

9 QUESTION: You would have no problem, then, with
10 this agency appearing as a respondent in the court of
11 appeals, or as an appellee.

12 MR. POSTOL: Well, that's correct.

13 QUESTION: That's okay.

14 MR. POSTOL: As a prac -- first of all --

15 QUESTION: And they do have standing.

16 MR. POSTOL: They do not have standing. They
17 are a respondent under the law --

18 QUESTION: Why don't they have standing there
19 but they have standing here, at the next stage?

20 MR. POSTOL: Well, because to appear as a
21 respondent is not standing. To appear as respondent means
22 that they defended the decision below, and presumably an
23 agency you would think would want to defend its own
24 decision.

25 QUESTION: Is that right? Everybody in the

1 world can come in and defend cases before us as a party?

2 MR. POSTOL: No.

3 QUESTION: Why not?

4 MR. POSTOL: Because that is --

5 QUESTION: I thought it was because they don't
6 have standing.

7 MR. POSTOL: Yes.

8 QUESTION: All right. Now, why does the agency
9 have standing at this level to defend its decision, but
10 not at the court of appeals level to defend its decision?

11 MR. POSTOL: Well, because it doesn't have --
12 because there is a difference between trying to
13 challenge -- standing is ability to challenge, to appeal.
14 Amicus curiae can come in to give their interest --

15 QUESTION: They're not parties, though. They're
16 not parties, though.

17 MR. POSTOL: That is correct.

18 QUESTION: But you're saying the agency has a
19 right to come here as a plaintiff party, in effect, before
20 this Court, but not to appear as a defendant party in the
21 court of appeals.

22 MR. POSTOL: Well, I'm saying that's an import
23 of rule -- appellate rule 15. Your Honor may be right
24 that under Article III they do not have standing because
25 they do not have an interest.

1 QUESTION: I guess the question was, initially
2 it used to be simple a long time ago, I thought, where
3 normally agencies issued orders and people who were
4 aggrieved by those orders could go and fight them in
5 court. Obviously, the agency wouldn't be in there but to
6 defend it, because it was the agency's order. I take it
7 that was the situation here before this new statute.

8 But now we have a new world. It's as if
9 Congress set up some other little agency --

10 MR. POSTOL: But I --

11 QUESTION: -- or a board. Now, obviously, the
12 Secretary sometimes could be upset about what that board
13 does. It wasn't his or her order any more, it's the
14 board's order, so our problem is what to do in this new
15 world, where -- and I don't know, the Solicitor General
16 may or may not. They may want to -- they're saying, okay,
17 it's all right if the agencies fight each other before
18 other agencies.

19 MR. POSTOL: I don't --

20 QUESTION: So it used to be that they could
21 control it, but now Congress has these new -- now, what
22 should we do in this new world, where in fact the board
23 may sometimes do something that the Secretary of Labor
24 himself wouldn't want done?

25 MR. POSTOL: Your Honor, I think if you look at

1 what Congress intended in 1972, they did not intend a new
2 world.

3 QUESTION: But they created one.

4 MR. POSTOL: But they did not. They did not.
5 All they said was, instead of the Deputy Commissioner
6 issuing decisions, we don't want him to do that. We're
7 going to replace him by an administrative law judge and
8 the board.

9 QUESTION: Mr. Postol, would you concede that
10 they did -- Congress did intend a new world in the Black
11 Lung Benefits Act, which is the only other act that I know
12 of that's at all like -- that's at all comparable with --

13 MR. POSTOL: Well, but yes, they did grant the
14 Director explicit standing in the Black Lung Act. The
15 Director has a much greater role in the Black Lung Act
16 because oftentimes it is the Black Lung Fund that is
17 paying the benefits.

18 QUESTION: Well, it's conceded by all around
19 that there's standing where the fund, here the 8(f) fund,
20 there the counterpart is at stake, but under both acts
21 there are cases where there's no pecuniary interest of the
22 Government at stake, and yet we know that Congress
23 provided expressly, with the virtually identical regime,
24 for standing.

25 MR. POSTOL: But it isn't an identical regime?

1 Because under the Black Lung Act the Government says 30
2 percent of people can retire. In a large percentage of
3 the claims, there is no employer. They can't identify the
4 coal mine.

5 QUESTION: Let's take the ones where they can.
6 If it's 30 percent, 40 percent, no matter, there's a
7 significant number where they can.

8 MR. POSTOL: I think in those cases it is true
9 that Congress explicitly gave the Director standing. I
10 don't think that they have -- that they have the power
11 under Article III. In those cases where the Director has
12 no interest, I think that they exceed their power under
13 Article III, that Article III says, you must have
14 something at stake. You must have an injury in fact.
15 That's all the decisions of this Court.

16 This Court has repeatedly held that no matter
17 how vigorous someone believes that the decision below is
18 not correct, that it's wrong, that that interest in
19 correctness is not enough to have Article III standing, so
20 that in the Black Lung Act, if the Director has nothing at
21 stake, no financial interest, it is true that Congress
22 gave them explicit standing, unlike the Longshore act. I
23 think, though, in those cases where the Director has
24 nothing at stake, I think they exceeded their power under
25 Article III.

1 QUESTION: And couldn't come in as an intervenor
2 either, if -- let's say the employee initiated the review
3 proceeding in court.

4 MR. POSTOL: That is correct. They could, of
5 course, come in --

6 QUESTION: Do you have an Article III problem
7 with the Fair Labor Standards Act, the administrator
8 enforcing the Fair Labor Standards Act at the initial
9 level of enforcement?

10 MR. POSTOL: No, because under the Fair Labor
11 Standards Act, just like under OSHA, the Department of
12 Labor is the prosecutor. They have -- they stand in the
13 place --

14 QUESTION: Well, but for -- I agree with you
15 absolutely under the statute, but from the standpoint of
16 Article III, why does an administrator under the Fair
17 Labor Standards Act have any more or less interests
18 than -- for Article III purposes for injury in fact --

19 MR. POSTOL: Because --

20 QUESTION: -- than the administrator in the
21 other cases we're talking about?

22 MR. POSTOL: Because in those cases Congress has
23 said your job is to make sure the safety laws are
24 enforced, or under the Fair Labor Standards Act, your job
25 is to make sure the overtime laws are enforced.

1 QUESTION: Well, suppose in this case Congress
2 had said, it's your job to participate in all of these
3 cases?

4 MR. POSTOL: If Congress said, we want the
5 Director to represent claimants, claimants who have a
6 vested -- there's something -- there's an injury in fact,
7 that Director, your job is to make sure they get the most
8 money possible, that in fact they could have standing.

9 But that's not what Congress did. What Congress
10 said was, we're going to have an adjudicator, an
11 administrator-adjudicator, and that's going to be the
12 Benefits Review Board.

13 Now, the Director's point is, well, Congress
14 made a mistake. They should have said the Director, who
15 didn't exist, by the way, in 1972, should be some kind of
16 super adjudicator to overrule -- try to overrule the
17 Benefits Review Board, but that's not what Congress did.
18 Congress said, the final agency decision is the Benefits
19 Review Board.

20 QUESTION: Well, but the point is, Congress
21 could have enacted it without an Article III problem. It
22 seems to me we have just a statutory problem before us.

23 MR. POSTOL: That -- if, in fact, they said that
24 the Director's job was to maximize the claimant's
25 benefits, then Your Honor would be correct, but the

1 Government has conceded, in fact, that's not what they
2 did.

3 In other words, Congress can give a Government
4 agency an interest to protect, and then in protecting that
5 interest they have standing, but merely having an interest
6 in a "accurate decision," 1) that wouldn't meet
7 Article III standing. Those -- you've got to take sides.
8 You have to have a client to have standing.

9 That is the heart of the controversy, and that,
10 frankly, is one of the problems the Director has always
11 had. At least twice before this Court they changed sides.
12 Why did they change sides? Because they don't have
13 anything at stake.

14 They're sitting there with some kind of super
15 adjudicatory body, which I believe is this Court, and
16 they're saying, well, maybe it should be this way, or
17 maybe we're going to change our minds from the court of
18 appeals here.

19 They have nothing at stake. Therefore, they
20 don't have the controversy, and therefore they don't have
21 the standing, and similarly, even in the briefs before
22 this Court they've changed their position.

23 In their petition for certiorari, they took the
24 position that our job is to maximize the claimant's
25 benefits. When we challenged them in our response brief

1 and said, look, you're an agency, then they changed their
2 position and said no, we're not taking sides, we are here
3 to help the Court decide what's the accurate decision.

4 But in fact, that's the Benefits Review Board.
5 That's what Congress created the Benefits Review Board to
6 do.

7 QUESTION: Why does an administrator have to be
8 identified for all times and in all cases with one side
9 alone in order to have a concrete stake?

10 MR. POSTOL: Because otherwise he has nothing at
11 stake.

12 QUESTION: No. Otherwise, he chooses, in
13 effect, what to place at stake. He's kind of like a --
14 well, the analogy isn't right -- sort of like a private
15 lawyer who could represent a plaintiff or a defendant --

16 MR. POSTOL: Sure, if --

17 QUESTION: -- and in one case chooses one, in
18 another chooses the other. There may, from the
19 administrator's standpoint, the Director's standpoint, be
20 something very much at stake in each case.

21 MR. POSTOL: But Congress has to tell the
22 agency, has to give them that interest. The agency can't
23 assume it itself. In effect --

24 QUESTION: Why can't Congress give the agency
25 the choice and say, if you -- if you as someone charged

1 with the appropriate administration of the statute believe
2 that something is at stake which merits your taking the
3 position of the employer in one case or the employee in
4 another case, so long as there is something concrete at
5 stake in each of those cases, you may have the choice.

6 MR. POSTOL: One is --

7 QUESTION: Why can't Congress do that?

8 MR. POSTOL: One is Congress would have to do
9 it, which they did not. Secondly, as Your Honor points
10 out --

11 QUESTION: Well, it didn't do it -- it didn't do
12 it very clearly, but we might say that's what Congress
13 intended.

14 MR. POSTOL: Then the director would have to
15 tell the Court in this case what is the concrete thing
16 that they're protecting? Whether Mr. Harcum gets paid or
17 not has nothing to do with the safety standard, it has
18 nothing to do with vocational rehabilitation, because --

19 QUESTION: Well, but your opponent says that's a
20 short view, because ultimately if there is an appropriate
21 administration on a case-by-case basis, the safety
22 standards or the inducement to follow them will take care
23 of itself.

24 MR. POSTOL: Well, in each particular case,
25 they're going to have to establish standards. This Court

1 has made clear you have to do that in each case, and
2 certainly in this case there's nothing there. Now, maybe
3 they can come up with a case --

4 QUESTION: Could I interrupt with a question
5 that helps me along the lines of Justice Souter? Do you
6 agree they have standing to approve or disapprove of
7 settlements before the proceeding gets started?

8 MR. POSTOL: Well, that -- yes, they do, at the
9 administrative level. Interestingly enough, Congress
10 enacted -- in section 8(i) of the act, if the Director
11 doesn't approve a settlement, either party has a right to
12 go de novo to the administrative law judge and ultimately
13 the Benefits Review Board to overrule the Director's
14 decision, so that's --

15 QUESTION: No, but you do recognize that they
16 have a sufficient interest in the proceeding to be able to
17 say yes or no to settlement --

18 MR. POSTOL: Yes.

19 QUESTION: at the --

20 MR. POSTOL: Well, Congress --

21 QUESTION: Why, then, is this not analogous, if
22 the -- an employee decides not to seek further review and
23 accept what's on the table, isn't that in the nature of a
24 settlement? Why wouldn't they have the same kind of
25 standing to say, no, you can't make that particular deal?

1 MR. POSTOL: Because in section 8(i) Congress
2 explicitly said, Director, we want you to ultimately rule
3 on the settlement, but although the administrative law
4 judge and Benefits Review Board then has a right to
5 appeal. In this case they didn't do that. They didn't
6 say, we want -- and they knew how to do it in the Black
7 Lung Act. They said, you have standing in all cases.
8 They did not do that in this case.

9 QUESTION: Your argument on this point is
10 entirely statutory?

11 MR. POSTOL: Well, it can be both. I think the
12 easy way --

13 QUESTION: Well, but let me back up a little.
14 In constitutional Article III terms, is there a difference
15 between the standing to approve or disapprove settlements
16 before the proceeding begins and approve or disapprove
17 termination of appellate proceedings?

18 MR. POSTOL: Yes, there is. The difference is,
19 Congress, under section 8(i), gave the Director the duty
20 to make sure the settlement was fair. Therefore,
21 Congress --

22 QUESTION: But if we read the statute to say
23 they intended the same duty as to the intermediate
24 proceeding, why wouldn't the article III issue be the
25 same? If we read the statute that way, and I understand

1 you --

2 MR. POSTOL: Sure.

3 QUESTION: -- say we should not.

4 MR. POSTOL: I think -- sure. You could say
5 that -- well, I'm not -- no, I do not believe so. I think
6 if Congress said, Director, we want you to make sure every
7 decision is correct, I think this is what we'd have a hard
8 time saying. That vague correctness is enough. I think
9 you need something more --

10 QUESTION: It's enough at the trial level, but
11 not at the appellate level.

12 MR. POSTOL: No, I --

13 QUESTION: You must make sure every settlement
14 is fair at the trial level, but abandonment of appeal as
15 a species of settlement, you don't have the same --

16 MR. POSTOL: I don't think they could go to the
17 court of appeals on the standing -- on the settlement. In
18 other words, the settlement level is all structured at the
19 administrative level. They have at the administrative
20 level the agency -- Congress has said the agency could
21 decide if it's appropriate. I think the -- then they can
22 go to the ALJ, and the benefits Review Board, because
23 that's the agency. The agency --

24 QUESTION: You're saying there's no Article III
25 issue at that point?

1 MR. POSTOL: I think at the agency level I do
2 not believe there's an Article III standing.

3 QUESTION: Your primary argument is not
4 Article III, as I understand it. It's just that adversely
5 affected or agreed within the meaning of the statute here
6 does not --

7 MR. POSTOL: That's correct.

8 QUESTION: Does embrace it.

9 MR. POSTOL: I think if you look at the -- our
10 main argument is, if you look at the '72 amendments, there
11 was no such thing as the agency appealing the decision,
12 and there's nothing in the '72 amendments that suggests
13 that Congress envisioned the Department of Labor to all of
14 a sudden start appealing its own decisions.

15 QUESTION: And you're not relying, as I
16 understand it, upon the definition of "person." That is
17 not an argument you're making.

18 MR. POSTOL: Well, I think if Your Honor
19 rejects -- well, no, I think we are, as an alternative.

20 QUESTION: I don't think you are, because you
21 acknowledge that the Secretary would have standing if the
22 Secretary's fund were affected.

23 MR. POSTOL: No. I think --

24 QUESTION: You don't acknowledge that?

25 MR. POSTOL: I don't acknowledge that.

1 QUESTION: You don't?

2 MR. POSTOL: I think that is an argument. I do

3 not think that -- well --

4 QUESTION: I thought you'd given that away.

5 MR. POSTOL: You're right. Let me back up.

6 QUESTION: If you don't want to give it away --

7 MR. POSTOL: No, no --

8 QUESTION: -- then you can rely on person --

9 MR. POSTOL: I do precisely -- I agree that

10 under Article III, Congress could give them standing to

11 protect the fund. What I don't agree with is that

12 Congress did that.

13 QUESTION: Did that.

14 MR. POSTOL: But you see, I think Congress said,

15 when the agency rules to its Benefits Review Board, the

16 agency is done.

17 QUESTION: That's it.

18 MR. POSTOL: All right. Now, if Congress wanted

19 to, they could say in -- that --

20 QUESTION: You're saying, protect the fund by

21 appointing good people to the Benefits Review Board.

22 That's --

23 MR. POSTOL: They could do that.

24 QUESTION: That's the Secretary's --

25 MR. POSTOL: They have the ultimate power. They

1 have the power to hire and fire the Benefits Review Board.

2 QUESTION: It is the Benefits Review Board also
3 under the Black Lung Act.

4 MR. POSTOL: Yes, it is.

5 QUESTION: So it's --

6 MR. POSTOL: It's the same agency.

7 QUESTION: Right. But now, in answer to Justice
8 Scalia, you seem to be making a purely statutory argument
9 so that you'd have a dysjunction, if we accepted that
10 argument. Congress appeared to have meant to have the
11 same regime govern both acts --

12 MR. POSTOL: Yes.

13 QUESTION: -- is that not so?

14 MR. POSTOL: That is correct. But in the Black
15 Lung Act, they said the Director has standing, and I
16 think, as I pointed out in our brief, there's some logic
17 to that, because in the Black Lung cases oftentimes the
18 Director is protecting the Black Lung Fund.

19 QUESTION: Am I right that we just -- we got
20 into this only because the Fourth Circuit raised the
21 question on its own motion, and it did so because it
22 thought that there was an Article III infirmity?

23 MR. POSTOL: Well, they raised it on their own.
24 They did not rule on the Article III. what they said is,
25 the affected and aggrieved standard is, in fact, identical

1 to Article III, and we don't think that they are aggrieved
2 or affected, so the Fourth Circuit equated the statutory
3 definition with the Article III standard, and therefore
4 didn't differentiate. If I can --

5 QUESTION: I assume that it's a question that
6 the Court would have to raise sua sponte, whether the lack
7 of standing is a constitutional lack or a statutory lack.
8 If you have a case before you in which someone does not
9 have statutory standing, I suppose that's a case over
10 which you have no jurisdiction, so the mere fact that the
11 court below raised it sua sponte doesn't mean that the
12 court below was necessarily relying on constitutional
13 grounds, isn't that right?

14 MR. POSTOL: That is correct. If they have no
15 subject matter jurisdiction, they have no subject matter
16 jurisdiction and they have to raise it.

17 May I go back to a point the Court raised
18 earlier with the Solicitor, and that is, to understand the
19 plaintiff's procedure, the fact is that the Director
20 cannot file a claim. Under section 12 and 13 of the act,
21 an employee must give notice of his injury, and within 1
22 year, under section 13, a claim, the injured party must
23 file a claim.

24 The fact is, if the injured party does not file
25 a claim, the Department of Labor cannot do anything about

1 it. They are not some kind of super prosecutor. They are
2 simply administrators, so that if the claimant decides, I
3 don't want to file a claim, I was injured at work, but so
4 be it, I don't want any money, the Director can't initiate
5 the claims proceeding.

6 In addition --

7 QUESTION: Is that any different under the Black
8 Lungs Act?

9 MR. POSTOL: I'm not sure, Your Honor. I tried
10 a lot of Longshore cases. I've never tried a Black Lung
11 case. I believe that they have to file a claim as well,
12 but I'm not positive of that.

13 So that 1) the Director can't start the
14 proceeding, so they have no control. Secondly, the
15 Solicitor relies heavily on the fact that there is this
16 administrative proceeding in which the Deputy
17 Commissioner, now called District Directors, tries to
18 bring the parties together, tries to get them to settle,
19 but look what Congress did with that. Congress said,
20 that's fine and good, but we're separating the
21 administration from the adjudication, so when you go to
22 the administrative law judge level, it's a de novo
23 hearing. Nothing that happened before the administrator,
24 the Deputy Commissioner, is in evidence. His ruling has
25 no effect. That's how Congress set it up.

1 They then put an agency in, the Benefits Review
2 Board, to give the final agency decision. Nowhere in
3 there did they suggest that there would be some other part
4 of the Department of Labor, because, in fact, when they
5 amended the act in '72, there was no such thing.

6 And in fact, as Justice Scalia's question
7 raised, if this agency has a right to intervene whenever
8 it thinks a decision is wrong, then why can't the NLRB go
9 around and say, this was a bad decision. We think it
10 hurts labor unions. We would like to appeal.

11 So I think while the -- you could decide this on
12 Article III grounds, I think there's a simple, easy way to
13 decide it, and that is, in 1972, for the first 45 years,
14 the agency never appealed its own decisions.

15 When Congress amended the act, and simply
16 substituted the Benefits Review Board for the ultimate
17 agency decision instead of the Deputy Commissioner, it
18 changed nothing. It did not expect, it did not envision,
19 and it did not authorize some creature to develop in the
20 Department of Labor to then appeal one delegee's of the
21 Secretary of Labor, the Benefit Review Board's decision.

22 If there are no more questions, despite the fact
23 these nice lights haven't gone on yet, I think I've made
24 all my points.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Postol.

1 Ms. Brinkmann, you have 1 minute remaining.

2 REBUTTAL ARGUMENT OF BETH S. BRINKMANN

3 ON BEHALF OF THE PETITIONER

4 MS. BRINKMANN: Your Honor, the practical
5 consequences to rule adversely would be that incorrect
6 interpretations by the board would be binding on ALJ's
7 even though the Director is the Government official
8 charged with ensuring that the act is properly
9 administered.

10 Also, the reason there was no appeals prior to
11 1972 was because it was not -- it was a unitary scheme at
12 that point in time. In 1972, Congress intended to enlarge
13 the Secretary's role in the adjudication of claims.

14 Third, I'd like to go back to the fact that the
15 fact that the Director and the Secretary did not exercise
16 the authority to instigate claims, we do believe under
17 section 914 her authority to --

18 CHIEF JUSTICE REHNQUIST: Your time has expired,
19 Ms. Brinkmann.

20 MS. BRINKMANN: Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: The case is submitted.

22 (Whereupon, at 10:56 a.m., the case in the
23 above-entitled matter was submitted.)

24

25

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:

*DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
DEPARTMENT OF LABOR, Petitioner v. NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY, ET AL.*

CASE NO.:93-1783

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

BY *Ann Marie Federico*

(REPORTER)

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