SUPREME COURT OF THE UNITED STATES

No. 93–1783

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

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

[March 21, 1995]

JUSTICE GINSBURG, concurring in the judgment.

The Court holds that the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (OWCP) lacks standing under §921(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. §901 *et seq.*, to seek judicial review of LHWCA claim determinations. Before amendment of the LHWCA in 1972, the Act's administrator had authority to seek review of LHWCA claim determinations in the courts of appeals. The Court reads the 1972 amendments as divesting the Act's administrator of access to federal appellate tribunals formerly open to the administrator's petitions. The practical effect of the Court's ruling is to order a disparity between two compensatory schemes—the LHWCA and the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 U. S. C. §901 *et seq.*—measures that Congress intended to work in essentially the same way.

Significantly, however, the Court observes that our precedent "certainly establish[es] that Congress *could* have conferred standing upon the [OWCP] Director without infringing Article III of the Constitution." *Ante*, at 11 (emphasis retained).[1]

[1]In contrast, the Court of Appeals for the Fourth Circuit raised the standing issue in this case on its own motion

While I do not challenge the Court's conclusion that the Director lacks standing under the amended Act, I write separately because I am convinced that Congress did not advert to the change—the withdrawal of the LHWCA administrator's access to judicial review—wrought by the 1972 LHWCA amendments. Since no Article III impediment stands in its way, Congress may speak the final word by determining whether and how to correct its apparent oversight.

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because it feared that judicial review initiated by the Director would "strik[e] at the core of the constitutional limitations placed upon th[e] court by Article III of the Constitution." 8 F. 3d 175, 180, n. 1 (1993); see also *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297, 302–305 (1983) (noting but not deciding Article III issue).

Before the 1972 amendments to the LHWCA, the OWCP Director's predecessors as administrators of the Act, officials called OWCP deputy commissioners, adjudicated LHWCA claims in the first instance. 33 U. S. C. §§919, 923 (1970 ed.); see *Kalaris* v. *Donovan*, 697 F. 2d 376, 381–382 (CADC), cert. denied, 462 U. S. 1119 (1983). A deputy commissioner's claim determination could be challenged in federal district court in an injunctive action against the deputy commissioner. 33 U. S. C. §921(b) (1970 ed.); see *Parker* v. *Motor Boat Sales, Inc.,* 314 U. S. 244, 245 (1941). As a defending party in district courts, the deputy commissioner could appeal adverse rulings to the courts of appeals pursuant to 28 U. S. C. §1291, even when no other party sought appeal. See *Henderson* v. *Glens Falls Indemnity Co.*, 134 F. 2d 320, 322 (CA5 1943) ("There are numerous cases in which the deputy commissioner has appealed as the sole party, and his right to appeal has never been questioned.") (citing, *inter alia*, *Parker*, *supra*).

The 1972 LHWCA amendments shifted the deputy commissioners' adjudicatory authority to Department of Labor administrative law judges (ALJs). Although district directors—as deputy commissioners are now called[2]—are empowered to investigate LHWCA claims and attempt to resolve them informally, they must order a hearing before an ALJ upon a party's request. 33 U. S. C. §919. The 1972 amendments also replaced district court injunctive actions with appeals to the newly created Benefits Review Board. Just as the deputy commissioners were parties before district courts prior to 1972, the Director—as the Secretary's delegate—is a party before the Benefits Review Board under the current scheme. 20 CFR §801.2(a)(10)

[2]20 CFR §§701.301(a)(7), 702.105 (1994).

(1994). Either the Director or another party may invoke Board review of an ALJ's decision. 33 U. S. C. §921(b)(3); 20 CFR §§801.102, 801.2(a)(10) (1994). As before the amendments, further review is available in the courts of appeals. 33 U. S. C. §921(c).

The Court holds that the LHWCA, as amended in 1972, does not entitle the Director to appeal Benefits Review Board decisions to the courts of appeals. Congress surely decided to transfer adjudicative functions from the deputy commissioners to ALJs, and from the district courts to the Benefits Review Board. But there is scant reason to believe that Congress consciously decided to strip the Act's administrator of authority that official once had to seek judicial review of claim determinations adverse to the administrator's position. In amending the LHWCA in 1972, Congress did not expressly address the standing of the Secretary of Labor or his delegate to petition for judicial review. Congress did use the standard phrase “person adversely affected or aggrieved” to describe proper petitioners to the courts of appeals. See 33 U. S. C. §921(c). But it is doubtful that Congress comprehended the full impact of that phrase: Not only does it qualify employers and injured workers to seek judicial review but, as interpreted, it ordinarily disqualifies agencies acting in a governmental capacity from petitioning for court review.[3]

Congress' 1978 revision of the Black Lung Benefits

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[3]The law-presentation role OWCP's Director seeks to play might be compared with the role of an advocate general or *ministère public* in civil law proceedings. See generally M. Glendon, M. Gordon, & C. Osakwe, Comparative Legal Traditions 344 (2d ed. 1994); R. David, French Law 59 (1972).

Act (BLBA) reveals the judicial review design Congress ordered when it consciously attended to this matter. The 1978 BLBA amendments were adopted, in part, to keep adjudication of BLBA claims under the same procedural regime as the one Congress devised for LHWCA claims. In the 1978 BLBA prescriptions, Congress expressly provided for the party status of the OWCP Director. See 30 U. S. C. §932(k) ("The Secretary [of Labor] shall be a party in any proceeding relative to a claim for [black lung] benefits.").

Congress enacted the BLBA in 1969 to afford compensation to coal miners and their survivors for death or disability caused by pneumoconiosis (black lung disease). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 8 (1976). The BLBA generally adopts the claims adjudication scheme of the LHWCA. 30 U. S. C. §932(a). Congress amended the BLBA in 1978 to clarify that the BLBA *continuously* incorporates LHWCA claim adjudication procedures. See §7(a)(1), 92 Stat. 98 (amending BLBA to incorporate LHWCA "as it may be amended from time to time"); S. Rep. No. 95–209, p. 18 (1977) (BLBA amendment "makes clear that any and all amendments to the [LHWCA]" are incorporated by the BLBA, including "the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication").

In the context of assuring automatic application of LHWCA procedures to black lung claims, see H. R. Conf. Rep. No. 95–864, pp. 22–23 (1978), Congress added to the BLBA the provision for the Secretary of Labor's party status "in any proceeding relative to a claim for [black lung] benefits." See §7(k), 92 Stat. 99. According to the Report of the Senate Committee on Human Resources:

> "Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the

> amended [LHWCA] confe[r] standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and appeal of claims. *In establishing the [LHWCA] procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case*. The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the [BLBA] should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the [BLBA], to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts." S. Rep. No. 95–209, *supra,* at 21–22 (emphasis added).

Even if this passage cannot force an uncommon reading of the LHWCA words "person adversely affected or aggrieved," see *ante*, at 8, it strongly indicates that Congress considered vital to sound administration of the Act the administrator's access to court review.

The Director has been a party before this Court in nine argued cases involving the LHWCA.[4] In two of

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[4]*Director, OWCP* v. *Greenwich Collieries*, 512 U. S. ___ (1994); *Bath Iron Works Corp.* v. *Director, OWCP*, 506 U. S. ___ (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. ___ (1992); *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U. S. 624 (1983); *Director, OWCP* v. *Perini North River Associates*, 459 U. S. 297 (1983); *U. S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U. S. 608 (1982); *Potomac Electric Power Co.* v. *Director,*

these cases,[5] the Director was a petitioner in the court of appeals. As this string of cases indicates, the impact of the 1972 amendments on the Director's *statutory* standing generally escaped this Court's attention just as it apparently slipped from Congress' grasp.

In addition to the BLBA, four other Federal Acts incorporate the LHWCA's claim adjudication procedures. See Defense Base Act, 42 U. S. C. §1651; District of Columbia Workmen's Compensation Act, 36 D.C. Code Ann. §501 (1973);[6] Outer Continental Shelf Lands Act, 43 U. S. C. §1333(b); Employees of Nonappropriated Fund Instrumentalities Statute, 5 U. S. C. §8171. Claims under the LHWCA, the BLBA, and these other Acts are handled by the same administrative actors: the OWCP Director, district directors, ALJs, and the Benefits Review Board. Because the same procedures generally apply in the administration of these benefits programs, common issues arise under the several programs. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 512 U. S. ___, ___ (1994) (slip op., at 14) (invalidating "true doubt" burden of persuasion rule that Department of Labor ALJs applied in both LHWCA and BLBA claim adjudications).

OWCP, 449 U. S. 268 (1980); *Director, OWCP* v. *Rasmussen*, 440 U. S. 29 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977).

[5] *Morrison-Knudsen Construction Co.*, *supra*; *Rasmussen*, *supra*. In neither of these cases did the Board's ruling affect the §944 special fund. See *ante*, at 6, n. 3.

[6] This law "applies to all claims for injuries or deaths based on employment events that occurred prior to July 2[4], 1982, the effective date of the District of Columbia Workers' Compensation Act [36 D.C. Code Ann. §36–301 *et seq.* (1981)]." 20 CFR §701.101(b) (1994).

Under the Court's holding, the Director can appeal the Benefits Review Board's resolution of a BLBA claim, but not the Board's resolution of an identical issue presented in a claim under the LHWCA or the other four Acts. I concur in the Court's judgment despite the disharmony it establishes and my conviction that Congress did not intend to put the administration of the BLBA and the LHWCA out of sync. Correcting a scrivener's error is within this Court's competence, see, *e.g.*, *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. ___ (1993), but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition.