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IN THE SUPREME COURT OF THE UNITED STATES

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DANA ROBERTS, :

Petitioner : No. 10-1399

v. :

SEA-LAND SERVICES, INC., ET AL. :

- - - - - x

Washington, D.C.

Wednesday, January 11, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:23 a.m.

APPEARANCES:

JOSHUA T. GILLELAN, II, ESQ., Washington, D.C.; on behalf of Petitioner.

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

PETER D. KEISLER, ESQ., Washington, D.C.; on behalf of the Private Respondent.

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P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 10-1399, Roberts v. Sea-Land Services.

Mr. Gillelan.

ORAL ARGUMENT OF JOSHUA T. GILLELAN, II,  
ON BEHALF OF THE PETITIONER

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

Dana Roberts was injured and shortly thereafter became disabled in the course of his work for Sea-Land in fiscal year 2002, but he was not awarded compensation until fiscal year 2007.

The question presented here is whether the maximum weekly rate established by section 6 of the Longshore Act that was in effect at the time his disability began or that which was in effect at the time he was awarded compensation governs his case. He is entitled to whichever maximum is the applicable one.

Section 6(c) of the act provides explicitly that the applicable maximum is that in effect at the time that the claimant is "newly awarded compensation." The term "award" or "awarded" in the Longshore Act has a consistent meaning throughout, contrary to the views of

1 the court of appeals below; and that meaning is a  
2 compensation order filed pursuant to section 19(e) of  
3 the act, which is described in section 19(e) as "the  
4 order making the award."

5 JUSTICE SCALIA: It seems to me that -- that  
6 the two parties are at extremes and that there is indeed  
7 something in the middle. I mean, you say it has to be  
8 the determination of entitlement to compensation by the  
9 agency. The other side says: No, it's just  
10 entitlement, whether it's been decreed or not. Why --  
11 why wouldn't it be an award, however, if it was the  
12 employer that voluntarily paid the amount due, which is  
13 what he's supposed to do anyway, right? Why wouldn't  
14 that be an award of compensation?

15 MR. GILLELAN: Well, because the statute --  
16 in some sense of the word "award" --

17 JUSTICE SCALIA: Yes, a sense that -- that  
18 the text would bear, as opposed to the -- to the sense  
19 that the other side argues here.

20 MR. GILLELAN: I think that the text will  
21 not bear that reading, in particular because the  
22 payments that you are describing that could be  
23 considered an award are described throughout the act as  
24 payments "without an award." Now, how the claimant can  
25 have been newly awarded benefits at the time the

1 employer makes a payment "without an award" I think  
2 defies the meaning of that word.

3 JUSTICE SCALIA: Where -- well, I wish you  
4 would submit the sections of the act that use it that  
5 way, that say compensation without an award.

6 MR. GILLELAN: Section 14(a) through (e)  
7 refers to compensation payments without an award.

8 JUSTICE SCALIA: Okay.

9 MR. GILLELAN: Those are the provisions.  
10 Section 14(a) and (b) directs those payments without an  
11 award.

12 JUSTICE GINSBURG: And the -- and the  
13 critical time, then -- I think, isn't it true that most  
14 compensation payments are the -- are as a result of  
15 voluntary action by the employer and not a proceeding?

16 MR. GILLELAN: That is true, yes.

17 JUSTICE GINSBURG: So then in those cases,  
18 when the employer says, okay, I will voluntarily make  
19 this compensation available, then the measuring --  
20 the -- the pay would be measured by the time the  
21 employer makes -- makes the compensation available,  
22 right?

23 MR. GILLELAN: I think not, because the --  
24 the statutory provision says it's the award that is  
25 determinative.

1 JUSTICE SCALIA: Well, it's --

2 JUSTICE GINSBURG: But there's no award.

3 MR. GILLELAN: But there can be an award. I  
4 think that's the critical --

5 JUSTICE GINSBURG: But we have -- what is --  
6 I mean, it can be. But here's a person who has been  
7 injured and gets compensation without having to bring  
8 any legal proceeding for it. What is the weekly -- the  
9 measure then? It can't be an award, the date of the  
10 award, because there is no award. So what is it?

11 MR. GILLELAN: The employer that wants to  
12 lock in this year's maximum rate and not have his  
13 liability progress above that simply needs to have an  
14 award entered.

15 JUSTICE SCALIA: No, he doesn't. No, he  
16 doesn't. He can just begin payment. The -- (c), which  
17 is the section we are talking about here, doesn't just  
18 provide for newly awarded compensation. It also says  
19 "survivors currently receiving compensation for  
20 permanent total disability or death benefits."

21 "Currently receiving." Now, does that mean  
22 it has to have been decreed by the agency? I don't  
23 think so.

24 MR. GILLELAN: That provision, which -- that  
25 clause --

1 JUSTICE SCALIA: That clause.

2 MR. GILLELAN: -- that separate clause,  
3 which is not in this case, because --

4 JUSTICE SCALIA: I understand. But it --  
5 but it applies to the question, it seems to me, that  
6 Justice Ginsburg asked, doesn't it?

7 MR. GILLELAN: No, I think not.

8 JUSTICE SCALIA: No?

9 MR. GILLELAN: The function of that clause  
10 is that in permanent total and death cases, because  
11 there is an annual escalator provision, whatever your  
12 rate is this year going to go up. If it's permanent  
13 total or death case, it is going to go up each October  
14 1st by the increase in the national average wage.

15 JUSTICE SCALIA: But only if you have been  
16 receiving compensation.

17 MR. GILLELAN: If you -- if --

18 JUSTICE SCALIA: Okay? If neither the  
19 employment -- if neither the employer gives you the  
20 compensation voluntarily nor as you -- as you contend,  
21 there has been an award by the agency, you are out; (c)  
22 doesn't apply. Right?

23 MR. GILLELAN: I wouldn't say (c) doesn't  
24 apply, no. I think --

25 JUSTICE SCALIA: How else would it apply?

1 You are either receiving compensation, which I would  
2 understand to mean receiving it from the employer or by  
3 reason of an award, or else you have been newly awarded  
4 compensation, which I guess means it hasn't yet been  
5 paid, but -- but you have the award in your pocket.

6 MR. GILLELAN: Well, the -- the function of  
7 that separate clause is for cases in which an award has  
8 been entered of death benefits or permanent total  
9 disability benefits, and everything up to that point is  
10 governed by the maximum that is in effect at the time of  
11 that --

12 JUSTICE SCALIA: It doesn't say that,  
13 counsel. It says "survivors currently receiving  
14 compensation."

15 It doesn't say by virtue of an award. It  
16 says "receiving compensation." So if the employer is  
17 paying it voluntarily, you are in there. And then it  
18 goes on and it contrasts with receiving compensation  
19 those newly awarded compensation. You are not yet  
20 receiving it, but you have been awarded it.

21 MR. GILLELAN: Well, Mr. Roberts did not  
22 fall within the currently receiving compensation --

23 JUSTICE SCALIA: I understand that. But I'm  
24 just trying to make sense out of the provision. And it  
25 doesn't seem to me to make any sense unless you read it



1 just the way I suggested.

2 MR. GILLELAN: Okay. I hope I can provide  
3 that sense. The function of that separate clause is  
4 that a claimant who has been awarded compensation at a  
5 given rate, which is the maximum at the time of the  
6 award, will continue to receive compensation --

7 JUSTICE SCALIA: It doesn't say that. It  
8 says nothing about an award. The last part talks about  
9 an award. It says "currently receiving compensation for  
10 permanent total disability or death benefits." And if  
11 you are receiving it from your employer, I don't know  
12 why that isn't covered by that. Why isn't it covered?

13 MR. GILLELAN: I can certainly see that  
14 those terms would appear to apply to that situation in  
15 which the employer is paying compensation for death or  
16 for permanent total disability. That wouldn't provide  
17 us for a maximum -- any applicable maximum.

18 JUSTICE SCALIA: I don't think it affects  
19 your case. It's just a matter of understanding what  
20 this provision is talking about.

21 MR. GILLELAN: Yes. And what I'm trying to  
22 say about the function of this clause is that a claimant  
23 who has been awarded compensation for permanent total  
24 disability -- let's assume the employer hasn't paid  
25 anything until the ALJ issues an award, and at the time

1 that award is issued the maximum is \$1,000 a week and  
2 the employer was -- the employee was making more than  
3 1500, so that maximum is the rate.

4 JUSTICE SCALIA: But if the employer has  
5 been paying voluntarily, you don't penalize the employee  
6 for not having an award, right? I mean he's in the same  
7 position; the employer has conceded the liability.

8 MR. GILLELAN: He certainly is not in the  
9 same position, no.

10 JUSTICE SOTOMAYOR: Counsel, would  
11 Justice Scalia's reading in your judgment -- accept his  
12 proposition that those currently receiving voluntary  
13 payments from the employer fall under subsection (c).  
14 Would his reading require the employer every year to  
15 recalculate the benefits to the maximum that's  
16 established that year?

17 MR. GILLELAN: Yes, it would. Yes, it  
18 would.

19 JUSTICE SOTOMAYOR: And that's why his  
20 reading --

21 MR. GILLELAN: And that is precisely the  
22 function of that clause.

23 JUSTICE SOTOMAYOR: The function of (b) is  
24 to set a maximum that will control all payments present  
25 and future.

1 MR. GILLELAN: Yes, yes, definitely.

2 JUSTICE SOTOMAYOR: And so if you read it  
3 the way he does, that maximum would change each year.

4 MR. GILLELAN: Yes. And for permanent total  
5 disability and death cases --

6 JUSTICE SCALIA: I don't understand why  
7 that's so only for employment -- for employer payments  
8 and not the case for awards. If that's so for the  
9 employer's payment, why isn't it so for awards that have  
10 been decreed? Why don't they change every year?

11 MR. GILLELAN: They do. If the award is for  
12 permanent total disability or for death, they do.

13 JUSTICE SCALIA: Okay, so then my reading  
14 makes perfect sense.

15 MR. GILLELAN: Yes, your reading does make  
16 perfect sense. And the function of that second -- the  
17 clause for those currently receiving compensation for  
18 permanent total or death, is that even when the maximum  
19 continues to go up after the date of an award that new  
20 maximum is the applicable one for the continuing period  
21 of disability or survivorship.

22 CHIEF JUSTICE ROBERTS: When -- one of the  
23 arguments on the other side that I thought made some  
24 sense was the idea that you should focus on a particular  
25 point in time when you are figuring out what the amount

1 of the award is going to be; that it doesn't make --  
2 that it's at least odd to say, well, we're going to  
3 calculate how much you're entitled to at this point, but  
4 in terms of the applicable maximum we are going to wait  
5 however long it takes and calculate that as of this  
6 point. Doesn't it make more sense to figure out the  
7 applicable numbers at the same point in time?

8 MR. GILLELAN: Marginally more sense,  
9 perhaps so. But that is an argument that should be  
10 addressed to Congress. Congress could easily have made  
11 section 6(c) turn on the time of injury. Instead they  
12 had provided very explicitly --

13 CHIEF JUSTICE ROBERTS: So if we think -- if  
14 we think the statute -- in other words, your argument,  
15 your response is that the statute is unambiguous and it  
16 can't be read in a more sensical way.

17 MR. GILLELAN: Yes. Yes.

18 CHIEF JUSTICE ROBERTS: Okay.

19 MR. GILLELAN: Yes, and that each use of the  
20 term "award," contrary to the Ninth Circuit's view, is  
21 consistent with that. That is, whenever Congress refers  
22 in this statute to an award or compensation being  
23 awarded, it is talking about the order making the award  
24 as its described in section 19(e).

25 JUSTICE SCALIA: You don't really have to

1 establish that, do you? All you have to establish is  
2 that there is no way in which newly awarded compensation  
3 means entitlement to compensation. That's all you have  
4 to establish.

5 MR. GILLELAN: That is exactly true.

6 JUSTICE SCALIA: You don't have to show that  
7 it's used consistently throughout, only that it's never  
8 used to mean entitlement to compensation.

9 MR. GILLELAN: That is exactly correct.

10 JUSTICE ALITO: Are you conceding in answer  
11 to these questions that your reading doesn't really make  
12 any sense, that's just what Congress -- that's what  
13 Congress did?

14 MR. GILLELAN: No, I hope I am not conceding  
15 that.

16 JUSTICE ALITO: Well, what sense does it  
17 make? Why should the ceiling depend on whether an  
18 employee is getting compensation voluntarily from the  
19 employer or as a result of a formal award? If you have  
20 two identical, identically situated employees and one is  
21 getting the compensation without an award and one is  
22 getting it with an award, as you understand the term  
23 "award," why -- what sense does it make to treat them  
24 differently?

25 MR. GILLELAN: I would say they certainly

1 are not identically situated. The claimant who has an  
2 award --

3 JUSTICE ALITO: They are identically  
4 situated in every respect except one. One has a formal  
5 award, one does not. What sense does it make to treat  
6 them differently?

7 MR. GILLELAN: There are serious  
8 consequences of the fact that one has an award and the  
9 other is being paid only without an award.

10 JUSTICE SCALIA: Counsel, if I understood  
11 your response to my prior line of questioning, you deny  
12 that they are treated differently. The one who is  
13 receiving compensation is treated the same, under the  
14 same provision. There are two parts to it: Survivors  
15 currently receiving compensation and survivors newly  
16 awarded compensation.

17 Those two classes are treated exactly the  
18 same. The only one that is treated differently is  
19 somebody who is neither being paid by the employer nor  
20 has yet received an award.

21 MR. GILLELAN: No. No.

22 JUSTICE SCALIA: No?

23 MR. GILLELAN: No, no.

24 The clause that depends on whether you are  
25 currently receiving only applies to permanent total

1 disability and death cases. In all other cases, the  
2 clause that says "newly awarded" is the only applicable  
3 provision.

4 JUSTICE SCALIA: I see. Partial disability,  
5 in other words.

6 MR. GILLELAN: Correct.

7 JUSTICE SCALIA: Okay.

8 MR. GILLELAN: And temporary total.  
9 Temporary total has -- the rates do not go up each year.

10 JUSTICE BREYER: Would you then go back -- I  
11 did have the same question Justice Alito asked and I  
12 would like to hear the answer. The answer has -- I will  
13 add one footnote, perhaps, which might make it a more  
14 complete answer, and that is that it makes very little  
15 sense to me when a worker becomes disabled on January 1,  
16 1990, for example, he is now disabled. And so we  
17 calculate what his wage was.

18 His wage was \$200 a week. And now we say,  
19 but that shouldn't exceed twice the average weekly wage,  
20 and we are not going to apply it to him. You are going  
21 to apply it to him at some random date. His wage that  
22 he is getting paid is figured out as of January 1, 1990.

23 MR. GILLELAN: Yes.

24 JUSTICE BREYER: But the maximum that it  
25 could be is figured out as of January 1, 1998, when he

1 finishes a proceeding.

2 Now, I just -- for both reasons, why would  
3 you distinguish and why would you get that result? For  
4 those two reasons it doesn't seem to make much sense to  
5 me, your reading of it, while theirs does make sense.  
6 Now, you explain why that is.

7 MR. GILLELAN: Okay. Okay. I think the  
8 point is to encourage the employer to get an award  
9 entered promptly, because that way they will lock in  
10 that early maximum rate or minimum rate. The minimum  
11 rate provision applies exactly the same way under  
12 section 6(c).

13 JUSTICE KAGAN: But I thought Congress  
14 wanted the system to operate so that people just did it  
15 voluntarily without an award.

16 MR. GILLELAN: Well, they want that to  
17 happen as often as possible, but the employer has the  
18 right in any case to file a notice with the Department  
19 of Labor saying, we do not believe the claimant is  
20 entitled to compensation.

21 JUSTICE SCALIA: Counsel, it really doesn't  
22 make a whole lot of sense. I mean, it seems to me you  
23 have to acknowledge that it would be a much better  
24 statute had it been written differently. And really  
25 your argument here is it's not up to us to revise the



1 inadequacies of a statute. I mean, your argument is you  
2 just can't read the language that way. And it provides  
3 a stupid result. And there are such things as stupid  
4 statutes and this is one of them, right?

5 MR. GILLELAN: I don't think it's stupid,  
6 but yes, my basic argument is --

7 JUSTICE BREYER: You think it is not stupid  
8 because you think it is a good idea to give a lot of  
9 work to the Department of Labor and that all the  
10 employers are going to do this voluntarily and there  
11 will never be a problem with it; all should be  
12 encouraged to go and get a certificate from the  
13 Department of Labor. All right. I will take that as  
14 something.

15 Now, why is it I can't read the statute the  
16 way that it seems to make somewhat more sense? I don't  
17 see any words here that stop me from reading it.

18 MR. GILLELAN: "Newly awarded compensation"  
19 are the critical words.

20 JUSTICE BREYER: Where exactly? You mean in  
21 (c)?

22 MR. GILLELAN: In (c), yes, 6(c).

23 JUSTICE BREYER: You just told me that just  
24 this had to do with permanent or total disability, and  
25 this is far --

1           MR. GILLELAN: No. Excuse me. The other  
2 clause of that provision, the one that says "currently  
3 receiving compensation," that one only applies to  
4 survivors and permanent totally disabled workers.

5           JUSTICE BREYER: Why don't they both? I  
6 mean, as I read it naturally, it says that -- we now  
7 have a special thing, you know, which these people are  
8 the dead ones and the widows are getting it and the  
9 permanently disabled people, and the -- this individual,  
10 and the secretary, the secretary or his delegate is  
11 going to calculate this thing all the time, and they've  
12 got a special thing here for -- for -- for permanent  
13 people, permanently disabled, and they are saying as to  
14 those people, we are giving them a break. They can't  
15 look for more work. They can't look for -- they are  
16 dead, for example, and they can't find other sources of  
17 income.

18           And so we say that, that if the average wage  
19 goes up and their wage was higher to begin with, we will  
20 raise it a bit. And that applies not only to the people  
21 who are just getting this for the first time in the  
22 relevant period; it also applies to all those who have  
23 been getting it. It applies to both groups. Well, that  
24 makes sense to me.

25           MR. GILLELAN: For permanent total

1 disability and death, yes.

2 JUSTICE BREYER: Right. So the whole thing  
3 applies just to the permanently disabled and the death  
4 things. What says it applies to anybody else?

5 MR. GILLELAN: No, the -- the clause --

6 JUSTICE BREYER: The whole thing. The  
7 whole -- the whole -- all of (c,) that's in my thing  
8 here that's seven lines. All of (c) applies to  
9 permanently disabled and those who died.

10 MR. GILLELAN: Well, that's certainly -- no  
11 one has put forward that construction, and that would  
12 mean that there is no maximum applicable to other  
13 categories of disability, like Mr. Roberts's disability.

14 JUSTICE BREYER: Oh, yes. Oh. I feel  
15 slightly like an Abbott and Costello movie, but I  
16 am getting --

17 JUSTICE SOTOMAYOR: Counsel, so what happens  
18 to your argument if we disagree with you that employers  
19 have a way to seek a compensation order? As I read the  
20 regulations, the only way they can do that is if the  
21 employee files a claim, and the employee's filing of the  
22 claim then sets the process in motion. I can't imagine  
23 that any employee, knowing that a future award could  
24 help them, would bother filing a claim to help the  
25 employer lock in his rate.

1 MR. GILLELAN: I think -- actually my  
2 experience, my universal experience with this statute,  
3 is that that is not a realistic view of what claimant's  
4 behavior is.

5 The critical difference is an award -- the  
6 entry of an award does not merely confirm that the  
7 employer is making payments; it requires it to continue  
8 making those payments until --

9 JUSTICE SOTOMAYOR: That's not my question.  
10 Most of your argument is premised on the -- I thought,  
11 that the employer could lock in his rate --

12 MR. GILLELAN: Yes.

13 JUSTICE SOTOMAYOR: -- by seeking an award.

14 MR. GILLELAN: Yes.

15 JUSTICE SOTOMAYOR: If I disagree with you  
16 that the Act doesn't provide for that and neither do the  
17 regulations, that only employees can seek awards, what  
18 happens to your argument?

19 MR. GILLELAN: Oh, I think -- well -- I have  
20 trouble accepting that hypothetical situation,  
21 because --

22 JUSTICE SOTOMAYOR: As I've studied it, I  
23 think that's the case. Assume that fact to be true,  
24 that employers have no regulatory or statutory right to  
25 seek an award. They can either stop paying and have the

1 employee make a claim or not.

2 How -- what does this do to your argument,  
3 if that's accurate?

4 MR. GILLELAN: Nothing. It simply requires  
5 the employer to induce the claimant to file a claim if  
6 it wants that award.

7 JUSTICE SOTOMAYOR: By stopping payment.

8 MR. GILLELAN: Yes.

9 JUSTICE SOTOMAYOR: So that destroys the  
10 whole voluntary payment aspect.

11 MR. GILLELAN: Well, they wouldn't --  
12 indeed, they wouldn't have to stop payment. They simply  
13 need to tell the claimant: If you don't file a claim,  
14 we are going to stop payments.

15 JUSTICE SOTOMAYOR: That's an odd statute.

16 JUSTICE BREYER: I see. Is your argument  
17 this now -- I'm sorry to be so slow. But that, look,  
18 there is a statute here that says compensation cannot  
19 exceed more than 200 percent of the annual or weekly  
20 wage, then in (3) it says how to calculate that  
21 particular number.

22 And then you guy over to (c) and (c) says  
23 that calculated number applies to those newly awarded  
24 compensation. And you're saying "newly awarded  
25 compensation" means somebody got it through an award,

1 not somebody got it automatically. And since somebody  
2 got it -- had to get it through an award or it wouldn't  
3 apply when you just get it because they pay for it, it  
4 just doesn't apply. You have to go get the award, and  
5 the word you are turning on is "newly awarded."

6 MR. GILLELAN: Yes.

7 JUSTICE BREYER: That's the argument?

8 MR. GILLELAN: Yes, it is.

9 JUSTICE BREYER: Like Abbott and Costello, I  
10 don't know what I'm talking about. But I do -- I do --  
11 I was, I was -- now I fully understand your argument.

12 JUSTICE SOTOMAYOR: Mr. Gillelan, could I  
13 just --

14 JUSTICE SCALIA: Counsel, could I ask you  
15 about another inconsistency in this section? We have  
16 gone over one, which I think is there. Isn't there a  
17 group left out of this thing, even under, even under the  
18 government's interpretation of it? What happens to  
19 people who are receiving compensation for temporary  
20 total disability or for partial disability? They  
21 don't -- they don't come under either one of those two  
22 categories, even under the government's interpretation,  
23 right?

24 MR. GILLELAN: No. I think under the  
25 government's interpretation, as under ours, they fall

1 under those --

2 JUSTICE SCALIA: No, they haven't gotten an  
3 award yet. They have not gotten an award yet and they  
4 are only partially disabled or have temporary permanent  
5 disability. They are not covered by (c), are they?

6 MR. GILLELAN: Well, they are covered by it,  
7 but before we know which year's maximum applies, an  
8 award --

9 JUSTICE SCALIA: Oh, that's right, but  
10 they -- but it doesn't take effect --

11 MR. GILLELAN: That's correct.

12 JUSTICE SCALIA: -- during that year.

13 MR. GILLELAN: That's correct.

14 JUSTICE SCALIA: Well, does that make any  
15 sense?

16 MR. GILLELAN: Yes --

17 JUSTICE SCALIA: No, it doesn't. But you  
18 say the statute doesn't make sense.

19 MR. GILLELAN: I think it does because it  
20 encourages the employer to have an award entered so that  
21 it will have the benefit of the current maximum rate and  
22 not next year's or the year's after or the year's after  
23 that.

24 JUSTICE KAGAN: All right --

25 JUSTICE SCALIA: That's not a serious --

1 CHIEF JUSTICE ROBERTS: Go ahead. You have  
2 been waiting the longest.

3 (Laughter.)

4 JUSTICE KAGAN: I think the way the argument  
5 has gone so far is that we've all been saying this can't  
6 make sense, and you have been saying, as you have every  
7 right to say, yes, but this is what the statute says  
8 based on the "newly awarded" language.

9 But that does assume that "newly awarded"  
10 can't mean an entitlement. And then you run up against  
11 some other statutory provisions where an award does seem  
12 to mean, not a formal compensation order, but instead an  
13 entitlement to funds. So 908(d)(1), it seems as though  
14 the word "award" means entitlement; 910(h)(1), it seems  
15 as though the word "award" means an entitlement; and  
16 933(b), which says "award in a compensation order,"  
17 suggests that awards can be made in a formal order or  
18 awards can be made differently because of an entitlement  
19 that is automatically paid.

20 So I guess there are three places that it  
21 seems to me your reading of the word, your limited  
22 reading of the phrase "newly awarded," runs into  
23 problems in those three ways, and I'm left then thinking  
24 we should do what makes sense.

25 MR. GILLELAN: I may have missed what the



1 third of those was. I have the --

2 JUSTICE KAGAN: 933(b), 908(c)(1) and  
3 910(h)(1).

4 MR. GILLELAN: Ah, okay. Um, yes, 9 -- the  
5 section '8(d)(1) that they are referring to refers to an  
6 award to an employee -- the unpaid portion of an award  
7 to an employee who dies before that award has been paid  
8 out. Their reading of "award" in that provision is  
9 contradicted by the subsequent paragraph of the same  
10 subsection, which says "an award may be made after the  
11 death of the injured employee."

12 It's 908(d)(3). Now that is impossible on  
13 their reading of "award" on the reading they give  
14 "award" on section '8(d)(1). No, what it means in  
15 '8(d)(1), as throughout the act, is an award. And if  
16 none has been entered while the claimant is still alive,  
17 it is entered after his death.

18 And the survivors under that provision take  
19 the rest of it that had not been paid before the death.  
20 Now, you have essentially the same analysis of those  
21 other provisions. Yes, in those other provisions as  
22 well, it does mean a compensation order. If you cut it  
23 loose from that statutory foundation, we get three or  
24 four different possible meanings that the Respondents  
25 try to put on it, and we are cut loose from anything.

1 JUSTICE SCALIA: Well, you're -- you're  
2 making your case harder than it has to be, it seems to  
3 me, by saying that it always means an award of  
4 compensation by the agency.

5 I -- I think in -- in '8(d), I don't think  
6 it means that, but it certainly means an amount due and  
7 not an entitlement. It means an amount, a specific  
8 amount due. And that explains its meaning elsewhere,  
9 but that's quite different from saying that it means  
10 entitlement.

11 MR. GILLELAN: No doubt it is, yes. And --  
12 and perhaps there may be some variation in the meaning  
13 in the other provisions. That's possible. But in  
14 section '6(d), we think it has to mean the entry of an  
15 award. That's the only definite event it could refer  
16 to.

17 JUSTICE SCALIA: Oh, I think that's true,  
18 but only because of the earlier portion of '6(c)  
19 which -- which covers all other payments that are not by  
20 virtue of an award, receiving compensation.

21 MR. GILLELAN: Yes. Right.

22 I would reserve what time I have left.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 MR. GILLELAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Palmore.

1 ORAL ARGUMENT OF JOSEPH R. PALMORE  
2 ON BEHALF OF THE FEDERAL RESPONDENT

3 MR. PALMORE: Mr. Chief Justice, and may it  
4 please the Court:

5 Petitioner's interpretation of section 906,  
6 which hinges entirely on the date of an administrative  
7 compensation order, renders that provision impossible to  
8 apply in the many cases expressly contemplated by the  
9 act in which there is no such order. That  
10 interpretation also creates arbitrary distinctions  
11 between beneficiaries' benefit levels based on  
12 administrative happenstance.

13 JUSTICE SCALIA: Your -- I'm sorry.

14 CHIEF JUSTICE ROBERTS: So if you're walking  
15 down the street, you're on a business enterprise, they  
16 haven't shoveled the snow, you slip and fall and you're  
17 hurt, you go home and say: Good news, I've been awarded  
18 damages?

19 MR. PALMORE: The statute provides for the  
20 award of damages, and I think this is -- this -- the key  
21 to this, understanding how this scheme works, is  
22 understanding section 914 and section 913. These are at  
23 page 17a of the appendix.

24 JUSTICE SCALIA: We're not talking about how  
25 the scheme works. Grant you that it makes a lot more

1 sense your way, but will you grant that it's not up to  
2 us to rewrite the statute?

3 MR. PALMORE: It's absolutely not up to  
4 you --

5 JUSTICE SCALIA: Okay.

6 MR. PALMORE: -- to rewrite the statute,  
7 Justice Scalia.

8 JUSTICE SCALIA: So what we're talking about  
9 is whether "awarded" in that provision can bear the  
10 meaning that you want to give it. Let's assume that  
11 Congress passes a -- a new statute providing for tax  
12 credits for -- for each child, okay? My wife gives  
13 birth to a child just before Christmas, and I say: Oh,  
14 goody; I've been awarded \$2,000. I wouldn't say that.  
15 That's not a normal use of the language.

16 MR. PALMORE: I think it's --

17 JUSTICE SCALIA: I am entitled to it under  
18 this statute. But when the event of having a child  
19 occurs, I don't say: "I've been awarded \$2,000." You  
20 might say it analogously. I mean, you know: Oh, hey,  
21 I've been awarded \$2,000. But that's analogous. And  
22 statutes are not written by analogy; they're written to  
23 say what they say.

24 And I don't know anybody that would use the  
25 term "awarded" the way you want it used. The Chief

1 Justice's example is another one: Oh, good, I've been  
2 awarded damages. You haven't been awarded damages.  
3 You're entitled to them.

4 MR. PALMORE: I think Justice Kagan  
5 highlighted three provisions where the statute does in  
6 fact use the word "award" to indicate a statutory  
7 entitlement.

8 JUSTICE SCALIA: Let's go through those.

9 MR. PALMORE: I'd be glad to, Justice  
10 Scalia.

11 JUSTICE SCALIA: And you -- you show me  
12 how -- I agree with you that they don't mean the entry  
13 of an award by the agency, but I don't agree with you  
14 that the only -- only reading you can give them is  
15 entitlement.

16 MR. PALMORE: Well, Justice -- to start  
17 with, section 933, which is at page 24a of the  
18 government appendix. This is one of the sections  
19 highlighted by Justice Kagan.

20 JUSTICE SCALIA: 933 of the gray brief?

21 MR. PALMORE: Of the gray brief. 933(b)  
22 says: "Acceptance of compensation under an award in a  
23 compensation order filed by the deputy commissioner will  
24 have certain consequences." That expressly  
25 contemplates -- this is page 24a, Justice Scalia.

1 Sorry.

2 JUSTICE SCALIA: I'm sorry. Give me a  
3 minute. Give me a minute.

4 MR. PALMORE: Okay.

5 JUSTICE SCALIA: The language is important,  
6 isn't it.

7 MR. PALMORE: Absolutely.

8 JUSTICE SCALIA: What page?

9 MR. PALMORE: Page 24a of the appendix to  
10 the gray brief.

11 JUSTICE SCALIA: Okay, got it.

12 MR. PALMORE: Okay.

13 JUSTICE SCALIA: And the language is?

14 MR. PALMORE: So the first sentence says:  
15 "Acceptance of compensation under an award in a  
16 compensation order" --

17 JUSTICE SCALIA: Right.

18 MR. PALMORE: -- "filed by the deputy  
19 commissioner shall have certain legal consequences" --

20 JUSTICE SCALIA: Right.

21 MR. PALMORE: -- that aren't important here.  
22 That sentence, even read by itself, suggests there can  
23 be an award that's not in a compensation order.

24 Moreover --

25 JUSTICE SCALIA: Oh, yes. Yes.

1 MR. PALMORE: -- the last sentence says:  
2 "For purposes of this subsection" -- not the purposes of  
3 the entire act -- "for purposes of this subsection, term  
4 'award' with respect to a compensation order means a  
5 formal order issued by the deputy commissioner and the  
6 administrative law judge."

7 JUSTICE SCALIA: That's -- that's true. And  
8 what that means is that it can be considered an award if  
9 you've gotten it from the employer voluntarily. That is  
10 still an award of compensation.

11 That's all that that last sentence proves.

12 MR. PALMORE: I think it contemplates -- it  
13 certainly precludes, I think, Petitioner --  
14 Petitioner's --

15 JUSTICE SCALIA: Oh, yes. Yes. I agree  
16 he's wrong.

17 (Laughter.)

18 MR. PALMORE: Well, the actual -- the actual  
19 receipt interpretation that Your Honor is advancing is  
20 not one that's been advanced in this case. It would  
21 have extraordinarily -- extraordinary practical  
22 difficulties and application would be really  
23 inconsistent.

24 JUSTICE SCALIA: No, no, no. I think he's  
25 persuaded me that in -- in the section we're talking

1 about, subsection (c), the only meaning left for "award"  
2 is an award by the agency, because --

3 MR. PALMORE: Well, I'd like to try -- I'd  
4 like to try to convince you otherwise.

5 JUSTICE SCALIA: But -- but you have to show  
6 me one other provision at least where the only meaning  
7 you can give "award" is entitlement to money.

8 MR. PALMORE: Well, I think section  
9 910(h)(1), another provision cited by Justice Kagan, is  
10 another example.

11 JUSTICE SCALIA: (H)(1)?

12 MR. PALMORE: (H)(1).

13 JUSTICE SCALIA: "Upward adjustments to" --

14 MR. PALMORE: At 15a.

15 JUSTICE SCALIA: -- "compensation to" --

16 MR. PALMORE: Right. This is a very  
17 complicated provision, but what's important to note here  
18 is that Congress made -- this was Congress's attempt to  
19 provide additional benefits to beneficiaries whose  
20 disabilities commenced before 1972.

21 JUSTICE SCALIA: Right.

22 MR. PALMORE: They make a critical --

23 JUSTICE SOTOMAYOR: What page are you on?

24 MR. PALMORE: I'm sorry. Page 15a of the  
25 appendix to the gray brief.



1           The specifics aren't as important as the use  
2 of the phrase, and it's one, two three, four, five lines  
3 from the bottom, "or his survivor was awarded  
4 compensation as the result of death." So it makes a key  
5 determinant for figuring out how these adjustments are  
6 going to be made whether someone was awarded  
7 compensation prior to October 27th, 1972. There's no  
8 indication here, and it would make no sense to suggest,  
9 that Congress meant to distinguish between people who  
10 had a formal compensation order and those who didn't.

11           I think -- but if I could go back to  
12 section --

13           JUSTICE SOTOMAYOR: And his answer to that  
14 was -- his answer to that was that the provision also  
15 permits an entry after someone -- of an order after  
16 someone dies.

17           MR. PALMORE: That's his answer on some of  
18 the other provisions --

19           JUSTICE SOTOMAYOR: So it's -- the  
20 incongruity is taken care of by the act directly.

21           MR. PALMORE: Right. But here, here there'd  
22 be no reason for someone to go in and get a compensation  
23 order, because these are long-past disabilities, and  
24 Congress was simply creating a rule for how to true-up  
25 these past beneficiaries and provide them additional

1 benefits.

2 But I think if you --

3 JUSTICE SCALIA: What -- what does "awarded  
4 compensation at less than the maximum rate" mean? I'm  
5 not sure what that refers to.

6 MR. PALMORE: There was an old maximum.  
7 Prior to 1972, there was a \$70 maximum.

8 JUSTICE SCALIA: Right.

9 MR. PALMORE: Okay. So if someone --

10 JUSTICE SCALIA: Aren't you entitled to get  
11 the maximum? No?

12 MR. PALMORE: Yes. But some people --  
13 two-thirds of their average weekly wage resulted in a  
14 figure below the maximum, right. So for those people,  
15 what section 910(h)(1) did was said if you were awarded  
16 compensation at less than the prior maximum, you were  
17 going to get an inflation adjustment.

18 JUSTICE SCALIA: I got you.

19 MR. PALMORE: For everyone else who was  
20 already at the maximum, they got a new,  
21 statutorily-created time of injury, which was itself  
22 significant that Congress went -- used that route.

23 But there's no indication --

24 JUSTICE SCALIA: You're right, it doesn't  
25 make sense.

1 MR. PALMORE: It doesn't make sense under  
2 Petitioner's reading. I think it does make sense under  
3 our reading.

4 JUSTICE SCALIA: Yes, yes.

5 MR. PALMORE: Okay?

6 And if you go to page 17a, I think these are  
7 the key provisions for understanding how section 906  
8 works in the statutory scheme. Section 914, at the  
9 bottom of the page -- 17a to the government's brief --  
10 provides that: "Employers must pay compensation without  
11 a compensation order promptly, as soon as they have  
12 notice of an injury."

13 (B), which is on the next page, 18a, says  
14 that the first payment has to come in 14 days, within  
15 14 days of notice of the injury, "unless the employer  
16 controverts liability." So if I'm an employer and I  
17 have an employee who's injured, I've got to get out my  
18 checkbook on day 14 and start writing checks.

19 I need to know what number to fill in.

20 CHIEF JUSTICE ROBERTS: But you're doing  
21 that -- you're doing that without an award.

22 MR. PALMORE: Correct.

23 CHIEF JUSTICE ROBERTS: So how can you say  
24 what the employer pays should be considered an award if  
25 it's not an award?

1 MR. PALMORE: Because if you don't consider  
2 that, then the -- the statutory provision is impossible  
3 to apply. Because then it's unclear -- and I haven't  
4 heard Petitioner answer what the statutory maximum is --  
5 if that employee who gets his first check after 14 days  
6 has not been newly awarded compensation --

7 JUSTICE KENNEDY: Well, then we're back --  
8 we're back into (b) overrides (a). You -- you are  
9 saying that (a) would be interpreted in favor of the  
10 Petitioner but for (b).

11 MR. PALMORE: No, I'm saying that --

12 JUSTICE KENNEDY: Because I agree with the  
13 Chief Justice. With -- without an award it -- it seems  
14 to me it tends to help the Petitioner.

15 MR. PALMORE: That use of "award" clearly  
16 means compensation order, and I'm not here to suggest  
17 that the -- that the statute never uses the word award  
18 to mean compensation order. Often it does, and in this  
19 case that provision does. But the larger point is that  
20 that employer --

21 JUSTICE KENNEDY: Oh, I see.

22 MR. PALMORE: -- has to start payments in  
23 14 days, and he has to know what statutory maximum  
24 applies. Under Petitioner's view of the statute, there  
25 is no answer to that question, because that employee has

1 not been newly awarded compensation, so section  
2 906(c) --

3 JUSTICE KAGAN: And in what percentage of  
4 the cases are we in that world?

5 MR. PALMORE: It's a -- in a substantial  
6 majority of cases no claim is ever filed, Justice Kagan.  
7 Page 38 of the red brief points to legislative history  
8 before Congress in 1972 which demonstrated that, and  
9 that remains the case. This is a workers'  
10 compensation -- team -- that encourages employers to  
11 pay, which without administrative compulsion. It's  
12 supposed to be simple to apply. The employer is  
13 supposed to know how much to write that check for at the  
14 time he writes that first check, after the 14 days.

15 JUSTICE GINSBURG: But your reading doesn't  
16 encourage employers to pay, because they can stop --  
17 just by saying they contest, right?

18 MR. PALMORE: Absolutely. They have a  
19 statutory right to controvert.

20 JUSTICE GINSBURG: So -- so your reading  
21 leads I think to protraction. And they get that date of  
22 injury rule no matter how long they string it out under  
23 your reading. If you read -- what is the magic  
24 phrase -- newly --

25 MR. PALMORE: Newly awarded compensation.

1 JUSTICE GINSBURG: You can say, well, that  
2 means in the case of the employer who pays promptly,  
3 pays immediately and continues to pay voluntarily, that  
4 the compensation is required when the employer starts  
5 paying voluntarily. But if the employer stops paying,  
6 then the compensation is newly awarded when there is an  
7 award.

8 So I don't see why -- what kind of problems  
9 this statute would have if we say newly awarded could  
10 mean awarded by the statute, which would be newly  
11 awarded when you are injured. But it can also mean  
12 compensation ordered by an award. So, you have the  
13 employer who pays promptly can lock in that early date,  
14 but if he doesn't pay promptly, the -- then the ceiling  
15 is going to go up till the time the award is entered.

16 What is wrong with that reading?

17 MR. PALMORE: It's again a reading that  
18 hasn't been advanced in this case but I understand Your  
19 Honor's question and Your Honor's point. I think that  
20 reading of it would be very difficult to apply because  
21 there may be many cases when the employer will write one  
22 or two checks and then stop. There made be cases in  
23 which the employer will write a check for the wrong  
24 amount; there will later be a dispute about what the  
25 proper benefit level would be.

1           So I think you'd develop a whole new body of  
2 case law and controversy about what it meant for the  
3 employer to have paid --

4           CHIEF JUSTICE ROBERTS: But those aren't  
5 going to be the typical cases, I think. You say there  
6 may be cases and I suppose there may be. I assume what  
7 happens -- employers don't just write checks. They say  
8 this is how we calculate what we owe you. And it is  
9 based on the maximum of this year, not any future ones,  
10 and if the employee says no, no, no; I have a right to  
11 get the -- then the employer will say well, okay, I  
12 either agree with that or not, but you don't get a  
13 check.

14           MR. PALMORE: Well, the -- the employer will  
15 need to protect itself by writing that check unless it's  
16 going to controvert liability. Justice Ginsburg pointed  
17 to one of Petitioner's arguments that this provides an  
18 incentive for employers not to controvert liability when  
19 they don't have a good faith basis for doing so, but  
20 section 938 of the act provides for attorneys fees in  
21 that situation so there is already a remedy for that  
22 kind of situation.

23           CHIEF JUSTICE ROBERTS: I -- I understand  
24 the amounts at issue here. What is the usual amount  
25 that is at stake in this sort of case? We are talking

1 about the concerns, I guess on both -- about  
2 gamesmanship, but how much difference are we talking  
3 about?

4 MR. PALMORE: Well, the --

5 CHIEF JUSTICE ROBERTS: I don't know; maybe  
6 you don't have statistics, on an average.

7 MR. PALMORE: Well, I can give you this case  
8 as an -- as an illustration. So in this case the  
9 Petitioner's disability began in 2002, so our view is  
10 that that was when he was initially awarded compensation  
11 so the 2002 maximum of \$966 applies. Petitioner's view  
12 is that because he received a formal compensation order  
13 in 2007, the 2007 maximum applies, this 1,114, so it can  
14 make a considerable difference.

15 I think, though, that Petitioner  
16 recognizes --

17 CHIEF JUSTICE ROBERTS: The consequence -- I  
18 mean, there is a time value of money, too. The  
19 consequence of the employee saying, I'm going to wait 5  
20 years, because I think the maximum is going to be a lot  
21 higher is that he doesn't get anything in the meantime,  
22 right?

23 MR. PALMORE: Well, that's -- that's right.

24 CHIEF JUSTICE ROBERTS: It's reasonable for  
25 an employer to say, okay, if you want to wait, I'll



1 wait.

2 MR. PALMORE: That's right. The larger  
3 point though is that in many cases in which compensation  
4 is paid without compulsion of a compensation order, an  
5 employee never files a claim. Section 913 expressly  
6 contemplates that by saying that an employee has 1 year  
7 in which to file a claim from an injury unless he has  
8 been receiving payments, in which the time runs from the  
9 last payment received.

10 JUSTICE BREYER: What happens, just for my  
11 technical knowledge here, the -- the employee suffers  
12 partial disability on February 1. He then doesn't  
13 notify the employer until, let's say, February 10, and  
14 then the employer waits for a week or so, and then  
15 begins to pay.

16 Now is the employer supposed to calculate  
17 the -- the weekly wage that he's paying on in the week  
18 February 1 to February 10 -- or 3 days he puts it aside.  
19 But -- the first week? Or does he do it on the first  
20 week he got notice? How is that -- how does that work?

21 MR. PALMORE: Well, he needs to provide --  
22 he needs to make a payment within 14 days.

23 JUSTICE BREYER: That's right. But I'm  
24 saying he has to write the check now.

25 MR. PALMORE: Right.

1 JUSTICE BREYER: And the wage could have  
2 changed in those few weeks.

3 MR. PALMORE: It's from the --

4 JUSTICE BREYER: The first week he didn't  
5 get the notice, then the second week he did get the  
6 notice. Which week does he calculate the payment on?

7 MR. PALMORE: From when the disability  
8 commenced.

9 JUSTICE BREYER: All right.

10 MR. PALMORE: But you're not --

11 JUSTICE BREYER: Then we can't -- we cannot  
12 read this thing "award" to mean award by the employer.  
13 We can't read it to mean award by the -- by the  
14 government, in your view. We have to mean it to mean  
15 the time that he became entitled to some money?

16 MR. PALMORE: That is our submission,  
17 Justice Breyer.

18 JUSTICE BREYER: And the tough thing is  
19 saying, well, that that's an award. That's what this  
20 case turns on.

21 MR. PALMORE: Well, as we've -- as I was  
22 discussing earlier we -- sometimes do awards that way.

23 JUSTICE BREYER: And what you pointed to in  
24 the statute is you pointed to some situations which say  
25 we have situation 3 and 4, and they are not present

1 here. But in situation 3 or 4, award does mean this.

2 MR. PALMORE: I think --

3 JUSTICE BREYER: All right. That --

4 MR. PALMORE: Right. I think if I can show  
5 you -- if I can show you -- there are some cases --

6 JUSTICE BREYER: You don't have another  
7 example of a -- of a situation where award did mean --  
8 so you are saying there are some others where award  
9 doesn't mean, okay.

10 MR. PALMORE: Well, I think there are --

11 JUSTICE BREYER: But is there anything --  
12 what is the most analogous thing you can find anywhere  
13 where award has referred to the time that a person  
14 became entitled to a thing, prior to the time anyone  
15 was -- became obliged to give him some money?

16 MR. PALMORE: Well, I think --

17 JUSTICE BREYER: Even if that time first was  
18 the period for -- way for calculating the money?

19 MR. PALMORE: I think 910(h)(1) is that  
20 example --

21 JUSTICE BREYER: 910(h)(1).

22 MR. PALMORE: And I hesitate to go back into  
23 the weeds of that provision.

24 JUSTICE BREYER: No, no, don't do it again.

25 (Laughter.)

1                   MR. PALMORE: But the first sentence says --  
2 it talks about those who were entitled to total  
3 permanent disability or death, which commenced, so it  
4 talks about commencement of entitlement.

5                   JUSTICE BREYER: It says awarded was awarded  
6 compensation.

7                   MR. PALMORE: And then later it uses awarded  
8 compensation. If I could go back quickly to the  
9 claim --

10                  JUSTICE BREYER: Yes, okay.

11                  JUSTICE SOTOMAYOR: Your brief -- your brief  
12 seem to use the newly awarded compensation, your meaning  
13 of it, at the time of injury, at the time of disability,  
14 the time of entitlement to compensation; and it seems to  
15 use those terms interchangeably. What term are you  
16 settling on and why?

17                  MR. PALMORE: Okay. I think we address this  
18 in footnote 9 of our brief. It's the commencement of  
19 entitlement to disability benefits, which is almost  
20 always going to be when disability itself commences.  
21 Petitioner has pointed out that there is an  
22 idiosyncratic set of cases in which, if a disability  
23 lasts more than 3 days but fewer than 14, you are not  
24 compensated for those first 3 days. So under that  
25 unusual it would be day 4, but the employer who writes

1 that check at day 14 is going to know. That's -- that's  
2 the --

3 JUSTICE BREYER: I mean, you can do it. You  
4 can say it's the time that the statute awards him the  
5 compensation. That's the English language.

6 MR. PALMORE: That's -- that's correct,  
7 Justice -- Justice Breyer. And I think that --

8 JUSTICE BREYER: And it's the statute that  
9 is doing the awarding.

10 MR. PALMORE: To make his -- I think  
11 Petitioner has developed kind of a procedural  
12 work-around to the -- the problem created by his  
13 interpretation the statute, which is if he needs a  
14 compensation order in every case to make the scheme make  
15 sense, to get compensation order he needs a claim in  
16 every case. And as the colloquy before reflected, the  
17 way he can get a claim in every case, because in many  
18 cases the claims are not filed today, is that the  
19 employer must threaten the disabled employee to cut off  
20 benefits if that employee doesn't file a claim.

21 Threaten to controvert liability when that  
22 employer has no good faith basis for doing so. All to  
23 get the employee to file a claim that the claim -- that  
24 the employee doesn't think is necessary, to get a  
25 compensation order which serves no other purpose than to

1 trigger this maximum rate provision.

2 That is contrary to the way this statute is  
3 supposed to work. The statute is supposed to encourage  
4 amicable agreement between employers and employees to  
5 avoid administrative process and the gearing up of the  
6 administrative machinery wherever possible.

7 And Petitioners proffered solution to the  
8 problem of the absence of a compensation order in every  
9 case is contrary to that of the entire thrust of the  
10 Longshore Act as a workers' compensation scheme.

11 JUSTICE GINSBURG: And your answer to the  
12 problem of an employer protracting, so he doesn't have  
13 to pay sooner, he can wait till later is there would be  
14 no penalty as long as the employer says I am contesting,  
15 but you say the attorneys fees, is that --

16 MR. PALMORE: Attorneys' fees and interest,  
17 both of which are generally applicable remedies that  
18 apply to cases that don't implicate the statutory  
19 maximum or the statutory minimum. Petitioner's solution  
20 using his reading of the statute to deal with employer  
21 delays over-inclusive and under-inclusive.

22 It is over-inclusive because it's going to  
23 deal with cases in which there hasn't been delay by any  
24 responsibility by an employer, but there's been  
25 administrative delay, there's been the dispute. But

1 it's also under-inclusive in that it only deals with  
2 those small number of cases that deal with the statutory  
3 maximum or minimum.

4 CHIEF JUSTICE ROBERTS: Thank you  
5 Mr. Palmore.

6 We will have Mr. Keisler speak for a bit.  
7 Mr. Kiesler.

8 ORAL ARGUMENT OF PETER D. KIESLER  
9 ON BEHALF OF THE PRIVATE RESPONDENT

10 MR. KEISLER: Mr. Chief Justice and may it  
11 please the Court:

12 I would like to begin if I may by addressing  
13 Justice Scalia's and the Chief Justice's questions on  
14 whether the term award can bear the meaning that ascribe  
15 to it and then explain why, since it can bear that  
16 meaning, this is the only sensible interpretation of the  
17 act.

18 First, it is not uncommon, Your Honor, to  
19 use the term award to describe a benefit conferred by a  
20 statute. The dictionary definition is a benefit  
21 conferred. Your Honor, Justice Scalia used a  
22 formulation, what if a statute awards a tax credit.  
23 Well, the Court's decision in *New Energy Company v.*  
24 *Limbach* began an Ohio statute awards a tax credit to a  
25 certain producer of ethanol. I think even Your Honor

1 was the author of that decision. It is --

2 JUSTICE SCALIA: I agree with that. You can  
3 speak of the statute as awarding something. But when  
4 you use the phrase "newly awarded" you are not referring  
5 to the enactment of the statute. You are referring to  
6 the time at which the person qualifies under the  
7 statute. And I don't know any usage of that sort that a  
8 person -- well, you know, when my wife has a baby, "I  
9 have been awarded money." You haven't been awarded  
10 money.

11 MR. KEISLER: I think the party becomes  
12 newly awarded at the time that the party becomes  
13 disabled, and therefore there is an amount due under the  
14 statute. And --

15 JUSTICE SCALIA: Yes, that's what you say.  
16 But, I don't know any common usage that employs the  
17 term --

18 MR. KEISLER: But it is a usage within the  
19 Longshore Act elsewhere, as Mr. --

20 JUSTICE BREYER: But, about the business,  
21 was newly awarded the tax credit at the time they made  
22 the deduction.

23 MR. KEISLER: At the time they became  
24 qualified for what the statute required them to do to  
25 get the tax credit, yes. And that is how it is used in



1 910 (h)(1), as Justice Kagan said. It's how it's used  
2 in 908. And section 933, specifically provides  
3 Petitioner's definition of award, a formal compensation  
4 order, but says it is only for purposes of this  
5 subsection.

6 CHIEF JUSTICE ROBERTS: But that's not the  
7 way it is used in 914.

8 MR. KEISLER: That's correct. And that's  
9 why this is a case like Robinson v. Shell Oil, in which  
10 the word employer was used throughout Title VII in  
11 different ways. And what the court said is you then  
12 have to look at the context of the individual provision  
13 in which the word appears that you are construing to  
14 determine how the word is being used in that particular  
15 provision.

16 And here the most fundamental reason why it  
17 is an untenable construction of this act to rely on the  
18 date of a compensation order to determine the applicable  
19 maximum rate is that then the act would be silent as to  
20 the maximum rate in the vast majority of instances in  
21 which compensation is paid, because as Mr. Palmore said,  
22 in the vast majority of instances no claim is filed.

23 And as Justice Sotomayor pointed out, when  
24 no claim is filed, no compensation order will ever be  
25 issued. And that's not an accident. That is a function

1 of a very central feature of the act's design that  
2 Petitioner's interpretation is entirely at odds with.

3           The act is designed to enable compensation  
4 to be calculated precisely and as early as possible so  
5 the money can get into the employee's hands very quickly  
6 and with a minimum of instances in which the  
7 administrative machinery has to be invoked. That's why  
8 the norm is no compensation order. And so Petitioner's  
9 interpretation is counter to that in at least two  
10 respects.

11           It relies on the existence of a compensation  
12 order which in most instances won't and shouldn't issue,  
13 and would maximize, rather than minimize, the number of  
14 instances in which someone has to go and get an order to  
15 force compensation orders out of a system to make  
16 Petitioner's interpretation work even though everything  
17 is happening exactly as the Act says it should be. The  
18 employer is voluntarily paying exactly the amount that  
19 the employee says is due, and there is no need to get  
20 the agency involved.

21           CHIEF JUSTICE ROBERTS: But how much of a  
22 practical problem is this? I understand the amounts are  
23 here, but if it's five years, and apparently the  
24 employee was happy to wait five years to get an award.  
25 Normally if you are an employee and you are disabled,

1 and the employer says, well here's what we are going to  
2 give you, and it's based on the maximum of the latest we  
3 have.

4           You're not going to say: I'm going to wait;  
5 these wages are going to go up nationally, and I'm going  
6 to wait a year; maybe I'll wait for years because I  
7 think there's a trend on national average wages, and I'm  
8 going to cash in on that; I am going to be without money  
9 for the next four years and I am disabled but -- I mean,  
10 that doesn't sound to me to be a plausible situation.

11           MR. KEISLER: But if Your Honor thinks about  
12 the situation in which the employee is voluntarily  
13 receiving from the employer everything that the employee  
14 agrees is due. Then the question is, in that  
15 circumstance where the employer is doing everything  
16 right, what can the employer do to force out of the  
17 system a compensation order that will lock in the  
18 maximum rate? And Petitioner's solution to that problem  
19 evidences the problem with his position.

20           CHIEF JUSTICE ROBERTS: Well, no, I mean --  
21 apparently -- I don't know what the employers do, but  
22 usually in a situation like this, the employers have  
23 good lawyers and they write at the end of the check, you  
24 know: This is in full satisfaction of any claims under  
25 the -- the whatever.

1 MR. KEISLER: But there is no compensation  
2 order until that employee files a claim. And under  
3 Petitioner's interpretation, there would therefore be no  
4 knowable maximum rate. And Petitioner's solution to  
5 that problem, on page 16 of his reply brief, is to say  
6 that the employer should threaten a bad faith cutoff of  
7 funds. The employer should say: I will cut you off  
8 unless you file a claim. That is bad for everyone.

9 It's bad for the employee who has access to  
10 payments delayed; it's bad for the employer who  
11 apparently is being told that it must controvert  
12 liability in bad faith because the employer doesn't in  
13 fact disagree that the employee is entitled to liability  
14 or face a 10% penalty for cutting off the employee  
15 without a basis for controverting liability, and it's  
16 bad for the agency who suddenly has all these claims  
17 filed, all in a situation in which everything is working  
18 exactly as the Act intends.

19 JUSTICE SCALIA: Give me your example again  
20 of award used as -- a penalty?

21 MR. KEISLER: 910(8)(1).

22 JUSTICE SCALIA: No, no, no; not from the  
23 statute. You, you--

24 MR. KEISLER: New Energy Company v Limbach.  
25 It was a commerce clause case from, I think, 1989 in

1 which Your Honor began the opinion by saying, to  
2 describe a setup, an Ohio statute awards tax benefits  
3 to, and then describes the category of energy producers  
4 who could take advantage of the tax benefit. And I  
5 think those energy producers --

6 JUSTICE SCALIA: That wasn't -- you, you  
7 gave another example.

8 MR. KEISLER: Robinson v. Shell oil?

9 JUSTICE SCALIA: No, not a case.

10 MR. KEISLER: Okay.

11 JUSTICE SCALIA: Just an example you made up  
12 out of your fertile imagination which seemed to me  
13 pretty good. I forgot it. I will get it from the  
14 transcript.

15 MR. KEISLER: I think it's the employee who  
16 was receiving voluntary payments, and everything is  
17 proceeding the way the Act intended. But, the employer,  
18 in order to know what its maximum rate will be, in order  
19 not to be surprised 5 years hence by a maximum rate that  
20 only then can be known, has to force a compensation  
21 order out of the system. And the only way Petitioner  
22 says the employer can do that is by threatening a bad  
23 faith cutoff of funds.

24 Whether it happens frequently or  
25 infrequently, Mr. Chief Justice, I think an

1 interpretation that relies on a mechanism that is so  
2 obviously counter to the way the statute is supposed to  
3 function is, by virtue of that, an extremely unlikely  
4 and unnatural interpretation of the statute.

5 JUSTICE GINSBURG: What percentage of the  
6 compensation cases involve the statutory maximum?  
7 Because if your pay is less than the statutory maximum,  
8 this issue doesn't come up.

9 MR. KEISLER: In 1972, Congress was told  
10 that it would be about 10 percent. My understanding is  
11 since then it's grown so that I'm told that about 20  
12 percent of cases today require application of the  
13 maximum rate.

14 CHIEF JUSTICE ROBERTS: Does the maximum  
15 always go up?

16 MR. KEISLER: Ever since 1972, each year's  
17 maximum as calculated by the Secretary of Labor has been  
18 higher than the preceding year.

19 CHIEF JUSTICE ROBERTS: Theoretically, it  
20 can go down.

21 MR. KEISLER: Theoretically, it can. It  
22 never has.

23 If the Court has no further questions.

24 JUSTICE KAGAN: Mr. Keisler, if I could just  
25 go back to this language. If, according to Justice

1 Scalia's old opinion, the statute awards compensation at  
2 the time of disability, essentially what you would be  
3 saying is that an employer who becomes disabled in a  
4 certain year is awarded compensation at that time.

5 Is that right?

6 MR. KEISLER: That's right, Your Honor.

7 JUSTICE SCALIA: Yes. But I didn't say in  
8 that opinion that the -- the employer in -- in that  
9 cases -- or whoever it was that was entitled within the  
10 statute -- was "newly awarded" it. I agree the statute  
11 awards it, but when you say somebody is "newly awarded,"  
12 you're talking about an event at that time. And  
13 that's -- that's a different usage.

14 MR. KEISLER: I think the function of  
15 "newly" in this statute is something different,  
16 Justice Scalia. And that relates to the questions that  
17 Your Honor and Justice Breyer were asking about the  
18 relationship between the "currently receiving" clause  
19 and the final clause. I think the "currently receiving"  
20 clause, which relates to those with permanent total  
21 disability and death, is an adjunct to another provision  
22 of the act, section 19(f), which provides for a COLA, a  
23 cost of living increase every year for that narrow  
24 subset of the most disabled of employees.

25 They and they alone get that annual bump-up.

1           And so that "currently receiving" clause is  
2 written for that category to make sure that their  
3 bump-up isn't capped by a static maximum rate. The  
4 other part of the clause, "newly awarded compensation,"  
5 is about everybody else.

6           Now, I think the use of the word "newly"  
7 there is just to distinguish it from the "currently  
8 receiving" clause, which is escalating year by year.  
9 And those newly awarded compensation, meaning at one  
10 point, fixed in time -- only when you are "newly"  
11 awarded compensation are you then going to have your  
12 maximum rate fixed.

13           And then -- and both Petitioner and we  
14 agree -- whatever it's fixed at, whatever year, that  
15 stays the same for the duration of your collection of  
16 compensation.

17           If the Court has no further questions, I  
18 thank the Court.

19           CHIEF JUSTICE ROBERTS: Thank you, counsel.

20           Mr. Gillelan, if I got that right, you have  
21 2 minutes remaining.

22           REBUTTAL ARGUMENT OF JOSHUA T. GILLELAN, II,

23           ON BEHALF OF THE PETITIONER

24           JUSTICE SOTOMAYOR: Counsel, let's assume an  
25 employer pays, continues to pay over a period of time,



1 and the employee needs more money and goes in and says  
2 "you owe me more money; I'm going to make a claim." The  
3 board says, "no, he doesn't owe you more money. He was  
4 paying the right amount." And so you're not entitled to  
5 the 1200 you're asking for; you're only entitled to the  
6 1000 he was paying.

7 Under your view, if that happened 5 or 10  
8 years after the payments started, would the employer be  
9 liable for the higher average 10 years later?

10 MR. GILLELAN: Only, of course, if the  
11 employees' own wages at the time of the injury qualified  
12 for that.

13 JUSTICE SOTOMAYOR: Assuming it does, that  
14 the answer is yes?

15 MR. GILLELAN: Yes.

16 JUSTICE SOTOMAYOR: So what stops an  
17 employee from simply doing what I said? What stops an  
18 employee from kicking up his own maximum by -- whenever  
19 he chooses to do it, years and years later?

20 MR. GILLELAN: Well, I think in that  
21 situation, the claimant hasn't triggered that award. In  
22 fact, the claimant has triggered the maximum that's in  
23 effect at the time of that award that only makes -- it's  
24 an award only of what the employer has been paying.  
25 It's not a denial, as its characterized in the

1 government's brief. But it is -- an award only of what  
2 of the employer has been paying.

3 If the claimant did not bring it forward  
4 with that, and the employer let it go for still further  
5 years, then even a subsequent year's maximum would be  
6 the idea --

7 JUSTICE SOTOMAYOR: If we find any ambiguity  
8 in the statute, in the statutory language, would it then  
9 make more sense to adopt your meaning or the  
10 government's, given all of the factors that the  
11 government argues counsels in its favor?

12 MR. GILLELAN: I think each of those  
13 arguments is fallacious. They misdescribe the statute  
14 in their reasons why this is not a sensible provision.  
15 But even if there is an ambiguity --

16 JUSTICE SOTOMAYOR: Assume that --

17 MR. GILLELAN: Before -- before we lose,  
18 that -- the other possible meanings of "newly awarded"  
19 have got to include what they say the test is.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 The case is submitted.

22 (Whereupon, at 12:23 p.m., the case in the  
23 above-entitled matter was submitted.)

24

25

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