

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: INGALLS SHIPBUILDING, INC., ET AL., V
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, DEPARTMENT OF LABOR, ET AL

CASE NO: No. 95-1081

PLACE: Washington, D.C.

DATE: TUESDAY, November 12, 1996

PAGES: 1-54

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
NOV 20 1996
Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'96 NOV 20 A9:46

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 INGALLS SHIPBUILDING, INC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 95-1081

7 DIRECTOR, OFFICE OF WORKERS' :

8 COMPENSATION PROGRAMS, :

9 DEPARTMENT OF LABOR, ET AL. :

10 - - - - -X

11 Washington, D.C.

12 Tuesday, November 12, 1996

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:47 a.m.

16 APPEARANCES:

17 RICHARD P. SALLOUM, ESQ., Gulfport, Mississippi; on behalf
18 of the Petitioners.

19 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the Federal Respondent.

22 WYNN E. CLARK, ESQ., Gulfport, Mississippi; on behalf of
23 the Private Respondent.

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
RICHARD P. SALLOUM, ESQ.	
On behalf of the Petitioners	3
BETH S. BRINKMANN, ESQ.	
On behalf of the Federal Respondent	25
WYNN E. CLARK, ESQ.	
On behalf of the Private Respondent	43
REBUTTAL ARGUMENT OF	
RICHARD P. SALLOUM, ESQ.	
On behalf of the Petitioners	51

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

2 (10:47 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 95-1081, Ingalls Shipbuilding, Inc. v.
5 Director, Office of Workers' Compensation Programs,
6 Department of Labor.

7 Mr. Salloum, you may proceed whenever you're
8 ready.

9 ORAL ARGUMENT OF RICHARD P. SALLOUM

10 ON BEHALF OF THE PETITIONERS

11 MR. SALLOUM: Mr. Chief Justice, and may it
12 please the Court:

13 If the opinion and judgment of the Fifth Circuit
14 in this case is allowed to stand, it would defeat the
15 purpose that Congress enacted section 33(g) of the
16 Longshoremen and Harbor Workers' Compensation Act which
17 was to protect an employer from increased compensation
18 liability when a worker, or those claiming through him,
19 settle a third party case for less than the compensation
20 they would be entitled under the Longshore Act.

21 It would also defeat the purpose for which
22 Congress passed section 33(f) of the Longshore Act which
23 is the give an employer credit to the extent of net third
24 party recoveries received by a worker or those claiming
25 through him.

1 The facts of this case are that Jefferson Yates,
2 between 1953 and 1967, worked as a ship fitter for Ingalls
3 Shipyard. He left Ingalls in 1967 and worked several
4 land-based jobs for other employers.

5 14 years after he left Ingalls, he was diagnosed
6 with asbestosis in March of 1981. In April of 1981, he
7 filed a claim against Ingalls for compensation and medical
8 benefits under the Longshore Act.

9 In May of 1981, his lawyers, who are the same
10 lawyers that represent him in the compensation claim
11 against Ingalls, filed a products liability suit in
12 Federal court in Biloxi, Mississippi, seeking \$6 million
13 in actual and punitive damages against 23 asbestos
14 manufacturers who he claimed made the asbestos to which he
15 was exposed at Ingalls.

16 Less than a year after his compensation claim
17 was filed against Ingalls, Ingalls wrote the district
18 director for the Sixth Compensation District and accepted
19 his claim, voluntarily accepted his claim, under the
20 Longshore Act and agreed to pay him medical benefits and
21 tendered to him all benefits under the Longshore Act.

22 In May of --

23 QUESTION: Mr. Salloum, may I get you to --
24 Salloum, may I get you to clarify for me how the employer
25 is injured here? Now, I assume the employer could file

1 suit against those third parties who were at fault for the
2 employee's injuries to recover payments that you -- the
3 employer made -- may have made.

4 MR. SALLOUM: If a Burnside action was filed
5 separate and apart from the Longshore Act, the employer
6 would be faced -- if the employer sued the 23 asbestos
7 manufacturers directly, the employer would be faced with
8 certain common law defenses in the Burnside tort action,
9 tort indemnity action, that the employer would not be
10 faced in a direct action by the worker against those
11 defendants under the Longshore Act.

12 For example, if the employer filed a direct suit
13 outside the Longshore Act under the Burnside tort
14 indemnity theory, the defendants, the asbestos
15 manufacturers, could assert certain contributory
16 negligence features of coworkers of Mr. Yates which would
17 serve to reduce Ingalls' recovery against those asbestos
18 manufacturers.

19 More important than that -- and this Court made
20 it clear in Bloomer -- that an employer is entitled to
21 receive back 100 percent of his compensation and medical
22 benefits plus its attorney's fees. That's provided by
23 Congress under section 933 of the Longshore Act.

24 If an employer is required, because of some
25 wrongful act of a worker, to file a separate Burnside tort

1 indemnity lawsuit, the employer, in addition to being
2 faced with common law defenses which would reduce its
3 recovery in the Burnside action, would also be faced with
4 having to bear its own attorney's fees and cost in the
5 Burnside action which Congress has made it clear in
6 section 933(e), as interpreted by this Court in Bloomer,
7 that the employer has its inviolate right to have 100
8 percent of its compensation and medical benefits --

9 QUESTION: So, you say you might not be made
10 whole or as whole as you would be otherwise.

11 How about recovering monies that you pay to Mrs.
12 Yates out of the post-death settlements?

13 QUESTION: Yes, ma'am. Your Honor, Ingalls
14 approved the post-death settlements. And I think the
15 classic example of that and why section 933(g) and section
16 933(f) are so important is that after Ingalls accepted Mr.
17 Yates' claim in June of 1992 and agreed to pay him
18 lifetime benefits under the Longshore Act, Mr. Yates and
19 Mrs. Yates between 1982, when Ingalls accepted the claim,
20 and 1986 when he died, entered into four settlements with
21 asbestos manufacturers in that third party case which Mrs.
22 Yates released her wrongful death claims for Mr. Yates
23 during his lifetime.

24 A classic example of that is that those four
25 settlements that were entered into between the time

1 Ingalls accepted the claim and the time Mr. Yates died
2 where she released her wrongful death claims totaled
3 \$30,000, which were much less --

4 QUESTION: And that money is not recoverable by
5 the employer.

6 MR. SALLOUM: That's correct, Your Honor. But
7 -- that's exactly right, Your Honor, but the comparison
8 that I'm making -- and the reason why Congress felt it so
9 important for an employer to have a right to consent to a
10 third party settlement is that after Mr. Yates died, Mrs.
11 Yates and her adult children -- the next three settlements
12 that they entered into after Mr. Yates died were for
13 \$105,000.

14 QUESTION: Well, you know, what you're basically
15 saying is that the rule should kick in once the employer
16 starts making payments, but that's not -- it's not
17 consistent with our holding in Estate of Cowart which said
18 a person satisfies the prerequisites attached to the right
19 and thus becomes a person entitled to compensation at the
20 moment the right to recovery is vested, that is, at the
21 time of the injury.

22 MR. SALLOUM: Your Honor, that's exactly what
23 we're saying.

24 QUESTION: But I think we've kind of decided
25 Cowart and relatively recently. Are you asking us to

1 reverse that?

2 MR. SALLOUM: No, I'm not, Your Honor. I'm
3 asking this Court to follow Cowart. I'm asking this Court
4 to find --

5 QUESTION: Well, I would think if we followed
6 Cowart, we would have to say that Mrs. Yates was not
7 entitled or qualified for a benefit until her husband's
8 death.

9 MR. SALLOUM: That I think, Your Honor, is a
10 source of confusion for the Fifth Circuit. What this
11 Court, as I understand Cowart, said was the right of Mr.
12 Cowart to recover compensation arose at the time of his
13 injury, not at the time that the employer acknowledged
14 liability under the act and not at the time that he was
15 found entitled to adjudication under the act. This Court
16 found in Cowart, as I understand Cowart, that his right to
17 recover compensation arose when his injury arose.

18 And we are simply saying that that principle
19 should hold true for those claiming through Mr. Cowart,
20 that the right of the worker and the right of those
21 claiming through the worker arising -- arises at the time
22 of the worker's injury.

23 QUESTION: But do you think that Cowart would
24 make Mrs. Yates a person entitled to compensation as soon
25 as he knew he had been exposed to asbestos?

1 MR. SALLOUM: I am, Your Honor.

2 QUESTION: Because they might divorce. She
3 might predecease him. I didn't think that was consistent
4 with Cowart, but you think it is.

5 MR. SALLOUM: I think it's very consistent with
6 Cowart, Your Honor. I think what's -- what the argument
7 that the Director has posed in the courts below and I
8 think the source of confusion is to take the vesting
9 language out of Cowart, take it in vacuo, and ignore this
10 Court's holding that Mr. Cowart became a person entitled
11 to compensation at the time of his injury.

12 The fact that a wife of a worker may divorce,
13 the fact that a wife of a worker may die before her
14 husband becomes an irrelevant fact, if that happens,
15 insofar as the employer is concerned because if the wife
16 divorces or if the wife predeceases the husband, then her
17 unapproved third party settlements for less than a
18 compensation she would be entitled against the employer
19 would not prejudice the employer because she would not
20 have a claim against that employer.

21 But the fact of the matter here is that Mrs.
22 Yates entered into these unauthorized third party
23 settlements.

24 QUESTION: Yes, but the question that -- I'm
25 still not sure I understand your answer because the

1 question is, when did she become a person entitled to
2 compensation?

3 MR. SALLOUM: Your Honor, she became a person
4 entitled to compensation at the same time that her husband
5 became a person entitled to compensation.

6 QUESTION: Even if the next day she died.

7 MR. SALLOUM: Yes, Your Honor, because the
8 prejudice to the employer would not be there if she died.
9 She would not have the death claim against the employer.
10 Her third party --

11 QUESTION: She would -- there would be no
12 prejudice to the employer unless she later became a person
13 entitled to compensation.

14 MR. SALLOUM: No, sir. There would be no
15 prejudice to the employer until she claimed compensation
16 by virtue of the occupational disease to her husband. She
17 became a person entitled to compensation at the same time
18 as her husband when he was diagnosed with an occupational
19 disease.

20 QUESTION: No, but supposing she did get a
21 settlement of her contingent claim later on and then she
22 died before he did but she had that money, you know,
23 tucked away. She got a settlement with the third party.
24 Would the employer be prejudiced at all in that
25 circumstance?

1 MR. SALLOUM: No, that's exactly right, Your
2 Honor, because --

3 QUESTION: She wasn't a person entitled to
4 compensation.

5 MR. SALLOUM: Well, the purpose -- if these
6 questions are asked without consideration to the reason
7 that 33(g) was enacted by Congress --

8 QUESTION: You sound like you're arguing the
9 dissent in Cowart.

10 MR. SALLOUM: No, Your Honor. I'm arguing the
11 majority opinion in Cowart and that is --

12 QUESTION: It's a very plain language, strictly
13 literal interpretation.

14 MR. SALLOUM: That is the plain language. The
15 plain language that was -- I believe the Court was
16 referring to in Cowart was not the phrase, person entitled
17 to compensation. The plain language that the Court was
18 referring to in Cowart, as I understand Cowart, was the
19 1984 amendments where they -- where Congress added the
20 language that if you don't -- if a worker does not receive
21 an employer's consent to a third party settlement, then he
22 is bound by the forfeiture provisions of 33(g) regardless
23 of whether or not the employer has paid compensation or
24 whether or not the employer has acknowledged liability.

25 QUESTION: Well, but the operative clause there

1 was again a person entitled to compensation.

2 MR. SALLOUM: That operative clause I believe
3 was considered by this Court in the context of the
4 addition by Congress in 1984 that they are barred
5 regardless of whether the employer makes the payments or
6 acknowledges liability.

7 QUESTION: Let me ask you something about the
8 Burnside action or actions like that. If the employer --
9 if there's a settlement with a third party, and the
10 employer then sues the third party, does the employer have
11 a cause of action on the grounds that the settlement was
12 somehow inadequate, or is it it just seeks indemnity based
13 on the fault of the --

14 MR. SALLOUM: Your Honor, I believe it would be
15 strictly based on tort indemnity.

16 QUESTION: And that's a State law cause of
17 action?

18 MR. SALLOUM: It's a State law cause of action,
19 Your Honor. It's been recognized by the Federal courts in
20 Burnside to be a tort indemnity.

21 QUESTION: In other words, the third party has
22 no duty to make an adequate settlement, no duty that runs
23 to the employer? It's just a strict indemnity.

24 MR. SALLOUM: That's correct, as I understand
25 it, Your Honor.

1 QUESTION: There's no breach by entering into a
2 settlement that deprives the employer of --

3 MR. SALLOUM: I think that representing a third
4 party asbestos manufacturer that settles out from under an
5 employer without that employer's consent runs the risk of
6 paying twice.

7 QUESTION: Well, but if that's true, then the
8 act does have a policing mechanism. It's not without
9 teeth.

10 MR. SALLOUM: Well, but, Your Honor, I believe
11 the policing mechanism would be the Burnside --

12 QUESTION: And the policing will be I guess the
13 third party. The third party would be well advised to
14 seek approval.

15 MR. SALLOUM: The third party and the worker
16 would be well advised to seek approval. That's correct,
17 Your Honor.

18 I --

19 QUESTION: Mr. Salloum, I'll ask what may be an
20 embarrassing question but it goes to the reason that I'm
21 not following your argument.

22 You say that the -- in effect, for purposes of
23 the statute, the wife becomes entitled or the spouse
24 becomes entitled at the same time as the injured party,
25 and you say that's the moment of injury. I thought the

1 distinction was that, in essence, the claim of the
2 immediately injured party arises because the injury is
3 physical, whereas the claim of the spouse arises later
4 because the injury is economic and it does not occur until
5 the support or the right to support is eliminated in this
6 case by the death. Am I -- do I misunderstand the nature
7 of the spousal claim here?

8 MR. SALLOUM: Your Honor, I believe you're
9 absolutely right on the nature of the spousal claim, but I
10 believe that you will see under the Longshore Act that a
11 claim for disability by a worker is purely economic. He
12 can have an occupational disease that's progressive in
13 nature and continue to work where that disease does not -
14 -

15 QUESTION: I see. So, you're saying if one
16 economic injury arises at the moment of physical injury,
17 the other one does too.

18 MR. SALLOUM: That's correct, Your Honor.

19 QUESTION: I see.

20 MR. SALLOUM: That's correct.

21 And the Ninth Circuit in Cretan found just that.
22 They recognized that the phrase, quote, person entitled to
23 compensation, was not defined by Congress in the Longshore
24 Act. They recognized that person entitled to compensation
25 was capable of several different interpretations, but the

1 interpretation that the courts must give to the phrase is
2 in the context of the reason that the statute is there in
3 the first place.

4 QUESTION: All right. With that in mind, what
5 if -- taking the earlier example in which the spouse dies
6 or is divorced before the injured party's date -- the
7 primary injured party's date of death, if the injured
8 party marries again, does the new spouse have any claim
9 following death?

10 MR. SALLOUM: No, Your Honor, and that's a very
11 important point. That's why we say that the rights of
12 both the worker and those claiming through the worker
13 arises at the time of his injury.

14 QUESTION: What's your authority for that
15 answer?

16 MR. SALLOUM: It's section -- it's the
17 dependency provision of the Longshore Act that says that
18 it's only the dependents of the worker at the time of his
19 injury --

20 QUESTION: At the time.

21 MR. SALLOUM: -- that are entitled to recover
22 under the Longshore Act. And that's why the Longshore Act
23 is all based on the -- all rights of the injured worker
24 and his family, as well as all liabilities of the
25 employer, begin at the moment of the injury not when he's

1 -- the worker is adjudicated entitled to compensation and
2 not when he dies before his wife. The Longshore Act
3 states that the worker's rights and his average weekly
4 wage upon which his compensation is based occurs at the
5 time of his injury.

6 It says that all questions of dependency, that
7 is, those who are ultimately entitled to recover under the
8 Longshore Act in the event the worker dies from an
9 employment-related problem -- those rights of dependencies
10 are determined at the time of his injury not at the time
11 of his death.

12 QUESTION: But they have to be dependent at both
13 times, don't they?

14 MR. SALLOUM: That's correct. That's correct.
15 They have to be primarily -- well, solely. The operative
16 part is dependent at the time of his injury. If he were
17 to die and he had other dependents that were not
18 dependents of his at the time of the injury -- for
19 example, if he divorced his existing wife at the time of
20 the injury and then remarried immediately prior to his
21 death, that wife, that surviving wife, would not be
22 entitled to benefits under the Longshore Act.

23 QUESTION: Neither spouse would benefit.

24 MR. SALLOUM: That's correct, Your Honor.

25 QUESTION: Now, is your answer or is the

1 dispositive character of your answer affected by the fact
2 that the claim against the third party is not or need not
3 be purely economic? Or let me put it this way. The claim
4 -- if the harbor worker brought a claim against the third
5 party, it would not be limited to economic.

6 MR. SALLOUM: That's exactly right.

7 QUESTION: Whereas if the spouse later brings
8 one, it would be limited to economic.

9 And is the -- does the statute -- when the
10 statute refers to entitlement, is it talking about
11 entitlement as against the third party as opposed to
12 entitlement as against the employer?

13 MR. SALLOUM: You know, last night, Your Honor,
14 I was thinking about that, and looking at the purpose for
15 which that statute is there, that same thought occurred to
16 me because Congress could well -- Congress speaks in terms
17 of 933(a) which says a person entitled to compensation
18 need not elect his remedy. He can sue both in tort and he
19 can seek compensation benefits provided those benefits,
20 those compensation benefits, are for more than what he's
21 recovered under the third party.

22 QUESTION: But if the entitlement refers to, in
23 effect, a general tort law entitlement, then your argument
24 would fail, wouldn't it?

25 MR. SALLOUM: Well, no, Your Honor. I think, as

1 I read the statute, as I understand the statute, the
2 person entitled to compensation -- the status of a person
3 entitled to compensation under the Longshore Act would
4 make that person responsible for meeting the employer
5 approval requirements of section 933(g).

6 QUESTION: Well, that's right, but if
7 entitlement to compensation is really -- or if the
8 entitlement that the statute speaks of is making reference
9 to the tort liability, then there would be no entitlement
10 on the part of the spouse prior to the death of the harbor
11 worker. And therefore, you would lose.

12 MR. SALLOUM: Well, I'm really -- I'm not sure I
13 follow you, Your Honor. It may be just because I've lost
14 your question, but I think --

15 QUESTION: Well, you said you were thinking the
16 same thing --

17 MR. SALLOUM: Well, I was thinking the same
18 thing in the context that a person entitled to
19 compensation -- I think Congress was looking at it in the
20 context --

21 QUESTION: You don't mean -- when you refer to
22 the person entitled to compensation, you mean just
23 compensation under the act, not compensation in a tort
24 action. Isn't that what you mean?

25 MR. SALLOUM: Well, I mean the section 933(g)

1 speaks in terms of a person entitled to compensation
2 having to comply with the employer approval requirement.

3 QUESTION: I know, but what does a person
4 entitled to compensation mean? Does it mean a person
5 entitled to compensation under the act, or does it mean a
6 person entitled to compensation in a separate tort action?

7 MR. SALLOUM: It means a person entitled to
8 compensation under the act.

9 QUESTION: I think that's clear, isn't it, from
10 933(a) which says -- which distinguishes between
11 compensation and damages? It ends -- is liable -- he need
12 not elect whether to receive such compensation or to
13 recover damages against such persons.

14 MR. SALLOUM: It is clear, Your Honor, and
15 you're correct. And I believe that if the Court -- the
16 Court has to apply the same interpretation to a person
17 entitled to compensation under 933(a), 933(g), and 933(f).

18 QUESTION: Can I ask you a couple of technical,
19 very general questions that are -- probably have a clear
20 answer? Is it -- suppose you're a covered employer and
21 I'm a covered employee and I'm exposed to a cancer-causing
22 substance that might or might not cause cancer 10 years
23 hence. Now, if I leave your employ later on and I do get
24 the cancer, I'm covered. Right? From you, not from some
25 other person.

1 MR. SALLOUM: That's correct, Your Honor. If it
2 is shown --

3 QUESTION: Thank you.

4 My second question is that in the language in
5 question, I would have thought reading it naturally,
6 though I don't -- this I guess is decided -- that it seems
7 to apply to an employer who is paying out to an employee
8 some money under this statute and they have 6 months, the
9 employee, to go and sue, and then thereafter you have 90
10 days to bring your own lawsuit if I don't.

11 And it says as to -- and I'm trying to get an
12 idea of the purpose of that under that incorrect
13 interpretation. But that being so, the purpose of -- why
14 do I have to go to the employer to get his approval
15 because, after all, if I settle for \$1, what difference
16 does it make? You, the employer, can go bring you own
17 lawsuit against the third party and get all the money back
18 that you had to pay me, can't you?

19 MR. SALLOUM: No, sir.

20 QUESTION: Or is that your answer to Justice
21 O'Connor?

22 MR. SALLOUM: That's correct, Your Honor.

23 QUESTION: Okay, I got that one. All right.

24 Now, then the next thing that -- and I take it
25 you're arguing this, that once we reject the

1 interpretation of the natural reading of the words, that
2 we're thinking of the pay-out case. Then I can't find any
3 basis hypothetically -- I'm not saying really -- but I
4 can't -- what is the basis for distinguishing between
5 everybody in the world who might be hurt working for you?
6 That is, why does a person -- what's the -- how would you
7 interpret these words?

8 Once you say the person entitled to compensation
9 is not the person who has passed the starting gate, i.e.,
10 the starting gate when you start to pay me, then is it
11 your view that then covers anyone who ever will be, will
12 be, or is now entitled to compensation?

13 MR. SALLOUM: That's correct, Your Honor.

14 QUESTION: And you're saying your view is
15 there's no way of drawing a line short of that. The
16 dissent in Cowart, which was I take it the position I said
17 wasn't the law, which I take it -- is that right, the
18 dissent in Cowart is focusing on those people who are the
19 people you're actually beginning to pay?

20 MR. SALLOUM: That was the dissent in Cowart.

21 QUESTION: Yes.

22 MR. SALLOUM: That's correct, Your Honor.

23 QUESTION: And once you're past that position,
24 once you're saying that's no good anymore, then it must
25 encompass anybody who's hurt --

1 MR. SALLOUM: It must encompass --

2 QUESTION: -- working for you I mean, you know,
3 who might eventually be entitled to compensation.

4 MR. SALLOUM: If the purpose of section 33 is to
5 be accepted by this Court, 33(g) would apply to every
6 worker and those claiming through that worker who file a
7 claim for compensation under the Longshore Act, if they
8 settle for less than the compensation they're entitled
9 third party without the consent of the employer, they come
10 within the requirements and allegations of section 33(g).

11 QUESTION: Mr. Salloum, your petition for
12 certiorari presented two questions, and the second of them
13 was, does the Director of the Office of Workmen's
14 Compensation Programs have standing to respond in the
15 court of appeals in opposition to a private party? Are
16 you going touch on that in your argument?

17 MR. SALLOUM: Thank you, Your Honor. I was.

18 QUESTION: Before you do, could I ask one other
19 question?

20 MR. SALLOUM: Sure.

21 QUESTION: In a pre -- when the wife settles
22 before the husband dies and asks for approval of the
23 settlement, how does -- how do you decide whether she must
24 ask for approval? Because it's only if the settlement is
25 for less than the amount she's entitled to, right?

1 MR. SALLOUM: That's correct, Your Honor.

2 QUESTION: How can you say that she's entitled
3 to anything more than zero at that time when she asks for
4 the settlement to be approved?

5 MR. SALLOUM: Well -- I'm sorry, Your Honor?

6 QUESTION: I mean, how -- what is the standard
7 by which you know the duty to ask for approval of the
8 settlement arises? In other words, it's less than she's
9 entitled to.

10 MR. SALLOUM: Well, if it -- the effect would be
11 the same if it's -- I guess the criteria would be based
12 upon her age, her husband's age, his average weekly wage,
13 other factors that enter into the compensation liability
14 for both the husband and the wife. When it's all said and
15 done, when the injury to the worker occurs, that
16 employer's compensation liability is fixed at that point.

17 QUESTION: Even to -- even as to the wife.

18 MR. SALLOUM: Even as to the wife. That's
19 correct. The only difference is is that when the husband
20 dies, the payments to him stop and the employer starts
21 paying the wife. I mean, that's the only change that's
22 occurred. There's some difference in the amount that's
23 paid, but the employer's obligations is fixed at the time.

24 QUESTION: But the difference is that the wife
25 gets less than the husband?

1 MR. SALLOUM: Yes, depending on the number of
2 children that there are. That's correct, Your Honor.

3 QUESTION: What if she's -- it seems to me there
4 are variables in there. Well, anyway, I don't want to
5 prevent you from addressing the other issue.

6 MR. SALLOUM: Thank you, Your Honor.

7 QUESTION: But I'm very much puzzled by that,
8 exactly what is the standard that determines her duty to
9 seek approval of a settlement that arguably is less than
10 she might become entitled to.

11 MR. SALLOUM: Yes. There are different factors
12 such as age, the compensation rate that's being paid, the
13 number of children she has, that sort of thing.

14 Very quickly -- and I'd like to reserve the
15 balance of my time for rebuttal.

16 Very quickly, the second issue upon which
17 certiorari was granted. It was our position, in follow-
18 up to this Court's opinion in the Newport News case, is
19 that the Director of Office of Workers' Compensation
20 Programs has no standing to participate actively in this
21 appeal. We would submit that section 921(c) of the
22 Longshore Act only vests into persons who are adversely
23 affected or aggrieved by a decision the right to appeal a
24 case to the United States courts of appeals.

25 Congress has defined person in the Longshore Act

1 as not to include the Director or the Secretary of Labor.
2 The Director and Secretary of Labor have no financial
3 stake in this case. There is no regulation of the
4 Director -- there's no function of the Director that's at
5 issue in this case. It's strictly a private dispute
6 involving a private compensation claim between a worker
7 and his family and the employer.

8 If there are no further questions at this time,
9 I'd like to reserve the balance of my time for rebuttal.

10 QUESTION: Very well, Mr. Salloum.

11 Ms. Brinkmann, we'll hear from you.

12 ORAL ARGUMENT OF BETH S. BRINKMANN

13 ON BEHALF OF THE FEDERAL RESPONDENT

14 MS. BRINKMANN: Mr. Chief Justice, and may it
15 please the Court:

16 Two questions are before the Court in this case.
17 We believe that the first question concerning the correct
18 interpretation of section 33(g) is answered by the text
19 and this Court's interpretation of that text in the Estate
20 of Cowart case. The Court there held that under the plain
21 language of section 33(g), the term person entitled to
22 compensation means a person who satisfies the
23 prerequisites attached to the right to Longshore Act
24 compensation.

25 QUESTION: Ms. Brinkmann, just last week we had

1 a case involving the word employee in which the Government
2 was arguing that the word employee sometimes in the
3 statute can mean current employees and sometimes can mean
4 current or past employees.

5 Now, why can't that principle be applied here,
6 that in some provisions here, the person entitled to such
7 compensation means the worker who was injured, but in
8 other provisions where it makes eminent sense, it can mean
9 him or a person who will later be entitled to
10 compensation, not the person now, but the one who may
11 later be entitled to it?

12 MS. BRINKMANN: Well, Your Honor, we believe
13 that in this particular case, when you look at the
14 structure of 33(g), there are many reasons why this cannot
15 be interpreted to someone who has a potential entitlement.

16 First of all, there are many prerequisites that
17 Mrs. Yates would have to meet in order to become eligible.
18 And I think this is what Justice Stevens was getting at.
19 This is one of the reasons that a person who's actually
20 entitled to compensation is in a very different situation
21 than Mrs. Yates for example. In order to determine
22 whether or not she would be entitled, not only would her
23 husband have to die, she would have to outlive him, they
24 would still have to be married at that time, and his death
25 would have to be caused by the work-related injury.

1 QUESTION: And will the timing of his death
2 affect the amount of her entitlement?

3 MS. BRINKMANN: Yes. They --

4 QUESTION: Which is what I think Justice Stevens
5 was getting at. How could we figure it?

6 MS. BRINKMANN: Exactly. In fact, when you
7 project out a -- what a person entitled to -- what a
8 person would be entitled to under the act, you can project
9 out on an actuarial table the life expectancy of the
10 worker, but for someone not yet entitled, you would also
11 have to find some way to project the likelihood of the
12 employee's death resulting from the work-related injury,
13 the likelihood --

14 QUESTION: Ms. Brinkmann, if we said, or may be
15 entitled to compensation, she would fit in that category.
16 If we -- if the words meant person now or in the future,
17 that would be a finite group because, as just was brought
18 out in the colloquy, you must be a dependent at the time
19 of the death, otherwise you're out. So, everyone who's a
20 dependent at the time of death is one who may be entitled.
21 Right?

22 MS. BRINKMANN: Actually, the widow -- the wife
23 does not have to be dependent in fact if she's married and
24 living with --

25 QUESTION: Yes, but she does have to be the wife

1 at that time.

2 MS. BRINKMANN: That's correct.

3 QUESTION: So, we know all -- the entire
4 universe of people who may be entitled we know at the time
5 of injury.

6 MS. BRINKMANN: No, Your Honor. I'd have to say
7 no, and I really want to correct I think a premise that
8 was underlined in the earlier argument.

9 The worker's right to entitlement is based on
10 disability, not injury. So, at the time of the injury,
11 that is not a person entitled to compensation. It's only
12 when that injury becomes disabling, it affects the
13 worker's urge --

14 QUESTION: Wage earning.

15 MS. BRINKMANN: -- wage earning -- thank you --
16 capacity does that person become entitled to
17 compensation. So, under that interpretation, any employee
18 that was ever injured might be entitled to compensation if
19 they're eventually disabled by that.

20 I think that there are --

21 QUESTION: I was just making the point that
22 we're talking about derivative liability and all the
23 people who are derivative of the worker are known. So,
24 we're not dealing with the question of, well, you really
25 can't tell until death who those dependents might be or

1 who the spouse might be.

2 MS. BRINKMANN: At the time of death, you would
3 be able to tell whether or not she was the spouse at the
4 time of death.

5 QUESTION: And the children presumably are not
6 beneficiaries if they have reached majority at the time of
7 death?

8 MS. BRINKMANN: That's correct.

9 QUESTION: So, you wouldn't know at the time of
10 exposure to asbestos whether the children would ever be
11 eligible. Is that right?

12 MS. BRINKMANN: I believe that's right, Your
13 Honor.

14 Also --

15 QUESTION: Excuse me. Had you finished your
16 answer?

17 MS. BRINKMANN: Yes.

18 QUESTION: May I? What about the case in which
19 the worker becomes entitled to compensation either because
20 it's clear the injury is disabling or you fix the point of
21 disability and he marries someone later? Does that later-
22 acquired wife possibly get widow's benefits?

23 MS. BRINKMANN: Yes, I believe so if that is the
24 fact at the time of death.

25 QUESTION: But then you wouldn't know -- you

1 wouldn't be able to identify the universe of people later
2 entitled to compensation even at the time of injury.

3 MS. BRINKMANN: That's correct. There are
4 actually myriad examples, adopted children, children that
5 are in utero. There are a multitude, and that's why the
6 words person entitled to compensation have a fixed meaning
7 we believe.

8 And we believe it would be -- we have every
9 reason to believe that Congress would have wanted to
10 distinguish people who were actually entitled to
11 compensation from those who were not for two -- at least
12 three reasons. One is because of the calculus of the
13 comparison of the amount of entitlement to the settlement.
14 It's just an incredibly complex and very speculative
15 determination.

16 But in addition, the person settling the case is
17 in a different position. If the person is entitled to
18 compensation, they have an option and a right to file a
19 claim for disability benefits under the act, and what
20 section 933 addresses is a person who, on account of a
21 disability or death, has a right to payment of some
22 compensation under the act. And it addressed whether or
23 not that person had to choose between the options.

24 This person at the time of the settlement, Mrs.
25 Yates, had no right to file a claim and indeed may never

1 have one.

2 QUESTION: Why is it that she could? If --
3 suppose 33(f) and (g) don't apply because she's not a
4 person entitled to compensation. Then how does she get
5 any money? She just gets it directly under 7, 8, and 9 -
6 - 907, 8, and 9, the basic requirement? Is that how she
7 gets it?

8 MS. BRINKMANN: Yes, under that --

9 QUESTION: Why is she entitled to that, whereas
10 the worker who -- let's say the ordinary case. The worker
11 is hurt. He's paid out his paycheck. Within 6 months, he
12 wants to file a lawsuit. The classic, ordinary case. He
13 goes to the employer. The employer says I'm not going to
14 approve this settlement. Why is that worker not entitled
15 to the basic compensation?

16 The statute says if the worker won't approve the
17 settlement under (g), that he's not entitled to the (f)
18 compensation. It doesn't say a word about the basic
19 compensation.

20 So, that's what I -- do you see -- I'm having
21 trouble understanding if we hold with you on this, are we
22 certain these people are going to be compensated at all?
23 And if they're compensated, why isn't the ordinary person
24 compensated when the employer refuses to approve the
25 settlement?

1 MS. BRINKMANN: Your Honor, I think if I'm
2 understanding you correctly, my answer is that the person
3 entitled to compensation does recover. Either they settle
4 and get the settlement amount or they don't settle and
5 they have their entitlement to rights under the act.

6 QUESTION: So, everyone whom -- if an employer
7 refuses to sign, the employer has to pay the full amount
8 of compensation anyway.

9 MS. BRINKMANN: Yes, they have to pay the
10 compensation that the person is entitled to under the act.

11 QUESTION: Anyway, and that's with an ordinary
12 worker who is hurt and they're paying out paychecks --
13 paying out compensation checks.

14 MS. BRINKMANN: Based on disability.

15 QUESTION: Based on disability. They have to -
16 - either they sign and they get the reduction of 933, or
17 they don't sign and they have to pay the full thing.
18 That's the employer's choice.

19 MS. BRINKMANN: There are many other choices, as
20 people have already mentioned. There's, of course, the
21 Burnside action that the employer can recover from a third
22 party also.

23 And I think it's important, Your Honor brings up
24 the other point that I wanted to make about why it would
25 be reasonable for Congress to have differentiated between

1 these two situations.

2 In the situation where the person is entitled
3 compensation and pursues an action against the third
4 party, the employer has a subrogation lien that this Court
5 has recognized under Bloomer and other cases, and that
6 then makes sense for that employer to have notice to be
7 able to intervene in that action, to be able to have some
8 input because they have a vested liability and a vested
9 right to recoup.

10 QUESTION: Can I ask you one final question and
11 that is this. Given your answers to what I've asked, then
12 what harm is done if you in fact interpret the statute the
13 way your opponents want if you say it applies to everybody
14 once they're hurt and could become entitled to
15 compensation? Because then those people, whenever they
16 sue, go and try to enter into a settlement. If the
17 employer approves the settlement, the woman or man is
18 fine. If the employer doesn't approve the settlement, the
19 woman or man eventually will get their full compensation
20 when the disability turns up and hurts them. So, what
21 harm is done? And the good would be it makes sense
22 administratively, you know, and so forth.

23 MS. BRINKMANN: Mrs. Yates may never have gotten
24 benefits. She may have been trying to enter into a
25 settlement at a particular time before. For example, an

1 employer was insolvent. Or she may have been trying to
2 enter into a settlement for loss of consortium at a wrong
3 -- potential wrongful death action which she then is not
4 entitled to any compensation because she divorces her
5 husband or she predeceases her husband. But she doesn't
6 have that option.

7 QUESTION: What harm is done? I -- what harm is
8 done? That's what I don't understand.

9 MS. BRINKMANN: She --

10 QUESTION: The only harm I can see that's being
11 done is that you're requiring her to go to the employer
12 whereas in some situations that will be a vain act because
13 she won't end up being the widow. But apart from that,
14 how is she prejudiced?

15 MS. BRINKMANN: It's part of the problem I
16 think, Your Honor, with what Congress looked at when they
17 eventually decided to not require workers to elect
18 remedies anymore. She's put in a situation of either
19 taking a settlement that will forever preclude her from
20 future potential compensation which she doesn't know if
21 she's entitled to yet or being left -- and being left
22 empty-handed. But she's being forced into a choice at the
23 time of the settlement that she can't make.

24 QUESTION: Then I didn't understand your answer
25 to my question.

1 QUESTION: I don't understand.

2 QUESTION: If she goes and tries to get the
3 settlement, like any other worker, if the employer
4 approves it, she gets the settlement. No problem.
5 Suppose the employer disapproves it. At that point I
6 thought you said that he or she or anyone would be
7 entitled to ordinary compensation under 906, 7, 8, and 9,
8 the rest of the act. Is that not so or is it so?

9 MS. BRINKMANN: A person who's entitled to
10 compensation would be because they have an entitlement,
11 but if she is not yet entitled, she cannot go and file a
12 claim, no. She only becomes entitled to compensation
13 after her husband dies, and that's --

14 QUESTION: You know, that position is
15 inconsistent, is it not, with the rule that was
16 promulgated after the '84 amendments? Didn't the Director
17 take the position at that time that coverage of a death
18 claim does not turn on when death is sustained?

19 MS. BRINKMANN: No, Your Honor. We addressed
20 that point I believe and it was raised in amicus briefs
21 and in our brief. What the Director said was interpreting
22 which employer would be liable for the compensation
23 benefits, and under that it's the employer who was the
24 employer at the time of the death or the injury. But that
25 doesn't mean that the --

1 QUESTION: At the time of the injury.

2 MS. BRINKMANN: That doesn't mean that the
3 person -- Mrs. Yates' entitlement to compensation vested
4 at that time. There was all the other prerequisites that
5 would have to occur before she could become entitled to
6 it.

7 QUESTION: Is it clear that if we rule, as you
8 suggest, and the wife in this case is not a person
9 entitled to compensation at the time she makes the
10 settlement -- is it true that when she does become a
11 person entitled to compensation and brings a suit against
12 the employer, that the employer cannot offset under 33(f)?
13 We don't have to decide that here, but it seems to me that
14 that's at least an open question.

15 MS. BRINKMANN: You don't have to decide that,
16 Your Honor, and we do think that that's an open question.

17 I should say that once Mrs. Yates became
18 entitled to compensation after her husband's death, she
19 did obtain prior written approval from the employer for -
20 -

21 QUESTION: But I was talking about offset for
22 the previous --

23 MS. BRINKMANN: Yes. That's not before the
24 Court in this case. Petitioners do not seek an offset in
25 this case, and it --

1 QUESTION: But you did take a position in your
2 brief on it. You said that they should -- the words
3 should be interpreted the same way in both sections.

4 MS. BRINKMANN: Yes, Your Honor, we did. We
5 think in light of the Court's holding in Cowart, that that
6 is required.

7 QUESTION: Let me ask you a very simpleminded
8 question. It was one that was brought up in the brief on
9 the other side, and that is, if you try to envision what
10 Congress was doing here, why would Congress want to say to
11 the widow or the potential widow who settles shortly
12 before the death, you can, in effect, recover twice, but
13 to the one who settles after the husband dies, you can
14 recover only once? What rationality is there to such a
15 scheme?

16 MS. BRINKMANN: I think that it would be
17 reasonable for Congress to have distinguished between
18 someone who already has a vested right to compensation, a
19 known alternative remedy, vis-a-vis a person who only has
20 a potential, perhaps entitlement at a later point in time.
21 And weighing that against an employer in the first
22 situation which also has a vested liability and a vested
23 lien and entitlement to recoup, giving that employer a
24 right to prevent a settlement or to participate in that
25 settlement, as opposed to in the latter situation where

1 the employer has no liability nor lien at that point in
2 time.

3 And we also think again because of the very
4 different nature of the determinations of what
5 compensation the person would be entitled to under the
6 act, in the one instance, when the person is entitled,
7 it's a reasonably, generally knowable calculation that may
8 involve actuarial tables, but in the other situation, it
9 involves much more than actuarial tables, a lot of
10 eventualities about outliving another person that --
11 expectancy of the duration of a marriage.

12 If I could, Your Honor, I'd like to turn to the
13 second question presented, whether or not the Director is
14 entitled to participate as a party respondent in a court
15 of appeals.

16 We believe that the Director is entitled to
17 participate under rule 15(a) of the Federal Rules of
18 Appellate Procedure which states that in each case the
19 agency must be named respondent. The Secretary --

20 QUESTION: That's simply a procedural rule,
21 isn't it, almost a pro forma type of rule?

22 MS. BRINKMANN: That's correct, Your Honor. I
23 think that would be --

24 QUESTION: Why would that control the outcome of
25 something like this?

1 MS. BRINKMANN: Because Federal Rule of
2 Appellate Procedure 15 addresses specifically the
3 situation where courts of appeals are reviewing agency
4 actions, and that rule envisioned that someone from that
5 agency would be in the court of appeals as a party
6 respondent.

7 It's different than Article III standing, Your
8 Honor. It --

9 QUESTION: Well, do you think that, say, the
10 rules -- a rule could confer standing on a respondent
11 party such as the Director here even though Congress had
12 not -- had indicated not?

13 MS. BRINKMANN: It's not standing, Your Honor.
14 I think it's just like a rule about intervention. There
15 are rules for parties to intervene and the Federal rules
16 permit that. That's to bring someone who isn't a party.
17 But that's not giving somebody a right to petition or
18 Article III standing to seek judicial review. That's a
19 very different scenario.

20 I would also point out --

21 QUESTION: Excuse me. You can intervene when
22 you don't have standing?

23 MS. BRINKMANN: Under -- in the district court,
24 under Federal Rule of Civil Procedure 24, there are
25 different provisions -- situations --

1 QUESTION: Surely you can't intervene in a suit
2 unless you have standing.

3 MS. BRINKMANN: I guess it depends on how you
4 describe standing, Your Honor. I think in the sense of
5 Article III standing that you're bringing a case to the
6 court where there's a case of controversy, I don't think
7 that's required for intervention. A intervenor has to
8 show an interest in the --

9 QUESTION: You don't think Article III standing
10 is required for -- on the part of the intervenor?

11 MS. BRINKMANN: I think under the Federal Rules
12 of Civil Procedure, it depends. There's varying levels of
13 interest and it may be that one person is entitled to
14 intervene as of a right because there's a particular --

15 QUESTION: Well, surely the Rules of Civil
16 Procedure can't confer standing in the face of the Article
17 III requirement.

18 MS. BRINKMANN: We agree with that, Your Honor.
19 That's correct.

20 But we think here the idea of having the Federal
21 agency before the court of appeals when an agency action
22 is being reviewed makes eminent sense. And in the Court's
23 opinion in Caputto, it talked about when it did not reach
24 expressly this issue -- it talked about the lower court
25 opinion in that case. And Judge Friendly's opinion there

1 had pointed out that it would be a novel form of review of
2 an agency action which did not include the Government as a
3 party in the court of appeals.

4 QUESTION: Well, what about the Newport News
5 case? It surely points in the other direction.

6 MS. BRINKMANN: Newport News addressed the
7 question of whether or not within the statutory definition
8 of a person adversely affected or aggrieved. The Director
9 in that particular case came within that.

10 I think that all the parties in that case
11 agreed, in fact, and the Court reserved the question.
12 Even under that definition, the Director could well have
13 Article III standing to petition for review under some
14 situations.

15 QUESTION: Is the Tax Court -- when we get cases
16 that originated in the Tax Court, is the Tax Court a party
17 before us?

18 MS. BRINKMANN: I don't --

19 QUESTION: I mean, surely it's different when
20 the agency is set up as an adjudicator. I mean, if you
21 have a legislative court, an Article I court, is that
22 court a party to any proceeding of the private parties who
23 then come before us to challenge what that Article I court
24 did?

25 MS. BRINKMANN: Your Honor, we believe that the

1 board, for example, would not be an appropriate party for
2 that very reason. The board does not have a vested right
3 to defend it.

4 The situation here in that the Department of
5 Labor is very unusual. It is not a unitary scheme as is
6 the normal scheme under most agencies where rulemaking,
7 adjudication, and policymaking are all in the same entity.

8 QUESTION: But it is the decree of the board --
9 of -- it is not the decree of the Labor Department, is it
10 --

11 MS. BRINKMANN: No.

12 QUESTION: -- that entitles this person to
13 compensation? It's the decree of essentially an Article I
14 court.

15 MS. BRINKMANN: Under section 921(c), Your
16 Honor, the Longshore Act itself makes clear that the court
17 of appeals under that provision, once the Benefits Review
18 Board opinion is petitioned to the court of appeals, the
19 court of appeals has the authority and power to modify,
20 reverse, to act on that board's opinion. We think that's
21 why it supports our view that it's not the board but the
22 Director that is named the agency under Federal Rule of
23 Appellate Procedure 15.

24 Prior to the change in '72 where the structure
25 of the appellate review changed, it used to be into the

1 district court, and then the Director could of course
2 participate. In '72 when it changed, it no longer
3 identified who should be the respondent. It identified a
4 court. Several courts have pointed out that they believe
5 in light of the Federal Rules of Appellate Procedure
6 enactment, it was no longer necessary to identify the
7 respondent.

8 QUESTION: Thank you, Ms. Brinkmann.

9 Mr. Clark, we'll hear from you.

10 ORAL ARGUMENT OF WYNN E. CLARK

11 ON BEHALF OF THE PRIVATE RESPONDENT

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

14 I am asking the Court to follow Cowart, a
15 decision decided 4 short years ago, which we submit
16 teaches us three things. One, in the words of Cowart,
17 there's a basic and unexceptional rule that when a statute
18 speaks clearly to a subject, judicial inquiry is no longer
19 warranted, and that statute, section 33 --

20 QUESTION: But judicial inquiry is warranted as
21 to what the statute says I take it.

22 MR. CLARK: Yes, sir, but interpretation beyond
23 the clear meaning of the statute is what I'm referring to.

24 Cowart teaches us two other things, and it's
25 right there on page 2594 of the Supreme Court Reporter and

1 page 2595.

2 Cowart teaches us that a -- the person entitled
3 to compensation status must be measured at the time of the
4 third party settlements, and in this case we're talking
5 about settlements made before Mrs. Yates became a widow,
6 at the time she had no right to invoke the administrative
7 machinery of the Longshore Act to file a Longshore and
8 Harbor Workers' Compensation claim for death benefits.

9 Cowart teaches us a third thing, and it says
10 this on page 2595. It says that person entitled to the
11 compensation means this, that the person satisfies the
12 prerequisites for the right.

13 There are a couple of misstatements that I
14 believe are just simply wrong that have made --

15 QUESTION: Mr. Wynn -- Mr. Clark, one thing I
16 think perhaps you can teach us, although if you think it's
17 not relevant, let us know. Why wasn't approval sought?
18 We had one person who was clearly a person entitled to
19 compensation. The settlement wasn't approved for the
20 worker or for his potential widow. Why not?

21 MR. CLARK: With respect to the pre-death
22 settlements, all parties were then operating under the
23 Dorsey and O'Leary cases out of the Benefits Review Board,
24 and they're cited in Cowart. And those cases said, which
25 is something that Cowart made short work of, was that you

1 have to be receiving compensation at the time in order to
2 be a person entitled to compensation. That's why there
3 was no problem at that time.

4 I might add too --

5 QUESTION: All of these settlements were -- I
6 thought -- then I'm confused. I thought one of the other
7 counsels said that some of these settlements were made
8 after the worker was -- yes, I think that -- was it -- Mr.
9 Salloum said that.

10 MR. CLARK: Yes, but they're still under the
11 category of pre-death settlements, settlements made during
12 the lifetime of Mr. Cowart, the traumatically injured
13 worker -- excuse me -- occupationally injured worker.

14 QUESTION: Yes, but there were -- none of the
15 settlements were approved although --

16 MR. CLARK: None of the pre-death settlements
17 were approved.

18 QUESTION: Yes, although some of those
19 settlements postdated the time when the worker himself
20 began to receive benefits.

21 MR. CLARK: That's correct.

22 QUESTION: And no approval was sought for those.

23 MR. CLARK: No approval was sought, and may I
24 add that no --

25 QUESTION: Why not?

1 MR. CLARK: No approval was required, and it's
2 right there in the petitioners' appendix to the petition
3 for certiorari, pages 49 and 48 and 62 and 63, is because
4 33(g)(1) only applies when the, quote, person entitled to
5 compensation, end of quote, settles for an amount less
6 than the compensation to which he was entitled.

7 There was a section 8(i) settlement in May, May
8 5, 1983, which determined that the petitioner Ingalls paid
9 Mr. Cowart -- excuse me -- Mr. Yates \$15,000 and kept his
10 medical benefits open. At that point he knew -- every --
11 all the parties knew -- what he was entitled to under the
12 act.

13 The third party settlements -- and we're talking
14 about the pre-death settlements -- netted \$18,000 plus,
15 and correctly the Benefits Review Board in the -- at the
16 pages I cite in the appendix noted that approval wasn't
17 even required from Mr. Yates, much less Mrs. Yates who
18 could never have invoked the administrative machinery of
19 the act during the lifetime of her husband on --

20 QUESTION: You have to make that evaluation at
21 the time that the settlement is entered into. Right? And
22 if it turns out that actuarially you were wrong and that
23 in fact the worker gets more -- was entitled to more from
24 the employer, it's too bad. You just look to the time of
25 the settlement to determine that issue?

1 MR. CLARK: Justice Scalia, you look at the time
2 of the settlement under Cowart to determine person
3 entitled to compensation status. To determine actuarial
4 --

5 QUESTION: Yes.

6 MR. CLARK: To determine actuarial for the claim
7 that Mrs. Yates is advancing, which is a mix and match
8 approach for the petitioners, you do it after the husband
9 has died and she at that time files a claim for
10 compensation.

11 QUESTION: I hope we're talking about the same
12 thing. I want to know what time you look to for purposes
13 of determining whether the settlement is indeed less than
14 what the person would be entitled to under this chapter.

15 MR. CLARK: You look at it when the person
16 entitled to compensation makes a third party settlement.

17 QUESTION: At the time of the settlement. So,
18 you have to do actuarial calculations.

19 MR. CLARK: Correct, yes, sir. You have to be a
20 person entitled to compensation first. Then there's the
21 third party settlement, and then you look actuarial. And
22 in this case --

23 QUESTION: What happens if your actuarial
24 calculations are wrong and the employer is in fact liable
25 for more than what the settlement was? Does he end up

1 coughing it up?

2 MR. CLARK: Well, he -- both the party -- the
3 actuarial determination would have to be made by the
4 administrative judge in the formal hearing and if either
5 party -- yes, they can appeal.

6 QUESTION: No, no. But it turns -- in the event
7 it is wrong, he lives longer and therefore is entitled to
8 more money than we had guessed at the time of the
9 settlement, what happens? The employer has to pay that
10 additional amount. Right?

11 MR. CLARK: Yes.

12 QUESTION: The risk is on the employer.

13 MR. CLARK: Yes, sir.

14 QUESTION: Why -- if there had never been a
15 settlement, she was -- would have been entitled to
16 compensation under some provision of the act other than
17 933(f). Right?

18 MR. CLARK: I don't I think I follow your
19 question.

20 QUESTION: If there had never been any
21 settlement at all, there never was a settlement offer,
22 your client would have been entitled to compensation under
23 the act, but not 933, some other provisions of the act.

24 MR. CLARK: My client would have been entitled
25 to compensation under section 9 of the Longshore Act for

1 death benefits.

2 QUESTION: Yes, but not 933(f), some other
3 thing.

4 MR. CLARK: Of course, not.

5 QUESTION: Yes, of course, not.

6 MR. CLARK: Yes.

7 QUESTION: Now, if there is a settlement and it
8 requires approval --

9 MR. CLARK: Yes, sir.

10 QUESTION: -- and she didn't get it.

11 MR. CLARK: It requires --

12 QUESTION: Suppose it did. Suppose you lost on
13 that.

14 MR. CLARK: May I be precise? It requires
15 approval if settlement is less for the compensation --

16 QUESTION: Yes, correct.

17 MR. CLARK: -- for which she --

18 QUESTION: Suppose that applied and she didn't
19 get it. Why isn't she still entitled to compensation
20 under those same other provisions since (g) only blocks
21 compensation under (f)? (g) only applies to not getting
22 compensation under (f). It doesn't apply to not getting
23 compensation at all. So, why isn't she still entitled to
24 compensation under all the other provisions? That's what
25 I've been unable to figure out, and for whatever reasons I

1 won't go into that would help me to understand that how
2 the statute works.

3 MR. CLARK: I believe the shorthand answer to
4 that is, one is that section 33(g)(2) says that failure to
5 obtain a prior written consent from the employer and
6 carrier terminates or forfeits your rights to compensation
7 and medical benefits. And number two, the answer is that
8 Cowart decided that issue adversely to the position that I
9 think the situation you're addressing.

10 QUESTION: Thank you.

11 MR. CLARK: Basically in the dissent.

12 The point is, if you look in -- and it's right
13 there in our briefs, pages 12 through 18. It basically
14 says this, that even the Ninth Circuit in the Witthuhn
15 case cited in our brief says -- and they use the words
16 vest -- that a widow's claim for death benefits under
17 section 9 vest at the time of the death of the worker on
18 whom she is dependent.

19 And to address Justice Ginsburg's question a
20 moment ago with some of the other counsel, it is possible
21 -- and it's on page 21 of the Director's brief. It is
22 possible for a wife to be living separate and apart under
23 section 9 from her husband at the time of death as long as
24 it's not due to her fault and not be dependent and still
25 be entitled to section 9 benefits.

1 Think of the things that could have prevented
2 Mrs. Yates from ever being entitled to compensation:
3 death. She may have predeceased Mr. Yates, and Mrs. Yates
4 today is 88 years old.

5 QUESTION: That can be figured out actuarially
6 just as when he is going to die can be figured out
7 actuarially. So, you could compute that into the
8 calculation, couldn't you? No?

9 MR. CLARK: Yes, sir, you could. But what I'm
10 referring to now is why, consistent with the cases cited
11 in my brief on page 12 though 18, which go directly
12 opposing -- opposed to what the petitioner is advancing
13 here. As I understood it, they said that her entitlement
14 -- entitlement -- arose at the same time as Mr. Yates'
15 diagnosis with asbestosis, which is --

16 QUESTION: Thank you, Mr. Clark.

17 Mr. Salloum, you have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF RICHARD P. SALLOUM

19 ON BEHALF OF THE PETITIONERS

20 MR. SALLOUM: Thank you, Mr. Chief Justice.

21 I think it's very important --

22 QUESTION: Mr. Salloum, Mrs. Brinkmann gave a
23 different answer to the question about is -- who is a
24 potentially qualifying widow. She seemed to suggest that
25 somebody who came into the picture after the injury could

1 be a qualifying widow.

2 MR. SALLOUM: Your Honor, that's the first thing
3 I was going to address. I don't believe that's correct.
4 The act provides that it's the wife of the worker at the
5 time of his injury that is entitled to compensation at his
6 death. If he was not married at the time of his injury or
7 if he changed wives at the time -- before the time of his
8 death, that wife that married the worker after his injury
9 would not be entitled to compensation. Only the wife
10 married to him at the time of the injury would be entitled
11 to compensation.

12 If the Court holds, as the Government and as the
13 respondents want the Court to hold, it would mean that no
14 employer would be entitled to any credit for any third
15 party recoveries made by a wife when she releases her
16 wrongful death claims during the lifetime of her husband.
17 They would not be entitled to any credit --

18 QUESTION: Of course, that was the rule for 12
19 years prior to Cowart, wasn't it?

20 MR. SALLOUM: I'm sorry, Your Honor?

21 QUESTION: That was the rule that was generally
22 applied for 12 years prior to Cowart, wasn't it, by the
23 Benefit Review Board?

24 MR. SALLOUM: Yes, that's correct, Your Honor.
25 And the Benefits Review Board since 1991 have changed

1 their position on a person entitled to compensation four
2 times: one in Force v. Director, one before the Fifth
3 Circuit in Cowart. They again changed their position
4 before this Court after certiorari was granted in Cowart,
5 and now they change their position for the fourth time in
6 this case.

7 We think it's very important to call to the
8 Court's attention, as we did in the briefing, that the
9 Director has passed a regulation which is section 20
10 C.F.R. 702.281 that says that the employer approval
11 requirements of section 33(g) and the employer credit
12 entitlements under section 33(f) shall apply to every
13 person claiming benefits under this act.

14 QUESTION: Why can't the employer just say no?
15 If the employer says, no, I won't approve the settlement
16 -- he says, no -- then the woman never gets any money?

17 MR. SALLOUM: No, that's not correct, Your
18 Honor. If the employer says, I won't approve the
19 settlement, she is guaranteed compensation from the
20 employer under the Longshore Act.

21 QUESTION: That -- if the employer says, no, I
22 won't approve the settlement, the employer has to pay the
23 whole thing.

24 MR. SALLOUM: The whole thing.

25 QUESTION: Okay. So, if she notifies the

1 employer, she just notifies the employer, and at that
2 point the employer says, no, she gets all the money.

3 MR. SALLOUM: That's not correct, Your Honor.

4 QUESTION: If the employer says, no, she gets
5 ordinary compensation.

6 MR. SALLOUM: No, Your Honor. If she notifies
7 the employer and says I have a third party settlement for
8 less than the compensation I'm entitled, and the employer
9 says no, and she settles regardless, under 33(g) she would
10 be barred. But if she says, okay, I won't accept the
11 third party settlement, then the very least she would get
12 would be her full compensation under the Longshore Act.
13 That's the least she would get.

14 All they have to do is come to the employer and
15 say, I have a third party settlement. It may be for more,
16 it may be for less. Will you approve it? If the employer
17 does not approve it and she does not accept the third
18 party settlement, the very minimum she would get --

19 QUESTION: Thank you, Mr. Salloum.

20 MR. SALLOUM: Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: The case is submitted.

22 (Whereupon, at 11:47 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:

INGALLS SHIPBUILDING, INC., ET AL., V DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL
CASE NO. 95-1081

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

BY Ann Marie Federico

(REPORTER)