No. 03-71622

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY A. DILTS (Widow of Henry C. Dilts),

Petitioner,

v.

TODD SHIPYARDS CORPORATION, ET AL.,

Respondents.

On Petition for Review of an
Order of the Benefits Review Board

BRIEF FOR THE INTERVENOR UNITED STATES AND RESPONDENT DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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This brief is submitted in response to this Court's notice, by letter dated September 15, 2003, to the Attorney General, in accord with Fed. R. App. P. 44 and 28 U.S.C. 2403(a), that the case raises a constitutional challenge to a provision of a federal statute, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (LHWCA or "the Act"). The brief is submitted jointly by the United States, which intervened for the express purpose of defending the statute, and the Director, Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor, who is a party-respondent to the case, see Ingalls

Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248, 269 (1997), but who has not previously participated in it.[1] The United States and the Director take no position on any other issue raised in this case.

STATEMENT OF JURISDICTION

This appeal arises out of a claim for LHWCA benefits. The administrative law judge (ALJ) had jurisdiction to issue a decision on the claim (ER 213-227) pursuant to 33 U.S.C. 919(d).[2] The Benefits Review Board (the Board) had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. 921(b)(3). The appeal to the Board (ER 239-241) was filed on March 11, 2002, within 30 days of the ALJ's February 19, 2002 decision, and thus was timely under 33 U.S.C. 921(a).[3] The Board's March 12, 2003

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[1] The United States's November 19, 2003 unopposed motion to intervene is pending as of the filing of this brief. Respondent Director, OWCP, had previously informed the Court by letter of May 23, 2003, that he would not be participating in this appeal. After receiving this Court's notification of the constitutional issue and reviewing the parties' briefs, the Director decided to file this brief in conjunction with the United States.

[2] The designation "ER" refers to the Excerpts of Record filed with petitioner's opening brief, while "SER" refers to the Supplemental Excerpts of Record filed with respondents' brief.

[3] After the ALJ's decision, the claimant filed a motion under Fed. R. Civ. P. 60(a) and (b), requesting the ALJ to address certain letters that claimant had previously sent the ALJ and to amend the record to include those letters. ER 228-229. The filing of this motion, however, did not affect the finality of the original decision. See Fed. R. Civ. P. 60(b); Browder v. Director, Dep't of Corr., 434 U.S. 257, 263 n.7 (1978); 29 (continued . . .)

decision affirming the ALJ's denial of benefits (ER 282-288) is a final order disposing of all parties' claims.

This Court has jurisdiction to review the Board's decision pursuant to 33 U.S.C. 921(c). The April 7, 2003 petition for review (ER 289-290) was filed with this Court within 60 days of the Board's decision and is therefore timely under 33 U.S.C. 921(c).

STATEMENT OF THE ISSUES

Section 33(g) of the LHWCA, 33 U.S.C. 933(g), provides that, if a person entitled to compensation enters into a third-party settlement for less than the compensation to which she would be entitled under the Act, without the prior written approval of her employer, her rights to compensation and medical benefits under the Act are terminated. The questions presented are:

1. Does Section 33(g) unconstitutionally delegate legislative power by providing the employer with unfettered

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(. . . continued)
C.F.R. 18.1(a) (Federal Rules of Civil Procedure apply in ALJ proceedings in situations not provided for or controlled by ALJ rules of practice, or by statute or regulation); cf. 20 C.F.R. 802.206(a), (b) (only motions for reconsideration filed within ten days of the filing of the ALJ's decision suspend the time for filing a notice of appeal with the Board). Subsequently, on April 9, 2002, the ALJ issued an order modifying his decision to reflect that the motion and letters are part of the record. ER 242-243.

discretion to deny a claimant's request for approval of a third-party settlement?

2. Does Section 33(g) deprive claimant of property without due process of law by giving the employer the power to disapprove the claimant's third-party settlement?

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below

Henry Dilts filed a claim for benefits under the LHWCA alleging that he suffered from a work-related disability, lung cancer, arising out of his exposure to asbestos during his employment with Todd Shipyards Corporation. ER 1.[4] After his death, his widow, petitioner Shirley Dilts, filed a claim for death benefits under the Act. ER 10, 13. Mrs. Dilts's claim was referred to a Department of Labor administrative law judge (ALJ), who denied the claim on the ground that she had, without Todd's prior written approval, entered into third-party settlements for less than the amount of compensation to which she was entitled under the Act, and therefore under Section

[4] The claims in this case are also lodged against various insurance carriers who covered Todd's LHWCA liability during various periods. ER 213 (caption listing carriers). One of those insurers, Eagle Pacific Insurance Company, appears as a respondent in this Court and has filed a joint brief with Todd. Because the issues on appeal do not require separate discussion of the insurers, for convenience we refer only to Todd in this brief.

33(g) had forfeited any right to LHWCA benefits. ER 213-226; SER 212.

On Mrs. Dilts's appeal, the Benefits Review Board affirmed. ER 282-287. The Board upheld the ALJ's finding that Mrs. Dilts had entered into such settlements without Todd's prior approval and thus had relinquished any right to LHWCA compensation. The Board noted Mrs. Dilts's argument that Section 33(g) of the Act violated the due process clause because the provision gives employers the unfettered discretion to deny or ignore employees' requests for approval to settle with third parties, but concluded that because Mrs. Dilts had not sought Todd's approval before entering into the settlements, the constitutional issue she raised is not presented by the facts of this case. ER 286-287.

On April 17, 2003, Mrs. Dilts filed this timely petition for review of the Board's decision. ER 289-290.

B. Statement of the facts

1. Statutory framework

The LHWCA requires covered employers to provide workers' compensation benefits when a covered employee is disabled or dies from a work-related injury. See 33 U.S.C. 903, 907, 908, 909. Section 33(a) of the LHWCA addresses the rights of a "person entitled to . . . compensation" to sue a third party for damages for such disability or death. 33 U.S.C. 933(a).

Section 33(a) provides that a person entitled to compensation is not required to elect between receiving compensation under the Act and pursuing a tort action against a third party. 33 U.S.C. 933(a). Section 33(b) provides that acceptance of compensation under an award assigns the employee's right to sue to the employer but gives that right back to the employee if the employer does not sue within 90 days. 33 U.S.C. 933(b). Section 33(f) provides that, if the employee brings a third-party suit, the employer is generally required to pay compensation to the extent that it exceeds the employee's net third-party recovery. 33 U.S.C. 933(f).

Section 33(g), the provision at issue in this appeal, applies where the claimant settles with a third party for less than the amount the LHWCA would require the employer to provide. It states, in relevant part,

> (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 chapter, the employer shall be liable for compensation as determined under subsection (f) of this section 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.

> (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 chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. 933(g)(1), (2).[5]

2. Facts of this case

Henry Dilts worked as a boilermaker for Todd Shipyards from 1965 to 1994, where he was allegedly exposed to asbestos. ER 214, 283. He subsequently developed lung cancer and in February 1999 filed a claim for LHWCA benefits, alleging that his cancer and resulting disability were caused by his work-related exposure to asbestos. ER 1, 283.

Mr. Dilts died in July 1999, and his widow, Shirley Dilts, then filed a LHWCA claim for death benefits. ER 10, 13, 214; 33 U.S.C. 909. She also joined actions against a number of asbestos manufacturers in which she sought damages for her husband's disability and death. ER 216, 219, 283. Between June 2000 and June 2001, Mrs. Dilts settled claims against a number of the third-party defendants and received payments from them. ER 75-142, 284-285.

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[5] The full text of 33 U.S.C. 933 is reprinted as an Addendum to this brief.

Mrs. Dilts's LHWCA claim was referred to a hearing before a Department of Labor ALJ. During the hearing on June 19, 2001, she testified that she had previously received and cashed checks from several asbestos manufacturers in settlement of her claims. See ER 215-216, 285. Todd then moved for summary decision, arguing that Mrs. Dilts's claim was barred by Sections 33(g)(1) and (2) because she had failed to obtain Todd's prior written approval for the settlements, as Section 33(g) requires. ER 143-156.

After the hearing but shortly before Todd filed its motion for summary decision, Mrs. Dilts's counsel sent Todd a request for Todd's approval of the settlements, accompanied by letters obtained from several asbestos manufacturers stating that the settlements were "pending the employer's approval." ER 230-233. The letters, however, were dated mid-July 2001, well after the settlements had been completed and Mrs. Dilts had cashed the settlement checks. ER 223, 231-233. In addition, the releases that Mrs. Dilts had signed at the time of the settlements' execution did not state that the settlements were conditioned upon her employer's approval. ER 223; see also ER 75-142.

3. Decisions below

a. The ALJ granted Todd's motion for summary decision, ruling that Mrs. Dilts was a person entitled to compensation within the meaning of Section 33(g) and that she

had settled claims with third-party defendants without Todd's prior written approval. ER 223-225; SER 212. The ALJ rejected claimant's argument, based on the July 2001 letters from non-bankrupt third-party defendants, that Section 33(g)'s forfeiture provision did not apply because the third-party settlements were conditioned on Todd's approval. The ALJ found that Mrs. Dilts had cashed checks and signed releases before then that "ma[d]e no mention" of such a condition. ER 223. Thus, the ALJ concluded that "claimant has made settlements with solvent third party defendants and pocketed the net receipts, without notice to Todd" and without securing its approval. Ibid.; SER 212.[6]

The ALJ also found that the amount of the third-party settlements was less than the amount to which Mrs. Dilts would be entitled under the LHWCA. SER 212. He therefore concluded

[6] Mrs. Dilts argued that there was no "settlement" with several third-party defendants because their payments were made pursuant to court orders in bankruptcy proceedings, and Todd appears to have conceded this point. ER 223; see generally Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 482 (1992) (employer's written approval not required under Section 33(g) where claimant "obtains a judgment, rather than a settlement, against a third party"). The ALJ agreed and declined to consider payments received from several bankrupt manufacturers. The ALJ found, however, that "the employer/carrier's exhibits and the testimony of the claimant clearly show[ed] that Mrs. Dilt's [sic] [also] cashed checks from settlements with third party defendants who were not in bankruptcy," and therefore Section 33(g)'s forfeiture provision applied. ER 223.

that Mrs. Dilts's claim for LHWCA benefits was barred by Section 33(g). ER 225; SER 212.

b. The Board affirmed the ALJ's decision. ER 282-287. The Board rejected Mrs. Dilts's argument that Section 33(g) did not apply because Todd waived the forfeiture provision by failing to respond to her August 2001 request for approval. The Board distinguished cases in which a waiver had been found because the LHWCA employer had participated in the third-party suits and joined in the settlement, noting that in this case, by contrast, Todd was unaware of the settlements until claimant testified at the ALJ hearing. ER 285. The Board also ruled that the ALJ properly found that Mrs. Dilts settled her third-party suits before she requested Todd's approval and that the settlements were not conditioned on such approval. Ibid.

The Board rejected as well claimant's argument that Section 33(g)'s forfeiture bar did not apply because Todd was not prejudiced by the settlements. ER 285. The Board concluded that Section 33(g)(1), which is intended to prevent claimant from bargaining away funds to which the employer may be entitled, contains no requirement that the employer demonstrate

prejudice, as by showing that it could have obtained a higher recovery from the third party. Ibid.[7]

Finally, the Board concluded that it need not address claimant's constitutional challenge to Section 33(g). The Board noted that Mrs. Dilts had not "sought [the] employer's written approval prior to entering into the third-party settlements," but instead had first informed the employer of the settlements after they were executed and claimant had received the proceeds. ER 286-287. The Board concluded that Mrs. Dilts's argument that Section 33(g) violates due process because it permits "employers to deny or ignore requests for approval of third-party settlements" is thus "not presented by the facts of this case." ER 286, 287 (emphasis supplied). Rather, the Board concluded, "the claimant's entitlement to benefits under the Act is forfeited only because she did not follow the requirements of . . . Section 33(g)." ER 287.[8] The Board accordingly affirmed the ALJ's decision denying benefits.

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[7] The Board, like the ALJ, also deemed it insignificant that some of the settlement proceeds claimant received were from bankrupt defendants, and arguably not part of a "settlement," since other proceeds were obtained from "non-bankrupt" companies and thus were clearly part of a settlement. ER 285-286; see note 6, supra.

[8] The Board also suggested that the claimant might not be able to show that "state action" was involved. ER 287 n.5.

SUMMARY OF ARGUMENT

Sections 33(g)(1) and (2) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1), (2), provide that a person entitled to compensation under the Act forfeits her right to such compensation if, without obtaining the prior written approval of her employer, she enters into a settlement with a third party for less than the amount that would be payable under the Act. Claimant challenges this provision, which has been integral to the Act since its enactment in 1927, on constitutional grounds, but her arguments are without merit.

Claimant argues that Section 33(g) unconstitutionally delegates legislative power to private parties because it gives unfettered discretion to employers to approve or disapprove third-party settlements reached by claimants, and that this denies due process. The Court should not address claimant's arguments, however. As the Benefits Review Board concluded, Mrs. Dilts did not seek her husband's employer's approval before entering into the third-party settlements. Due to this failure, the employer never faced the decision whether to approve the settlements. Thus, the questions whether the Constitution requires standards to govern the employer's decision and whether an employer's denial of approval of a settlement violates due process are not presented by the facts of the case.

In any event, claimant's arguments on the merits fail. The delegation argument is fatally flawed because Section 33(g) does not delegate legislative power, or any other governmental function, to a private party. Congress has not delegated the power to legislate, but has specified the rule of law that applies to effectuate the statutory purpose of balancing the claimant's entitlement to LHWCA benefits against the employer's right to a set-off from any third-party settlement -- i.e., that an employee forfeits LHWCA compensation if she enters into the third-party settlement, unless she obtains her employer's prior written approval. Because Congress could constitutionally require an election of remedies, it follows that permitting the claimant to pursue both remedies subject to the Section 33(g) conditions of notice and prior employer approval equally passes constitutional muster.

Moreover, the employer's decision whether to approve or disapprove the settlement -- like the claimant's own decision to enter into such a settlement -- simply triggers application of the statutorily-imposed rule and does not itself make law. Nor does the employer's decision constitute governmental action in any other way that would invoke the rarely-applied delegation principle. Thus, Section 33(g) is similar to numerous statutory provisions that contain a condition, based on private consent or waiver, to the application of a rule, none of which has been

found by the courts to be unlawful delegations of legislative power.

Even assuming claimant has a constitutionally protected property interest at stake in this litigation, claimant's further argument that Sections 33(g)(1) and (2) deprive her of property without due process of law is fundamentally misguided. Her contention that the employer-approval "requirement" of Section 33(g) violates due process in the context of multi-party asbestos litigation runs afoul of the proposition that economic legislation that does not burden fundamental rights must be upheld unless shown to be arbitrary or irrational. Section 33(g)'s employer-approval requirement is a component of a rational policy addressing the competing interests at stake in third-party litigation in the workers' compensation context. It protects an employer against the employee's accepting too little for her cause of action against a third party, which would deprive the employer of a proper set-off against LHWCA compensation and thus unfairly increase its compensation liability. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 482 (1992). Claimant's cursory argument that multi-party asbestos litigation is "unique" utterly fails to discharge her burden of showing that Section 33(g) is irrational; and, to the extent asbestos litigation poses unique concerns, those should be addressed to Congress, not this Court.

ARGUMENT

CLAIMANT'S CONSTITUTIONAL OBJECTIONS TO SECTION 33(g) OF THE LONGSHORE ACT ARE WITHOUT MERIT

A. Standard of review

The questions whether Sections 33(g)(1) and (2) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1) and (2), effect an unconstitutional delegation of legislative power or violate due process are issues of law reviewed de novo. Eunique v. Powell, 302 F.3d 971, 973 (9th Cir. 2002) ("'[t]he constitutionality of a statute is a question of law which we review de novo'") (citation omitted).

B. The Court should not address claimant's constitutional challenges to Section 33(g) because those issues are not raised by the facts of this case

Mrs. Dilts argues that Section 33(g) unconstitutionally delegates legislative power to private parties because it gives unfettered discretion to employers to approve or disapprove third-party settlements reached by claimants, and that it denies due process. As the Benefits Review Board concluded, however, Mrs. Dilts did not seek employer approval before entering into her settlements with third-party defendants. Thus, her objections that Section 33(g) does not provide standards for an employer's approval or disapproval and that an employer can deny or ignore a request for approval are not germane to this case. Accordingly, this Court should not address these issues.

It is well established that federal courts should decline to decide "any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied." Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997) (internal quotation marks and citations omitted) (emphasis added). Indeed, the Supreme Court has emphasized that this "doctrine of avoidance" applies to "the entire Federal Judiciary." Id. at 690. This Court accordingly has also stressed that a court "must start from a 'fundamental and longstanding principle of judicial restraint [that] requires [us to] avoid reaching constitutional questions in advance of the necessity of deciding them.'" United States v. Lamont, 330 F.3d 1249, 1251 (9th Cir. 2003) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988)); cf. Eunique, 302 F.3d at 973 ("'[a] court should invalidate [a] statutory provision only for the most compelling constitutional reasons'") (citation omitted).

Mrs. Dilts explicitly focuses her constitutional challenges to Sections 33(g)(1) and (2) on the statute's delegation of "legislative power" to the employer to approve or disapprove a claimant's third-party settlement, without any governing

"standards." See Pet. Br. 2 (Act "provides no standards for the exercise of [employers'/carriers'] discretion in approving or disapproving settlements"), 3 (delegation of "unfettered discretion" to employers/carriers and resulting absence of "judicial standards to determine whether [they] have abused th[eir] discretion"), 9-10, 17. She also complains more generally that an employer can deny or ignore a request for approval of such a settlement, and that such action amounts to a denial of due process. Id. at 3. Her constitutional challenges thus presume that a request for the employer's prior approval has been made and denied or ignored, and that she has consequently been injured by the employer's action.

Here, however, the ALJ found -- as the record shows and Mrs. Dilts effectively concedes -- that she never sought Todd's prior approval of any of the settlements she consummated with asbestos manufacturers. Without a request for Todd's prior approval and a denial thereof, the issues whether the Constitution requires standards to govern such a determination, and whether the request for approval can lawfully be denied or ignored, simply are not presented, and Mrs. Dilts has no standing to pursue them. Cf. Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 616-617 (1937) (upholding statute against argument that it fails to provide standards to be applied in granting license for sale of milk, but also stating that

plaintiffs challenging the law should apply for a license and obtain review if the license is denied before complaining of a danger that the license will be refused).

Mrs. Dilts's constitutional claims are thus limited to the circumstance where a request for the employer's prior approval has actually been made and denied. There was no such request or (a fortiori) denial here, and consequently it would be inappropriate for the court to entertain such arguments.[9]

C. Section 33(g) does not unlawfully delegate legislative power to private entities

Assuming Mrs. Dilts's constitutional arguments are properly before the Court, her assertion of an unlawful delegation of legislative power is plainly without merit. To begin with, the argument that there has been a standardless delegation of legislative power in violation of constitutional separation-of-powers principles ordinarily arises in the context of a delegation to an executive agency, rather than to a private entity. See Whitman v. American Trucking Ass'ns, 531 U.S. 457, 472-476 (2001); Panama Ref. Co. v. Ryan, 293 U.S. 388, 414-433 (1935).[10]

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[9] Mrs. Dilts's complaint that Todd ignored her post-settlement requests for approval raises factual and statutory issues, not constitutional ones.

[10] Article I, Section 1 of the Constitution vests "[a]ll legislative power herein granted . . . in a Congress of the (continued . . .)

In any event, while Mrs. Dilts is correct that Section 33(g)(1) provides no standards to guide an employer's approval or disapproval of a third-party settlement, and that such a determination is solely within the employer's discretion, her "unlawful delegation" argument fails because Section 33(g) effects no delegation of a legislative power, or, for that matter, any governmental function.

The delegation principle simply is not implicated where Congress allocates the rights and responsibilities of private parties within the framework of a workers' compensation scheme duly enacted under its maritime authority. Cf. Crowell v. Benson, 285 U.S. 22, 41-42 (1932) (upholding constitutionality of LHWCA generally). The distinction between an unlawful delegation of legislative power and a lawful exercise of such power by limiting the conditions under which entitlements are granted has long been recognized by the Supreme Court. "Congress manifestly is not permitted to abdicate or to transfer

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(. . . continued)
United States." Congress's delegation of authority to an agency comports with the Article so long as "Congress . . . 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" Whitman, 531 U.S. at 472 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). See also id. at 474-475 (noting that Court has found an intelligible principle lacking in only two statutes, and collecting cases finding the requisite "intelligible principle" in statutory delegations, including those authorizing agency regulation "in the public interest").

to others the essential legislative functions with which it is thus vested" by the Constitution. Panama Ref., 293 U.S. at 421. However,

> [t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.

Ibid. See also Southern Pac. Co. v. United States, 171 F. 360, 361 (9th Cir. 1909) ("while a Legislature may not delegate the power to legislate, it may delegate the power to determine some fact on which the operation of its own act is made to depend").

In Section 33(g), Congress has not delegated the power to legislate, but has specified the applicable rule of law -- i.e., that an employee forfeits LHWCA compensation if she enters into a third-party settlement for the requisite amount unless she obtains her employer's prior written approval. The employer's decision whether to approve or disapprove the settlement -- like the claimant's own decision to enter into such a settlement -- simply triggers application of the statutorily-imposed rule, and does not itself make law.

Plainly, it would have been constitutional for Congress to require a claimant to elect between pursuing a common-law right to compensation from a third party and seeking statutory

benefits from the employer through the LHWCA administrative process. See p. 34, infra. It necessarily follows that it is constitutional to allow the claimant to do both, subject to certain conditions. First, any amount recovered from a third party must be set off against the compensation for which the employer is determined to be liable. 33 U.S.C. 933(f). Second, inasmuch as a settlement will have a direct bearing on the amount the employer owes the claimant under Section 33(f), Congress requires the claimant to provide the employer prior notice of a settlement and gives the employer the right to approve or disapprove the settlement. See 33 U.S.C. 933(g)(1), (2).[11]

[11] As enacted, the LHWCA required an employee to elect between receiving LHWCA compensation and suing a third party, and assigned the employee's right to sue a third party to the employer if the employee elected LHWCA compensation. Longshore and Harbor Workman's Compensation Act, ch. 509, § 33(a), (b), 44 Stat. 1424, 1440 (1927) (election and assignment provisions). The original LHWCA also provided, however, that, if an employee recovered less from a third party than the employee could have received under the LHWCA, the employer would have to pay additional compensation under Section 33(f), subject to the provision, similar to current Section 33(g)(1), that if the employee compromised the third-party action for less than the compensation due, the employer remained liable "only if such compromise is made with his written approval." See id. § 33(f), (g), 44 Stat. at 1440. Thus, an employer-approval requirement (former Section 33(g)) was in the original Act, which was generally upheld as constitutional in Crowell, 285 U.S. 22. The current version of Section 33(a), which eliminated the election requirement, was adopted by amendment in 1959. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391; see Bloomer v. Liberty Mut. Ins. Co., 445 U.S. 74, 79-81 (1980).

These conditions express Congress's entirely rational concern about claimants' recoveries from settlements with third parties, because unduly low settlements could deprive employers of a proper set-off and thereby unfairly increase the amount of LHWCA compensation for which employers are liable. Congress therefore enacted Section 33(g)(1), which makes the employer liable for compensation under Section 33(f) only if it has consented in advance to a claimant's third-party settlement. 33 U.S.C. 933(g)(1); see Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 482 (1992) (Section 33(g) protects employer against employee's acceptance of too little in settlement of third-party action); Taylor v. Director, OWCP, 201 F.3d 1234, 1237 (9th Cir. 2000) (same). Thus, the employer-approval requirement is simply a condition that implements Congress's intent to protect the employer's right to an appropriate set-off.

In this regard, Section 33(g) is similar to other statutory provisions that the courts have found to be legitimate conditions intended to effectuate a congressional policy, rather than unlawful delegations of legislative power to a private entity. For instance, in Currin v. Wallace, 306 U.S. 1, 6 (1939), a statute authorized the Secretary of Agriculture to designate tobacco auction markets, but only if tobacco growers, by referendum, favored such markets. The Supreme Court held

that the referendum was not a delegation of legislative authority, but "merely . . . a restriction upon [Congress's] own regulation [of tobacco markets] by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'" Id. at 15. In this circumstance, the Court reasoned, "it is Congress that exercis[ed] its legislative authority in making the regulation and in prescribing the conditions of its application," and "[t]he required favorable vote upon the referendum is one of th[o]se conditions." Ibid.

Similarly, the court of appeals in Kentucky Division, Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1416 (6th Cir. 1994), approved a federal statute giving racehorse owners veto power over a racetrack's plan to permit interstate off-track betting. Echoing Currin's analysis, the Court held that the statute was not an unconstitutional delegation of legislative power to private parties, but "merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting." Ibid. See Sequoia Orange Co. v. Yuetter, 973 F.2d 752, 759 (9th Cir. 1992) (Agriculture Secretary's determination to implement amendment to orange marketing order with approval of 75% of growers was not unconstitutional delegation of power), as amended, 985 F.2d 1419 (1993); United States v. Frame, 885 F.2d 1119, 1128 (3d Cir. 1989) (industry

referendum was "valid condition upon the application of the Beef Promotion Act and not an unlawful delegation of power"), cert. denied, 493 U.S. 1094 (1990); cf. Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 695 (9th Cir.) (by requiring that state governor approve placing Indian reservation land in trust for gambling purposes, "Congress is exercising its legislative authority by providing what conditions must be met before a statutory provision goes into effect"; such "[c]ontingent legislation is constitutionally acceptable in many forms" and "is not an invalid delegation of legislative authority"), cert. denied, 522 U.S. 1027 (1997).

Moreover, courts have long recognized that there is no unconstitutional delegation when a statute imposes a prohibition on the activities of a private person but waives the prohibition if other persons who would be affected by the activities give their consent. For example, in Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917), the Supreme Court rejected an unlawful delegation challenge and upheld an ordinance that prohibited billboards in residential areas unless a majority of the property owners in a given block consented to the erection of such signage. The Court emphasized that the ordinance in question generally prohibited the erection of the billboards, "but permit[ted] the prohibition to be modified with the consent of the persons who are to be most affected by such

modification." Id. at 531. This, the Court concluded, was not a "delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances." Ibid.

Section 33(g)(1) operates in a similar fashion here: if a claimant settles with a third party (for an amount less than her potential LHWCA compensation), LHWCA compensation is not available, unless the employer "waives" that protection by consenting to the settlement. See also New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) ("[a]n otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection"); Silverman v. Barry, 845 F.2d 1072, 1086-1087 (D.C. Cir.) (upholding law that prohibited conversions of rental property to condominiums unless tenants consent), cert. denied, 488 U.S. 956 (1988).

Thus, it is clear that, when an employer decides whether to approve a third-party settlement, it is not "making law." Nor does the fact that the employer's decision may affect the employee's entitlement to LHWCA benefits render the decision governmental in character. Instead, the employer is protecting its own interests in the underlying LHWCA proceedings, as Congress authorized by enacting Section 33(g). See Cowart, 505 U.S. at 482 ("the employer is a real party in interest with

respect to any settlement that might reduce but not extinguish the employer's liability").

It is also significant that, in availing itself of the right to approve or disapprove a third-party settlement, the employer is not performing any function that the government would otherwise perform. Although the government administers and enforces the LHWCA, it has no role in approving or disapproving third-party settlements. The government's sole function respecting a third-party settlement is simply to provide the form for the employer's approval and to accept it for filing. 33 U.S.C. 933(g)(1).

The employer-approval provision in Section 33(g) thus bears no resemblance to the core government functions that were unlawfully delegated to private entities in other cases. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 310-312 (1936) (the power to fix maximum hours of labor and wages in coal industry); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 120-123 (1928) (the power to prohibit a use of private property that is otherwise lawful); Young v. City of Simi Valley, 216 F.3d 807, 817-818, 820 (9th Cir. 2000) (same, in First Amendment context), cert. denied, 531 U.S. 1104 (2001). See also Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982) (First Amendment case involving law giving church the

power to veto liquor license application of nearby establishment).

D. Section 33(g) does not effect a deprivation of property without due process

1. The Court need not decide if Mrs. Dilts has a constitutionally protected property interest in LHWCA benefits

Because there has not yet been a determination of the employer's liability, it is arguable that Mrs. Dilts has no protected property interest in LHWCA benefits. See American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59-61 (1999) (employee has no property interest in being paid for disputed medical treatment because state law required an employee to establish that the medical treatment was reasonable and necessary); Lyng v. Payne, 476 U.S. 926, 942 (1986) ("[w]e have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment").

However, in Cowart, 505 U.S. at 471, 475, the Supreme Court held that Section 33(g) of the LHWCA applies to a worker whose employer, at the time the worker settles with a third party, is neither paying LHWCA compensation to him nor subject to an order to pay. The Court explained that a "person entitled to compensation," as used in Section 33(g)(1), "need not be

receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated." Id. at 477 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). See also Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003) (applicants for social security disability benefits have property interest in receiving benefits); National Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 588 n.7 (9th Cir.) (both applicants for, and recipients of, benefits have "constitutionally protected property interest in those benefits"), cert. denied, 510 U.S. 1023 (1993).

The Court need not decide whether Mrs. Dilts has a protected property interest in her claim for benefits, as distinct from the payments themselves. See Sullivan, 526 U.S. at 61 n.13 (declining to address question). Assuming the existence of such a constitutionally protected property interest, Section 33(g) clearly passes constitutional muster, as we show in Part D.3, infra.

2. The "state action" doctrine is not a bar to claimant's due process challenge to Section 33(g), although it would bar any such challenge to an employer's act of approving or disapproving a third-party settlement

Respondents argue (Resp. Br. 35-42) that there is no due process violation in this case because the prerequisite of state action is missing. If Mrs. Dilts were challenging an employer's action in disapproving a settlement, respondents would be correct under the Supreme Court's decision in Sullivan. There the Court held that state action was lacking where private insurers, as permitted by a state workers' compensation statute, suspended claimants' medical benefits payments pending utilization review of the medical treatments. 526 U.S. at 52-58. Like the insurers' actions in Sullivan, an employer's or insurer's decision under the LHWCA to approve or disapprove a claimant's third-party settlement is a "private choice," id. at 54, "made by concededly private parties, and [it] 'turns on . . . judgments made by private parties' without 'standards . . . established by the State.'" Id. at 52 (quoting Blum v. Yaretsky, 457 U.S. 991, 1008 (1982)). See also ibid. ("[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action").[12]

[12] The Third Circuit has applied Sullivan in the LHWCA context. Kreschollek v. Southern Stevedoring Co., 223 F.3d 202, 207-208 (3d Cir. 2000) (rejecting due process challenge to Sections 14(c) and (d) of the Act, which permit employers, (continued . . .)

In this case, however, Mrs. Dilts is not challenging any particular action by the employer or any other private party. Indeed, because she failed to seek prior approval of her settlements by the employer, there is no such action to challenge. Rather, she has raised a narrow facial challenge to Sections 33(g)(1) and (2) on the ground that they offend due process. See, e.g., Pet. Br. 3 (Issue 3). Cf. Sullivan, 526 U.S. at 51 (court must "identify[] 'the specific conduct of which the plaintiff complains'"). Thus, here the federal law itself supplies the requisite governmental action. Cf. 2 Chester J. Antieau & William J. Rich, Modern Constitutional Law, § 26.00, at 21 (2d ed. 1997) ("[w]hen the legislature enacts statutes, enforcement of those statutes by the judiciary will generally constitute state action"). As we demonstrate next, however, Mrs. Dilts's due process challenge to Section 33(g) is patently without merit.

(. . . continued)
before an adjudication of liability, to terminate payments of compensation by controverting the employee's right to such payment; "[a]s in Sullivan, the actions taken by [claimant's] employer cannot be fairly attributed to the federal government because there is no federal government action involved in an insurer's unilateral decision to terminate benefits").

3. Section 33(g)'s forfeiture provision satisfies due process because it rationally balances the competing interests at stake in LHWCA-related third-party litigation

Mrs. Dilts's due process argument, like her argument regarding an unconstitutional delegation, is not clearly articulated, and is instead characterized by conclusory statements and a lack of relevant authority.[13] She does not expressly argue that she has been denied procedural due process, such as notice and a meaningful opportunity to be heard. Nor could she make such an argument with respect to the denial of her claim on the basis of Section 33(g).[14] She was accorded LHWCA procedures for resolution of her claim (see 33 U.S.C. 919(d); 20 C.F.R. 702.331-702.351) and thus had the opportunity for a formal hearing on the factual questions relevant to Section 33(g) forfeiture -- whether she entered into settlement agreements without obtaining the prior approval of her employer, and whether those agreements were for less than her potential compensation entitlement under the Act.

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[13] Because Mrs. Dilts's due process argument is inadequately developed, she has effectively waived it, and the Court may refuse to address it. Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (court will decline to address any argument that is not fully briefed).

[14] As explained in Subpart D.2, supra, any argument that the employer's decision to approve or disapprove a settlement must accord with due process fails because of the absence of state action.

The gravamen of her due process claim, however, appears to be that Section 33(g) violates the substantive component of that Clause, at least in the context of multi-party asbestos litigation. Pet. Br. 11. It is well established that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). See also Dodd v. Hood River County, 59 F.3d 852, 864 (9th Cir. 1995) ("[a] substantive due process claim requires proof that the interference with property rights was irrational and arbitrary"), cert. denied, 525 U.S. 923 (1998). Thus, Mrs. Dilts is faced with the heavy burden of showing that Section 33(g) is irrational, a burden that she plainly fails to meet.

a. The LHWCA, like other workers' compensation laws, is "a compromise between the competing interests of disabled laborers and their employers." Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268, 282 (1980). Employees lose rights they would have had to sue their employers, and employers lose defenses they could have asserted when sued for a workplace injury. Id. at 282 & n.24. In return, employees receive a prompt and certain recovery, and employers receive limits on

their liability. Ibid. There is no serious dispute that the basic compromise of rights embodied in workers' compensation laws, including the LHWCA, satisfies due process requirements. See, e.g., Crowell, 285 U.S. at 41-42 (LHWCA); New York Cent. R.R. v. White, 243 U.S. 188, 196-205 (1917) (state law).

As part of this workers' compensation compromise, Section 33 of the LHWCA adjusts the rights of employers and employees when a third party may be liable for a workplace injury. Section 33(a) gives employees a right to receive LHWCA compensation and sue a third party without electing between these remedies. 33 U.S.C. 933(a). Section 33(f) gives employees who recover from a third party a right to receive LHWCA compensation to the extent that compensation owed exceeds the third-party recovery. 33 U.S.C. 933(f). Because of the liability imposed by Section 33(f), "the employer is a real party in interest with respect to any settlement that might reduce but not extinguish the employer's liability." Cowart, 505 U.S. at 482. The written approval requirement in Section 33(g) "'protects the employer against his employee's accepting too little for his cause of action against a third party.'" Ibid. (citation omitted). Accord Taylor, 203 F.3d at 1237.

There is nothing irrational or arbitrary about this adjustment of employee and employer rights concerning LHWCA compensation. Congress could have required employees to elect

between receiving compensation or suing a third party and given the employee no LHWCA recovery if the employee chose to sue a third party. See 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 115.01 (2003) (discussing historical practice of states with its harsh results on employees); cf. Northern Pac. Ry. v. Meese, 239 U.S. 614 (1916) (no equal protection violation when state workers' compensation law bars employee actions against third party); Price ex rel. Price v. Western Res. Inc., 232 F.3d 779, 789 (10th Cir. 2000) (no due process violation when tort action against subcontractor is barred by availability of workers' compensation remedy against contractor). Instead, Congress has been more generous to employees, by giving them a right to sue third parties and recover LHWCA compensation under Section 33(f) when their third-party recoveries are less than the LHWCA provides in compensation. It is not arbitrary for Congress to temper this generosity by a provision such as Section 33(g), which protects an employer from an employee's settling for too little.

Moreover, although Section 33(g)(1) is designed to protect the employer's interest, there is no reason to believe that it creates a one-sided incentive for employers to withhold approval of reasonable settlements of employees' third-party claims. To be sure, an employer might decide to withhold approval of a settlement in the hope that the employee, needing the settlement

proceeds, would nonetheless enter into the settlement, thereby terminating the employee's LHWCA liability. Cf. Cowart, 505 U.S. at 483 (employer approval requirement "provides a powerful tool to employers who resist liability"). On the other hand, when the settlement amount is reasonable -- i.e., if it is as much as the employer could expect to receive if it pursued the claim as an assignee, see 33 U.S.C. 933(b), or if the employee were forced to litigate the claim to judgment -- then it would appear to be in the employer's interest to approve the settlement, thereby reducing its own LHWCA liability pursuant to 33 U.S.C. 933(f).

Nor does Section 33(g) empower an employer to abrogate an employee's LHWCA compensation entitlement. There is no direct causal connection between the employer's decision to disapprove a third-party settlement and the employee's loss of an entitlement to LHWCA compensation. Where the employee requests employer approval before entering into the settlement, as any prudent employee would do after the Supreme Court's 1992 Cowart decision, and the employer withholds such approval, the employee will lose such entitlement only if she decides to enter into the settlement notwithstanding the lack of employer approval.

Section 33(g) thus represents a reasonable balancing of the interests at stake in LHWCA-related third-party litigation, and

it is a far cry from arbitrary or irrational legislation that offends the Due Process Clause.

b. Mrs. Dilts has wholly failed to overcome the "presumption of constitutionality" that attaches to the provision. Turner Elkhorn, 428 U.S. at 15. She offers neither cogent legal argument nor any factual basis for questioning the rationality of the LHWCA's employer-approval requirement, either in today's workplace and economy or at the time it was originally enacted.[15] Indeed, she does not dispute that Sections 33(g)(1) and (2) make sense in the usual workers' compensation case. Pet. Br. 8 (provisions "may make some sense in the context of an industrial injury so that an employer who is paying benefits to a worker does not have its subrogation rights prejudiced by a sweetheart settlement between the worker and a liable third party"). Moreover, her argument that Section 33(g) is unconstitutional in the context of complex, multi-party asbestos litigation is essentially unexplained, consisting of one sentence in her brief. Pet. Br. 11.

To be sure, Section 33(g) was originally enacted in 1927, before the advent of today's mass tort litigation against multiple defendants, such as that involving the asbestos

[15] Most of the cases on which Mrs. Dilts relies arose under the Commerce Clause and are simply irrelevant to the due process issue. See Pet. Br. 11.

industry. Moreover, where a person entitled to LHWCA compensation seeks recovery from, and settles with, multiple third parties, the person has the additional burden of obtaining the employer's and insurer's approval of multiple settlements if she wishes to remain eligible for LHWCA compensation as well.[16] But Mrs. Dilts offers nothing to suggest that that "burden" is either inherently unfair or beyond Congress's contemplation in the statute.[17] Indeed, it has always been possible for a person to sustain an injury on the job that is caused by multiple factors, for which multiple parties could be liable.

In any event, Mrs. Dilts's cursory discussion of asbestos litigation is woefully deficient for establishing that such cases present problems that undermine the constitutionality of Section 33(g). Rather, claimant's problems in this case appear to stem from her failure (or that of her counsel in the asbestos litigation) to consider Section 33(g) before settling with some

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[16] Where a claimant has entered into multiple third-party settlements, however, the appropriate inquiry under Section 33(g)(1) is whether the aggregate amount of such settlements is less then the compensation to which the claimant is entitled. Harris v. Todd Pac. Shipyards Corp., 30 Ben. Rev. Bd. Serv. (MB) 5, 15-16 (1996). Thus, Section 33(g)(1) does not apply where the aggregate settlement amount is equal to or exceeds claimant's expected LHWCA compensation entitlement. Ibid.

[17] Although Section 33 refers to recovery against a "third person," in the singular, 33 U.S.C. 933(a), (b), (f), (g), "person" can be read as "persons." See 33 U.S.C. 902(22) ("[t]he singular includes the plural").

asbestos defendants. See ER 286 (Board notes that there is no evidence that claimant sought employer's approval prior to entering into third-party settlements); ER 223 (ALJ rejects claimant's attempt to undo settlements by submitting post-settlement letters from three of the third-party defendants, stating that the settlements were contingent on employer approval). Moreover, as the Board recognized, there may be ways for claimants to dispose of asbestos cases besides settling them and thereby avoid a forfeiture of LHWCA rights under Section 33(g). See, e.g., ER 285 4 n.3 (payments from a trust fund set up because of bankruptcy of asbestos manufacturer are not subject to Section 33(g)).[18]

Finally, whether asbestos litigation presents "unique" circumstances (Pet. Br. 11) that warrant a different approach under the LHWCA to third-party litigation is not a question of constitutional dimension, but is instead a policy question that

[18] Further, in some cases, a spouse of an employee exposed to asbestos may settle before the employee's death and not be subject to Section 33(g). See Ingalls Shipbuilding, Inc. v. Director, OWCP, 519 U.S. 248, 261-262 (1997); see also Taylor, 201 F.3d at 1240-1241 (spouse may recover twice for same injury if spouse settles before employee's death because third-party recovery is not offset against employer's liability for LHWCA death benefits). Here, however, "Mrs. Dilts is clearly a person entitled to compensation [within the meaning of Section 33(g)] as she filed the third party claims after the death of her husband." ER 223.

should be directed to Congress, rather than to this Court. See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (Congress is "far better equipped than the judiciary" to gather and evaluate data relevant to legislative judgments); see also Cowart, 505 U.S. at 483-484 (harsh effects of LHWCA Section 33(g) are for Congress to address).

CONCLUSION

In the event that the Court finds it necessary to reach the issue, Sections 33(g)(1) and (2) are constitutional and should be upheld.

Respectfully submitted.

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STATEMENT OF RELATED CASES

Counsel for Intervenor United States and Respondent Director, Office of Workers' Compensation Programs, are not aware of any related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Ninth Circuit Rule 32-1, I hereby certify that the Brief for the Intervenor United States and Respondent Director, Office of Workers' Compensation Programs, is monospaced and has 10.5 or fewer characters per inch and contains 8,728 words as determined by the Microsoft Word software system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief for the Intervenor United States and Respondent Director, Office of Workers' Compensation Programs, were served by first-class mail, postage prepaid, on December 19, 2003, on the following counsel of record:

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