SUPREME COURT OF THE UNITED STATES

No. 91–17

ESTATE OF FLOYD COWART, PETITIONER *v.* NICKLOS DRILLING COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 22, 1992]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

For more than 14 years, the Director of the Office of Workers' Compensation Programs interpreted the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §901 *et seq.* (LHWCA or the Act), in the very same way that petitioner Floyd Cowart's estate now urges. Indeed, the Director *advocated* Cowart's position in the Court of Appeals, both before the panel and before that court en banc.

After certiorari was granted, however, and after Cowart's opening brief was filed, the United States informed this Court: "In light of the en banc decision in this case, the Department of Labor reexamined its views on the issue." Brief for Federal Respondent 8, n. 6. The United States now assures us that the interpretation the Director advanced and defended for 14 years is inconsistent with the statute's "plain meaning." The Court today accepts that improbable contention, and in so doing rules that perhaps thousands of employees and their families must be denied death and disability benefits. I cannot agree with the Government's newly discovered interpretation, and still less do I find it to be compelled by the "plain meaning" of the statute. The Court needlessly inflicts additional injury upon these workers and their families. I dissent.

Ever since the LHWCA was adopted in 1927, it has included some version of the present §33(g), 33

U. S. C. §933(g), the provision at issue in this case. Because that provision cannot be considered in isolation from the broader context of §33, or indeed, the LHWCA as a whole, some background on the structure of the Act and the history of §33's interpretation is essential.

The LHWCA requires employers to provide compensation, "irrespective of fault," for injuries and deaths arising out of covered workers' employment. §§3(a) and 4(b), 33 U. S. C. §§903(a) and 904(b). In return for requiring the employer to pay statutory compensation without proof of negligence, the Act grants the employer immunity from tort liability, regardless of how serious its fault may have been. See §§5(a) and 33(i). Benefits under the LHWCA are strictly limited, generally to medical expenses and two-thirds of lost earnings, and are set out in detailed schedules contained in the Act itself. See §§7–9. A fundamental assumption of the Act is that employers liable for benefits will pay compensation "promptly," "directly," and "without an award" having to be issued. See §14(a).

In a case where a third party may be liable, the LHWCA does not require a claimant to elect between statutory compensation and tort recovery. §33(a). Where a claimant has accepted compensation under a formal award, then, within a specified time, he may file a civil action against the third party. §33(b). If a claimant recovers in that action, his compensation under the LHWCA is limited to the excess, if any, of his statutory compensation over the net amount of his recovery. §33(f). Section 33(f) thus operates as a set-off provision, allowing an employer to reduce its LHWCA liability by the net amount a claimant obtains from a third party. Where the claimant nets as much or more from the third party as he would have received from his employer under the LHWCA, the employer owes him no benefits.

Section 33(g) of the LHWCA, 33 U. S. C. §933(g), addresses the situation in which a claimant-plaintiff settles an action against a third party for *less* than he would have received under the Act. Under §33(f), considered alone, the claimant in this situation would always be able to collect the remainder of his statutory benefits from the employer. To protect the employer from having to pay excessive §33(f) compensation because of an employee's "lowball" settlement, §33(g) conditions LHWCA compensation, in specified circumstances, upon the employer's written approval of the third-party settlement. See *Banks* v. *Chicago Grain Trimmers*, 390 U. S. 459, 467 (1968).

Before the LHWCA's 1984 amendments, §33(g) provided that if a "person entitled to compensation" settled for less than the compensation to which he was entitled under the Act, then the employer would be liable for compensation, as determined in §33(f), only if the person obtained and duly filed with the Department of Labor the employer's written approval of the settlement. The meaning of the term "person entitled to compensation" has proved to be a difficult issue, both in the pre-1984 version of the Act and—as this case demonstrates—in the Act's current form.

This issue apparently was considered first in *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. 144 (1977), aff'd, 622 F. 2d 595 (CA9 1980). In that case, the employer denied liability for the death of the claimant's husband, contending that the decedent was not an employee covered by the LHWCA and that the injury did not arise out of his employment. 7 Ben. Rev. Bd. Serv., at 145. The employer persisted in denying liability even after its position was rejected by the Benefits Review Board ("BRB").[1] See *id*., at 146–147. Eventually, more than

[1]The BRB consists of persons appointed by the

28 months after her husband's accident, the claimant settled a third-party suit for $37,500. About one month thereafter, an Administrative Law Judge (ALJ), on remand from the BRB, entered an award for the claimant. The value of the death benefits awarded, assuming that the claimant would live out her normal life expectancy without remarrying, amounted to more than $150,000. See *O'Leary* v. *Southeast Stevedoring Co.*, 5 Ben. Rev. Bd. Serv. 16 (ALJ) and 20 (ALJ) (1976). At that point, the employer contested liability for any compensation on the ground that, under §33(g), the claimant had forfeited that compensation by failing to obtain the employer's written approval of the settlement.

The ALJ rejected the employer's position, reasoning that the claimant was not a "person entitled to compensation" at the time of the settlement. The BRB affirmed. The Board pointed out that the "underlying concept" of the LHWCA is that "the employer upon being informed of an injury will voluntarily begin to pay compensation." O'Leary, 7 Ben. Rev. Bd. Serv., at 147 (citing §14(a)). Further, the Board observed, §33(g) refers to the conditions under which an employer will be "liable" for compensation under §33(f); the reference to "liability," the Board reasoned, "contemplat[es] that the employer either be making voluntary payments under the Act or that it ha[s] been found liable for benefits by a judicial determination." *Id.*, at 148. Moreover, the Board continued, §33(b) gives the employer the right to pursue third parties only if the employer is paying compensation under an award. Thus, the premise of employer rights under §33, the Board concluded, is that the employer is "making

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Secretary of Labor and empowered to "hear and determine appeals raising a substantial question of law or fact" with respect to LHWCA benefits claims. §21(b)(3), 33 U. S. C. §921(b)(3).

either voluntary payments under the Act or pursuant to an award." *Ibid.*

The BRB observed that the employer in *O'Leary* had not paid compensation either voluntarily or pursuant to an award, but, instead, consistently had denied liability. It could hardly have been clear to the claimant at the time she settled her third-party suit that the BRB would ultimately decide in her favor. Indeed, only after that settlement and after the ALJ award did the employer concede that the claimant represented a "person entitled to compensation," and then only to argue that, for that reason, she had forfeited her right to compensation under §33(g). The Board emphasized that the employer's interpretation would place claimants in a severe bind:

> "If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . . ." *Id.*, at 149.

And under the employer's interpretation of §33(g), the employee would thereby forfeit all right to compensation under the Act. Surely, the Board concluded, "Congress by requiring written consent

could not have contemplated such a result." *Ibid.*

The Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion, App. 113, stating: "The Board's ruling is reasonable and furthers the underlying purpose of the Act." *Id.*, at 117. The Court of Appeals for the Fifth Circuit, in an unpublished opinion, upheld a similar BRB decision in 1984, finding the *O'Leary* approach "fully consistent with the language, legislative history, and rationale of" §33(g). See *Kahny* v. *OWCP*, 729 F. 2d 777 (table) and App. 96, 108. No other courts had occasion to examine the *O'Leary* interpretation before the LHWCA was next amended.

The Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639, revisited §33(g). *Id.*, at 1652. The former §33(g) was carried over, with minor changes not relevant here, as §33(g)(1), and a new subsection (g)(2) was added. Section 33(g) now reads as follows:

> "(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
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> "(2) If no written approval of the settlement is obtained and filed as required by paragraph (1),

> or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act."

In *Dorsey* v. *Cooper Stevedoring Co.*, 18 Ben. Rev. Bd. Serv. 25 (1986), appeal dism'd *sub nom. Cooper Stevedoring Co.* v. *Director*, 826 F. 2d 1011 (CA11 1987), the Board rejected an employer's argument that the final clause of the new §33(g)(2) should be understood as overturning the *O'Leary* rule that no duty to obtain approval arises until the employer begins to pay compensation. Subsection (g)(1), the Board stated, reenacted the prior version of §33(g) as it was interpreted in *O'Leary*; the new subsection, (g)(2), was intended to apply to situations not covered by (g)(1) or *O'Leary*. In these situations—where the employer has neither paid compensation nor acknowledged liability—notice, but not written approval, is required. 18 Ben. Rev. Bd. Serv., at 29–30. The Board interpreted the final clause of (g)(2)—language that echoes the Board's words in *O'Leary*—to make clear that the notification requirement, described in (g)(2), was not subject to the *O'Leary* limitation that is incorporated in (g)(1). *Id.*, at 29.

This interpretation is reinforced, the Board continued, by two other considerations. First, although in a number of instances the 1984 legislative history indicates a congressional intention to override other BRB and judicial decisions, that history "indicates no congressional intent to overrule *O'Leary*." *Id.*, at 30. Second, the Board observed, this Court has held that the LHWCA "should be construed in order to further its purpose of compensating longshoremen and harbor workers

`and in a way which avoids harsh and incongruous results.'" *Id.*, at 31, quoting *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953), and citing *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 268 (1977). As *O'Leary* made clear, allowing employers to escape all LHWCA liability by withholding approval from any settlement, while refusing to pay benefits or acknowledge liability, could hardly be thought consistent with the purpose of encouraging prompt, voluntary payment of LHWCA compensation.

Such was the legal background against which Cowart's claim was considered. In the administrative proceedings, the BRB relied on *O'Leary* and *Dorsey* to reject the argument, offered by respondent Nicklos Drilling Company, that by failing to obtain prior written approval of his third-party settlement Cowart had forfeited his LHWCA benefits. Because Nicklos was not paying Cowart benefits, either voluntarily or under an award, the Board reasoned, Cowart was not a "person entitled to compensation" within the meaning of §33(g)(1), and he therefore was not required to obtain Nicklos' approval of his settlement. 23 Ben. Rev. Bd. Serv. 42, 46 (1989). Instead, the Board held, Cowart was required only to give Nicklos notice of the settlement, as provided in §33(g)(2). Because Nicklos indisputably had notice of the settlement—indeed, it had notice three months before the settlement was consummated—the Board ruled Cowart was eligible for LHWCA benefits.

On Nicklos' petition for review, the Director of the Office of Workers' Compensation Programs ("OWCP") —head of the agency charged with administering the Act—defended the Board's interpretation before the Court of Appeals for the Fifth Circuit. First a panel of the Court of Appeals, and then the full court, by a divided vote sitting en banc, however, rejected the Director's position, ruling that Cowart was a "person entitled to compensation" and was required by §33(g)

(1) to obtain Nicklos' written approval. See 907 F. 2d 1552 (1990) (panel), and 927 F. 2d 828 (1991) (en banc). We are told that after this Court granted certiorari, and after Cowart filed his opening brief, the Director "reexamined" his position and argued that the interpretation of §33(g) he had maintained for 14 years, and defended in the Court of Appeals, was inconsistent with the Act's plain meaning.

This Court today agrees with the Director's post-certiorari position that Cowart's claim for compensation is barred by the "clear meaning" of the statute "as written." *Ante*, at 6. According to the Court, Cowart is plainly a "person entitled to compensation" within the meaning of §33(g)(1), and his failure to obtain Nicklos' written approval of his third-party settlement requires, by the "plain language" of §33(g), that he be deemed to have forfeited his statutory benefits. Although the Court does not identify any plausible statutory purpose whatsoever advanced by its reading, and although—to its credit—it acknowledges the "harsh effects" of its interpretation, *ante*, at 14, the Court ultimately concludes that the language of §33 compels it to reject Cowart's position.

In my view, the language of §33 in no way compels the Court to deny Cowart's claim. In fact, the Court's reliance on the Act's "plain language," *ante*, at 6, is selective: as discussed below, analysis of §§33(b) and (f) of the Act shows that, even leaving aside the question whether Cowart is a "person entitled to compensation," a *consistently* literal interpretation of the Act's language would not require Cowart to have obtained Nicklos' written approval of the settlement. Indeed, under a thoroughgoing "plain meaning" approach, Cowart would be entitled to receive *full* LHWCA benefits in addition to his third-party settlement, not just the excess of his statutory benefits over the settlement.

At the same time, a consistently literal interpretation of the Act would commit the Court to positions it might be unwilling to take. The conclusion I draw is not that the Court should adopt a purely literal interpretation of the Act, but instead that the Court should recognize, as it has until today, that the LHWCA must be read in light of the purposes and policies it would serve. Once that point is recognized, then, as suggested by the Court's closing remarks on the "stark and troubling" implications of its interpretation, *ante*, at 14, it follows that recognition of Cowart's claim is fully consistent with the Act.

Were the Court truly to interpret the Act "as written," it would not conclude that Cowart is barred from receiving compensation. Section 33(g)(1) of the LHWCA, on which the Court's "plain meaning" argument relies, provides that if a "person entitled to compensation" settles with a third party for an amount less than his statutory benefits, his employer will be "liable for compensation *as determined under subsection (f)*" only if the "person entitled to compensation" obtains and files the employer's written approval. The "plain language" of subsection (g)(1) does not establish any general written approval requirement binding either all "persons entitled to compensation," or the subset of those persons who settle for less than their statutory benefits. Instead, it requires written approval only as a condition of receiving compensation "as determined under subsection (f)." Where the "person entitled to compensation" is not eligible for compensation "as determined under subsection (f)," subsection (g)(1) does not require him to obtain written approval.

The "plain language" of subsection (f) in turn suggests that the provision does not apply to Cowart's situation. Subsection (f), by its terms, applies only "[i]f the person entitled to compensation

institutes proceedings within the period prescribed in subsection (b)." And the "period prescribed in subsection (b)" begins, by the terms of that subsection, upon the person's "[a]cceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board." Cowart's third-party suit was clearly *not* instituted within this period: he filed suit *before* any award of LHWCA benefits, and he still has not accepted (or been offered) compensation under any award. Thus, he does not come within the "plain meaning" of subsection (f), and, accordingly, for the reasons given above, he would not be bound by the subsection (g)(1) written-approval requirement. It would also follow that, because Nicklos indisputably received the notice required by subsection (g)(2), that provision would not bar Cowart from receiving LHWCA compensation and medical benefits.

Indeed, if Cowart is not covered by subsection (f), he would appear to have been eligible for a larger award than he sought. Subsection (f) does not authorize compensation otherwise unavailable; instead, it operates as a *limit*, in the specified circumstances, on the employer's LHWCA liability. If read literally, subsection (f) would not bar Cowart from receiving full LHWCA benefits, *in addition to* the amount he received in settlement of the third-party claim.

It is true that §33(f) has not always been read literally. Subsection (f) has been assumed to be applicable where, for example, the claimant's third-party suit was filed after an employer *voluntarily* began paying LHWCA compensation, not just where compensation was paid pursuant to an award. See, *e.g., I.T.O. Corp. of Baltimore* v. *Sellman*, 954 F. 2d 239, 240, 243–245 (CA4 1992); *Shellman* v. *United States Lines, Inc.*, 528 F. 2d 675, 678–679, n. 2 (CA9 1975), cert. denied, 425 U. S. 936 (1976) (referring to

the availability of an employer's lien, where the employer has paid compensation without an award, as "judicially created" rather than statutory). That interpretation is eminently sensible and consistent with the statutory purpose of encouraging employers to make payments "promptly," directly," and "without an award." See §14(a). A contrary interpretation would penalize employers who acknowledge liability and commence payments without seeking an award, and it would reward employers who, whether in good faith or bad, contest their liability until faced with a formal award. See *Shellman*, 528 F. 2d, at 679, n. 2 ("The purpose of this Act would be frustrated if a different result could be reached merely because the employer pays compensation without entry of a formal award.").

It is not obvious, however, that a similar argument from statutory purpose should be available to employers such as Nicklos who refuse to pay benefits and then seek shelter under §33(f) (and by extension, §33(g)(1)). And the fact remains that the Court professes to interpret the "clear meaning" of the statute "as written." The Court's interpretation today, however, is no more compelled by the language of the LHWCA than the interpretation Cowart defends: the Court is simply insensible to the fact that it implicitly has relied upon presumed statutory purposes and policy considerations to bring Nicklos and Cowart under the setoff provisions of §33(f), thus absolving Nicklos of the first $29,000 in LHWCA liability. Only at *that* point does the Court invoke the plain meaning rule and insist on a "literal" interpretation of §33(g)(1). This selective insistence on "plain meaning" deprives Cowart's estate of the last $6,242.77 Nicklos would otherwise have been bound to pay.

For these reasons, I think it clear that a purely textual approach to the LHWCA cannot justify the

Court's holding. In my view, a more sensible approach is to consider §33(g) as courts always have considered the other parts of §33—in relation to the history, structure, and policies of the Act.

Looking first to §33's history, for present purposes the most relevant aspect is the 1984 amendment to §33(g) through which that provision assumed its present form. The amended provision clearly bears the impress of the Board's *O'Leary* decision. The reference in §33(g)(2) to that subsection's applicability, "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits," tracks the limitation recognized in *O'Leary*—a limitation that had been unanimously approved by panels of two Federal Courts of Appeals. The question, then, is whether Congress sought to incorporate that holding or to repudiate it in the 1984 amendments to §33(g).

The critical fact in this inquiry is Congress' use of the term "employee," rather than "person entitled to compensation," in connection with the notification requirement. The use of this term is in marked contrast to the other clauses of §33(g). Section 33(g)(1) conditions §33(f) compensation of a settling "person entitled to compensation" on securing the employer's written approval, and §33(g)(2) provides, somewhat redundantly, that a "person entitled to compensation" forfeits all rights to compensation and medical benefits if the written approval mentioned in §33(g)(1) is not obtained. The notification clause of §33(g)(2), however, provides that "if the *employee* fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits . . . shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits" (emphasis added).

The use of the term "employee" in §33(g)(2) strongly suggests that Congress intended to incorporate the BRB's holding in *O'Leary*. As mentioned, the language Congress chose for the last clause of §33(g)(2) indicates that it was aware the Board had adopted a restrictive interpretation of the term "person entitled to compensation." Congress retained that term in connection with the written approval requirement of subsection (g)(1). Yet Congress chose the broad term, "employee," for the notification clause of subsection (g)(2), and "employee," unlike "person entitled to compensation," is a term expressly defined in the statute. See §2(3).[2] The Court cannot explain why Congress would have chosen two different terms to apply to the different requirements. Indeed, on the Court's interpretation, the two terms are identical in their extension. On the Court's reading, the term "person entitled to compensation" denotes only a statutory employee who has a claim that, aside from the requirements of §33(g), would be recognized as valid. And that is exactly the denotation of the term "employee" in connection with the notification requirement. The fact that Congress chose to use different terms in connection with the different §33(g) requirements—using, with respect to the written approval requirement, a term that it knew had been narrowly interpreted, and using, with respect to the notification requirement, a term broadly defined in the statute itself—surely indicates that Congress intended the two terms to have different meanings.

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[2]Subject to exceptions not applicable here, that section of the Act defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker."

Had Congress intended the meaning the Court attributes to it, it would have used the same term in both contexts.[3]

The inference that Congress intended to adopt the *O'Leary* rule in the amended language of §33(g) is only strengthened by consideration of the factual context to which the provision was designed to apply. As the Board noted in *O'Leary*, and as the Director argued to the Court of Appeals, the Act presumes that employers, as a rule, will promptly recognize their LHWCA obligations and commence payments immediately, without the need for a formal award. See §14(a). In that situation, the claimant generally knows the value of the benefits to be received, and can accurately compare that figure to any settlement

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[3]Two of the Court's other arguments concerning the 1984 amendments may deserve brief mention. First, the Court suggests in passing that "the legislative history of predecessor bills to the eventual 1984 enactment do indicate an intent to overturn *O'Leary*," citing snippets of written testimony submitted during the lengthy 1981 hearings. See *ante*, at 8–9. Needless to say, statements buried in hearings conducted *three years before the bill's passage* fall far short of demonstrating any such congressional intent. The BRB was correct when it said in *Dorsey* that the legislative history of the 1984 amendments indicates no intention to overturn *O'Leary*.

Second, the Court places great significance upon the fact that "at least some elements within the Department of Labor" read the post-1984 statute differently from the Director of OWCP. *Ante*, at 12. The Court is quite clear, however, that it is the Director who administers the Act, see *ante*, at 10, not these other "elements," and that the Director does not ask for deference to his recently adopted interpretation.

offer. The claimant in this situation has no strong interest in the precise amount of any settlement that nets less than the statutory benefits, so long as the costs of suit are covered, because by operation of §33(f), he would not be allowed to retain any of the proceeds. On the other hand, the employer who has acknowledged liability has a strong interest in recovering from the third party any benefits already paid to the claimant and in reducing or eliminating any future benefits it has committed itself to pay. For the employer in this situation, the precise amount of a settlement for less than the claimant's statutory benefits is vitally important: any net dollar the claimant recovers in a third-party action is a dollar less the employer will have to pay in LHWCA benefits.

Given the parties' different incentives in the situation where the employer already is paying benefits, it makes sense to require the claimant to protect the employer's interest, by requiring settlements to be reasonable in the employer's judgment. At the same time, giving the employer this power of approval does not generally threaten the claimant's interests, since, as mentioned, only the employer has an interest in settlements above the threshold of the claimant-plaintiff's expenses and below the amount of promised or delivered LHWCA benefits.

Matters are quite different, however, when (as in the present case) the employer has refused to make statutory payments and is not subject to an enforceable award at the time of settlement. First, the claimant generally will not be able to estimate with certainty whether he will receive any LHWCA benefits, let alone how much. Accordingly, the calculation required by §33(g)—a comparison between LHWCA benefits and settlement amount—will be far more difficult. Second, the claimant who is not receiving LHWCA payments, and who cannot be certain that he ever will receive payments, will have a

much more powerful interest in negotiating a third-party settlement that is as favorable as possible. This claimant, unlike its counterpart who is receiving payments, therefore will have a strong incentive—independent of the §33(g) requirements—to protect any interest the employer might have in reducing potential LHWCA liability. Finally, disabled longshore employees, or the families of a longshoreman killed on the job, are likely to be in a highly vulnerable position, subject to financial pressure that may lead them to overvalue a present lump-sum payment and undervalue future periodic payments that might eventually be available under an LHWCA award.

The employer who refuses to pay, by contrast, has taken the position that it owes no LHWCA benefits that may be reduced through a third-party settlement, and thus that it has no real interest in the amount for which the third party settles. Moreover, as has been noted, the claimant who is not receiving benefits has a strong incentive to protect the employer's interest in reducing or eliminating any LHWCA liability that might eventually be imposed. Under the Court's interpretation of §33(g)(1), however, such an employer in many cases can ensure that it will never be required to pay LHWCA benefits, even if it might otherwise ultimately be determined to be liable, simply by withholding approval of any settlement offer, regardless of amount. In practice, recalcitrant employers will seek to exempt themselves from statutory liability by withholding approval of settlements, hoping that their employees' need for present funds will force them to settle without approval. I cannot believe that Congress intended to require LHWCA claimants to bet their statutory benefits on the possibility that future administrative and perhaps judicial proceedings, years later, might vindicate their position that the employer should have been paying benefits—particularly when the employer's asserted interest is

already adequately protected independently of §33(g)(1).

The Court recognizes the patent unfairness of this situation, and it as much as admits that its interpretation is out of line with the policies of the Act. See *ante*, at 14. Nevertheless, the Court holds that the plain meaning of the term "person entitled to compensation" clearly applies to both categories of claimants—those whose employers have denied liability, as well as those whose employers have acknowledged that they must pay statutory benefits. See *ante*, at 7–8. For that reason, the Court implies, regardless of what Congress may have thought it was accomplishing in the 1984 amendments, the words "person entitled to compensation" simply will not bear the construction *O'Leary* gave them. See *ante*, 9.

Even setting aside my doubts, expressed above, about the plain meaning rule's application to this statute, I am not persuaded by the Court's contention. In my view, it does not strain ordinary language to describe claimants whose employers have acknowledged LHWCA liability as "persons entitled to compensation," but to withhold that description from claimants whose employers have denied liability for compensation. This is particularly so, given the context in which the term appears in the statute. Section 33(g)(1) requires the "person entitled to compensation" to compare two figures—the amount of a settlement offer, on the one hand, and the amount of compensation to which the person is entitled, on the other. But what is that latter figure in a situation in which the employer denies liability in full or in part? Doubtless, the claimant could hazard a guess by consulting the Act's jurisdictional provisions concerning who is covered for which kind of accident, the compensation schedules included in the Act, and, in the case of a disability claim, the opinion of the

claimant's doctor that the claimant in fact is disabled. The very nature of the situation, however, is that it is not clear that such a person is indeed "entitled to compensation"—that question, after all, is exactly the issue that the employer's position requires to be determined in administrative and perhaps subsequent judicial proceedings. The *O'Leary* limitation of the term "person entitled to compensation" to the situation in which the claimant's employer has acknowledged liability and commenced payments seems to me fully consistent with the requirements of ordinary language.

It is true, as the Court observes, that under the *O'Leary* interpretation, the term "person entitled to compensation" would take on different meanings in different contexts. See *ante*, at 9. This Court, however, has not inflexibly required the same term to be interpreted in the same way for all purposes. Compare *Barnhill* v. *Johnson*, ___ U. S. ___, ___ (1992) (slip op. 8–9 and n. 9), with *id.*, at ___ (STEVENS, J., dissenting) (slip op. 4) (noting that the maxim is "not inexorable," but arguing that because "nothing in the [statute's] structure or purpose" counsels otherwise, the Court should have applied it). This Court has recognized:

> "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section . . . .
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> "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932).

This case is one in which the statutory term in question should be read contextually, rather than under the assumption that the term necessarily has the same meaning in all contexts. The phrase "person entitled to compensation" is not defined in the statute, and it is susceptible of at least two interpretations—a "formalist" interpretation, according to which one may be entitled to compensation whether or not anyone ever acknowledges that fact, and a "positivist" or "legal realist" interpretation, according to which one is entitled to compensation only if the relevant decisionmaker has so declared. Which of these two senses is "correct" will depend upon context. The latter sense, I have suggested, is appropriate to a context in which liability for compensation is disputed and the employee is called upon to predict the future course of administrative and perhaps judicial proceedings—not just as to liability, but as to the precise amount of liability. And, in any event, I think, the text and circumstances of the 1984 amendment to §33(g) indicate that Congress intended to adopt the "realist" interpretation found in *O'Leary*.

Moreover, the Court simply has failed to apply, or even mention, a maxim of interpretation, specifically applicable to the LHWCA, that strongly supports Cowart's position. This Court long has held that "`[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 315–316 (1983), quoting *Voris* v. *Eikel*, 346 U. S., at 333. The only point at which the Court in this case consults the purposes of the Act is at the end of its opinion, when it assures the reader that its interpretation of the *notification requirement* of §33(g)(2)—as opposed to its interpretation of the written approval requirement stated in §33(g)(1)—is consistent with the statute's purposes. See *ante*, at

13. Finally, underscoring its refusal to apply the maxim of liberal construction to this case, the Court ultimately acknowledges that the interpretation of §33(g) it has adopted has "harsh effects" and "creates a trap for the unwary." *Ante*, at 14. For my part, I can imagine no more appropriate occasion on which the maxim should be applied.

Once it is recognized that a claimant whose employer denies LHWCA liability is not a "person entitled to compensation" for purposes of §33(g)(1), the proper resolution of this case is clear. Cowart was just such a claimant, and, accordingly, he was not bound by §33(g)(1)'s written approval requirement. It is undisputed that he satisfied the notice requirement of §33(g)(2). It follows that §33(g) is no bar to Cowart's eligibility for benefits.

The Court recognizes "the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute." *Ante*, at 14. It attempts to justify the "harsh effects" of its decision on the ground that it is but the faithful agent of the legislature, and "Congress has spoken with great clarity to the precise question raised by this case." *Ibid.* In my view, Congress did not answer the question in the way the Court suggests, let alone did it do so "with great clarity." The responsibility for today's unfortunate decision rests not with Congress, but with this very Court.

I dissent.