BRB No. 00-270

JERRY MILAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MASON TECHNOLOGIES	)	DATE ISSUED: Nov. 22, 2000
	)	
and	)	
	)	
CIGNA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Raymond Rivera Esteves (Juan Hernandez Rivera & Assoc.), San Juan, Puerto Rico, for claimant.

Antonio M. Peluzzo-Perotin (Colón, Colón & Martinez), San Juan, Puerto Rico, for employer/carrier.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (1998-LHC-2438) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3);

O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant worked as a facilities manager for employer, a contractor with the Navy, on the United States Naval Station at Roosevelt Roads in Ceiba, Puerto Rico. Tr. at 55. On February 22, 1994, claimant slipped and fell in a flooded area of a restroom during the course of his employment. Tr. at 51-53. He injured his knee, mouth, neck, right shoulder and lower back in the accident, and he has not returned to work. *See* Jt. Ex. 2; Tr. at 51. After continuing claimant's salary for a few months, employer began paying temporary total disability benefits on May 1, 1994. It continued to pay these benefits, totaling $107,146.72, through May 30, 1998. Jt. Ex. 6; Tr. at 62. In 1995, claimant filed a civil action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2671 *et seq.* On August 18, 1997, he and his wife entered into a settlement with the government for $50,000. Jt. Ex. 3.

The administrative law judge found that claimant had not obtained prior written approval of the settlement from employer as required by Section 33(g) of the Act, 33 U.S.C. §933(g), and that the settlement in the civil suit was for less than claimant's compensation entitlement under the Act. Decision and Order at 3. He found that employer's knowledge of the settlement did not amount to its approval, that claimant's wife's participation in the settlement did not bar application of Section 33(g), and that the third-party action had not been discussed in the informal conference and, even if it had, nothing the claims examiner may have told claimant would have nullified employer's rights under Section 33(g). *Id.* at 4-7. On the primary issue before the Board, the administrative law judge found that, although the United States "does not fit neatly" into the Act's definition of "person" in Section 2(1), 33 U.S.C. §902(1), it is included in the definition because of Section 33's purpose of protecting employers from insufficient settlements. Therefore, the administrative law judge concluded that Section 33(g) applies to bar claimant's future benefits because he failed to obtain employer's prior written approval before settling the civil action with the government. *Id.* at 7-8. Consequently, the administrative law judge terminated claimant's disability and medical benefits. *Id.* at 8. Additionally, the administrative law judge declined to address arguments regarding employer's contractual duty to secure workers' compensation insurance as required by the laws of Puerto Rico, as claimant raised this argument for the first time in his post-hearing brief. *Id.* at 5.

Claimant appeals the administrative law judge's decision. He argues that the administrative law judge erred in failing to admit the documentary evidence he submitted with his post-hearing brief, as those documents merely supported issues raised at the hearing and they posed no surprise to employer. Claimant also seeks reinstatement of his benefits, arguing that Section 33(g) does not apply for a variety of reasons. Finally, he contends he is entitled to an attorney's fee. Employer responds, urging affirmance of the termination of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds

solely on the issue of whether the United States is included in the Act's definition of a "person" at Section 2(1). He agrees with claimant that the definition does not include the federal government or its agencies.

Initially, we deny employer's "motion" to dismiss claimant's petition for review and brief as untimely. This "motion" was included in employer's response brief and, consequently, it does not comply with the requirements set forth in the regulations because it was not made in a separate document. *Fuller v. Matson Terminals*, 24 BRBS 252 (1991); 20 C.F.R. §802.219(b). Moreover, contrary to employer's assertion, claimant's brief was due 30 days after his receipt of the acknowledgment of the appeal, making it due on or before January 23, 2000. 20 C.F.R. §802.211. Claimant's brief was filed in a timely manner on January 13, 2000.

Next, we reject claimant's contentions of error concerning the administrative law judge's refusal to admit post-hearing evidence and his failure to address employer's duty under its contract with the United States Navy and under the laws of Puerto Rico to obtain insurance coverage.[1] Although this issue was included on claimant's pre-hearing statement, Jt. Ex. 8, the only evidence concerning insurance coverage submitted at the hearing appears to relate to employer's coverage for Defense Base Act claims. Jt. Ex. 7. The issue of employer's duty with respect to other insurance coverage under its contract with the Navy was not addressed at the hearing, and claimant did not request permission to submit post-hearing evidence on the matter. Accordingly, the administrative law judge declined to consider the argument. Decision and Order at 5. As the administrative law judge has great discretion in admitting evidence, 20 C.F.R. §702.339, and as claimant has not shown error on the part of the administrative law judge in rejecting this late submission of evidence, we affirm the administrative law judge's action. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 n.1 (1985). Moreover, while the administrative law judge is required to address all relevant issues, the relevancy of employer's alleged breach of contract is questionable, as it does not alter the provisions of the Act or how they would apply to claimant.

[1]Claimant attached to his post-hearing brief, *inter alia*, a copy of that portion of the contract between employer and the Navy which pertained to employer's responsibility for insurance coverage. Claimant argues that the FTCA claim against the United States was only possible because employer failed to secure a policy with the Puerto Rico State Insurance Fund as required by P.R.L.A. Title 11 §19 (1991). As a result of this failure, claimant contends employer subjected the U.S. Government to tort liability. Cl's Brief at 9-13; Cl's Post-Hearing Brief at Exh. 2. Thus, claimant asserts that employer should not benefit under the Act for its failure to comply with the contract and with the laws of Puerto Rico.

Claimant next contends the administrative law judge erred in applying Section 33(g) to this case. He argues that Section 33(g) is not applicable because the United States is not a "person" within the meaning of the Act, and therefore his failure to obtain written approval prior to settling the civil action against the government does not bar his right to benefits. The Director agrees. Employer argues in response that the administrative law judge correctly interpreted the definition of "person" to include the United States. The administrative law judge stated that the United States "does not fit neatly" into any of the categories used to define "person" under the Act. Decision and Order at 8. Nevertheless, he concluded that claimant's interpretation excluding the federal government from the definition based solely on the language of the Act was too narrow. Rather, the administrative law judge determined that the purpose of Section 33(g) to protect employers from insufficient settlements must also be considered, and he found it significant that the Supreme Court of the United States has used the term "third party" rather than "third person" in discussing civil actions and the applicability of Section 33(g). *Id.* (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968)). This led the administrative law judge to conclude "[t]here is no reason to believe that Congress intended to protect employers from insufficient settlements with a private party but not from insufficient settlements with the federal government." Decision and Order at 8. In light of his conclusion, the administrative law judge found that claimant settled a civil lawsuit with the United States, a third party, for a sum less than the amount of compensation to which he was entitled under the Act without first obtaining employer's written approval and this violated the provisions of Section 33(g), thereby requiring the termination of his benefits. *Id.*

Section 33(g) states:

> (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.
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> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this 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) (emphasis added). The Supreme Court has determined that Section 33(g) requires prior written approval in instances where the third-party settlement will be for an amount less than the amount of compensation to which a claimant is entitled, and prior notice where the settlement proceeds will equal or exceed the amount of compensation due or when a claimant obtains a judgment against a third party. *Cowart*, 505 U.S. at. 469, 26 BRBS at 49(CRT). As there is no dispute that claimant's settlement was for less than the amount of compensation due him, and that claimant did not obtain prior written approval of the settlement, if the term "person" includes the federal government, then claimant's right to future benefits is barred by the application of Section 33(g).

This is a case of first impression. As noted above, Section 33(g)(1) specifically refers to a settlement with "a third person referred to in subsection (a) of this section. . . ." 33 U.S.C. §933(g)(1). Section 33(a) states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that *some person other than the employer* or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against *such third person*.

33 U.S.C. §933(a) (emphasis added). Section 33(a) specifically refers to a "third person;" therefore, resolution of this case turns on the definition of "person." It is immaterial that case law refers to lawsuits against "third persons" as "third-*party* actions." The term "party" is not used in the section in question and has not been defined in the Act. The term "person," however, is defined. Section 2(1) of the Act, 33 U.S.C. §902(1), provides: "The term 'person' means individual, partnership, corporation, or association."

When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989). It is a settled principle of statutory construction that courts should give effect, if possible, to every word of the statute. *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1985); *Bowsher v. Merck & Co.*, 460 U.S. 824 (1983); *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270 (1956). If a term is given a definition in a statute, the courts are bound by that meaning. 3A Sutherland Stat. Const. §73.02 (5th ed. 1992). If Congressional intent is clear from the plain meaning of the words, then the language is regarded as conclusive and the application of other means of construction is unnecessary and unwarranted. *North Dakota v. United States*, 460 U.S. 300 (1983); *Catholic Relief Services, Inc. v. Meese*, 664 F.Supp. 1378 (E.D. Cal. 1987). In this event, the court may look to

legislative history only to see if there is a clear intent contrary to the language that would require questioning the language. *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 432 n.12 (1987). If the plain meaning is unclear, it is proper to consider the legislative history to ascertain the meaning of a statute, especially so as to avoid absurd results. 3A Sutherland Stat. Const. §73.02.

In this case, the meaning of the word "person" is in question, specifically, whether the term includes the United States, *i.e.*, whether the United States government can be a "third person" as that term is used in Section 33 of the Act. Neither the United States nor any of its entities is included in the plain language of Section 2(1);[2] consequently, neither the United States nor any of its governmental entities is expressly included in the term "third person" as that term is used in Section 33(g). Pursuant to the rules of statutory construction, our analysis can end here as the plain language of the Act is clear and unambiguous. *North Dakota*, 460 U.S. at 300. Moreover, a review of the interpretation of the term "person" as it relates to inclusion of the United States in other statutory frameworks provides further authority for holding that the United States is not a "person" under Section 33(g) as it is not specifically included in the statutory definition.

It is well-settled that common use of the term "person" does not include the sovereign. *Vermont Agency of Natural Resources v. United States*, ___ U.S. ___, 120 S.Ct. 1858 (2000); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); *United States v. Fox*, 94 U.S. 315 (1876). In *Fox*, the Supreme Court held that the United States was not a "person" within the meaning of New York estate law, making a devise of real property to the federal government void. The Supreme Court specifically stated:

> The term 'person' as here used applies to natural persons, and also to artificial persons, -- bodies politic, deriving their existence and powers from legislation, -- but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State.

[2]The definition has remained unchanged since the Act's enactment in 1927.

Fox, 94 U.S. at 321. Thus, because the term "person" does not commonly include the sovereign, "statutes employing the [word 'person'] are ordinarily construed to exclude it [the sovereign]." *Cooper Corp.*, 312 U.S. at 604. Using this principle, in *Cooper Corp.*, the Supreme Court held that the federal government is not a "person" under Section 7 of the Sherman Anti-Trust Act, 15 U.S.C. §7.[3] *Cooper Corp.*, 312 U.S. at 614.

Recently, the Supreme Court held that a state is not a "person" for purposes of *qui tam* liability.[4] *Vermont Agency*, 120 S.Ct. at 1858. The Court stated that it "must apply to [the text of the statute] our longstanding interpretive presumption that 'person' does not include the sovereign[,]" and that the presumption is particularly applicable if the interpretation is to subject states to a liability to which they had not previously been subject. *Id.* at 1866-1867. In analyzing this issue, the Supreme Court observed that natural persons, corporations, partnerships, and associations are all presumptively covered by the term "person" whereas states are not. *Id.* at 1868-1869.

In some statutes, such as in Section 2(1) of the Longshore Act, the definition of "person" has been extended to include entities such as corporations, partnerships and associations. *See also* 1 U.S.C. §1; 29 U.S.C. §113. The Supreme Court has held, however, that "[t]he absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them." *United Mine Workers*, 330 U.S. at 275; *Cooper Corp.*, 312 U.S. at 607.

For example, the definition of "person" under the Security Exchange Act, 15 U.S.C. §§78c(a)(9), 78j(b), does not extend to the sovereign. In *Brown v. City of Covington*, 805 F.2d 1266 (6th Cir. 1986), the United States Court of Appeals for the Sixth Circuit addressed a question of fraud in the sale of bonds to finance a health care center. It held that the city

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[3]Section 7 of the Sherman Anti-Trust Act provides for treble damages to "any person" who is injured in violation of the act.

[4]A *qui tam* action is when an individual sues on behalf of the state as well as for himself. Under the False Claims Act, 31 U.S.C. §3729, a private individual can bring a *qui tam* suit for himself and for the U.S. government, in the name of the government. *Vermont Agency of Natural Resources v. United States*, 120 S.Ct. 1858 (2000).

which issued the bonds could not be liable under the securities law because it does not fall within the definition of those "persons" who could be held so liable. Section 3(a)(9) of the Securities Exchange Act provides that "person" "means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, or a unincorporated organization." 15 U.S.C. §78c(a)(9). With heavy emphasis on the clear language of the 1934 Act, which was applicable to the case before it, and noting that the 1933 and 1975 versions specifically included governmental entities in the definition of "person," 15 U.S.C. §77b(2) (1933); 15 U.S.C. §78c(a)(9) (1982), the court held that the city of Covington is not a "person" and cannot be held liable for fraud under the Securities Exchange Act. *Brown*, 805 F.2d at 1270-1271.

The definition in question in *Brown* is, perhaps, the most similar to the one at issue herein. Both define "person" by stating what the term "means" as opposed to what the term "includes." The indication, therefore, is that the list in Section 2(1) is indeed exhaustive.[5] *Compare Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000) *with Brown*, 805 F.2d at 1270-1271. Given that the language of Section 2(1) leaves no uncertainty as to its meaning and the definition of the term "person" has not changed since the Act's enactment in 1927, and in light of the Director's position on the matter, we hold that the term "person" as defined in Section 2(1) does not include the United States government or its entities.[6] As the

[5]In tax-related cases, the word "includes" was used in the definition of "person," 26 U.S.C. §7701(a)(1), and the courts interpreted the lists as being open-ended. *State of Ohio v. Helvering*, 292 U.S. 360 (1934), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Chickasaw Nation*, 208 F.3d at 878-879; *Flandreau Santee Sioux Tribe v. United States*, 197 F.3d 949 (8th Cir. 1999); *Estate of Wycoff v. Commissioner*, 506 F.2d 1144 (10th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

[6]As the Director asserts, additional support for this conclusion can be found in

term is unambiguous, it was erroneous for the administrative law judge to disregard the plain language of the Act and to rely upon the intent behind Section 33 as controlling. The language of the Act needs no clarification; thus, there is no reason to look to the legislative history for interpretation of the words.

Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum], 514 U.S. 122, 29 BRBS 87(CRT) (1995), where the Supreme Court stated that an "agency" is not a "person" affected or aggrieved as that term is used in 33 U.S.C. §921(c), and in 5 U.S.C. §551(1), (2), where the Administrative Procedure Act defines "agency" as a government entity and specifically excludes "agency" from the definition of "person."

Because the United States is not a "person" under Section 2(1) of the Act, it cannot be a "third person" under Section 33 of the Act. Hence, that section is not applicable to settlements between the United States and a "person entitled to compensation." Because claimant settled his civil claim with the federal government, and because Section 33(g) is not applicable to that settlement, the settlement does not affect claimant's entitlement to benefits under the Act.[7] Consequently, we reverse the administrative law judge's termination of claimant's benefits, and we remand the case for reinstatement of claimant's temporary total disability and medical benefits. In light of claimant's successful prosecution, claimant's counsel is entitled to an attorney's fee. 33 U.S.C. §928. On remand, claimant's counsel may submit a petition for an attorney's fee and employer may file objections for consideration by the administrative law judge.

Accordingly, the administrative law judge's Decision and Order is reversed, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's decision except insofar as it holds that the administrative law judge erred in terminating claimant's rights to compensation and medical benefits pursuant to 33 U.S.C. §933(g), because without the written approval of employer, claimant obtained a settlement from the United States for an amount less than the compensation to which claimant was entitled. The administrative law judge's decision to terminate benefits was correct because the United States was, in the case at bar, a "person" within the meaning of the Longshore Act, whose settlement with claimant for an amount less than the compensation owed required the prior written approval of employer.

[7]In light of our conclusion that Section 33(g) is inapplicable in this instance, we need not address claimant's remaining Section 33(g) arguments.

While working for employer, a contractor with the Navy, claimant fell in a flooded restroom on the United States Naval Station in Ceiba, Puerto Rico. As a result of his injuries, claimant was unable to return to work. Claimant filed a claim for benefits under the Act and employer began paying claimant compensation for temporary total disability as of May 1, 1994. Thereafter, claimant filed a claim for damages relating to his work injuries under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680, and without notice to employer, settled his claim with the United States for $50,000 on August 18, 1997. At an informal conference on June 10, 1998, the district director instructed employer to terminate payment of compensation pursuant to Section 33(g).

Section 33(a) authorizes claimant to recover damages from a person other than employer, who is liable for his disability.[8] If claimant enters into a settlement with a third person liable for his disability for an amount less than the compensation owed, however, Section 33(g)(1) requires claimant to obtain from employer prior, written approval of the settlement.[9] The sanction for failure to obtain the required approval is set forth in Section 33(g)(2):[10] termination of all rights to compensation and medical benefits. This severe

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[8]Section 33(a), 33 U.S.C. §933(a), provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

[9]Section 33(g)(1), 33 U.S.C. §933(g)(1), provides:

> 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.

[10]Section 33(g)(2), 33 U.S.C. §933(g)(2), provides:

> 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

sanction is obviously intended to protect employer's interest in maximizing the third-party recovery which, Section 33(f) provides, offsets the compensation owed by employer.[11]

Claimant properly sued the United States under the Federal Tort Claims Act because the United States under Section 33(a) was a "person other than the employer . . . liable in damages . . ." for his disability. Obviously, in the instant case, the United States is a "person" within the meaning of Section 33. "Person" is defined in Section 2(1) of the Act: "The term 'person' means individual, partnership, corporation, or association." 33 U.S.C. §902(1). The relevant term is "individual" and the relevant authority is the Federal Tort Claims Act. It is there that Congress explained under what circumstances the United States could be held liable for tort claims as an "individual" is held liable. 28 U.S.C. §2674 provides in relevant part:

> 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.

[11]Section 33(f), 33 U.S.C. §933(f), provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The cases cited by the majority are totally inapposite because the narrow issue is whether the United States is a person within the meaning of the Longshore Act, whose settlement payment requires employer's approval and offsets employer's liability, if approval is obtained. To understand the intention of Congress with respect to the liability of the United States in tort, one must turn to the Federal Tort Claims Act in which Congress set out extensive rules and provisions relating to the circumstances under which the United States could be held liable in tort, like an "individual." *See* 28 U.S.C. §§1291, 1346(b), (c), 1402(b), 2401(b), 2402, 2411, 2412(c), 2671-2680. Because Congress used the term "individual" in the Longshore Act, it did not need to specify the United States. By reference to the Federal Tort Claims Act, one ascertains when the term "individual" encompasses the United States for purposes of tort liability payments. Moreover, Congress may have feared that to expressly add the United States to the definition of "person" in Section 2(1), might appear to authorize suits beyond those under the Federal Tort Claims Act.

The effect of Section 33(b) of the Longshore Act is to subrogate by operation of law employer to the rights of claimant.[12] Thus, the Longshore Act authorizes an employer to sue a "person" liable for claimant's disability under Section 33(a) and the law is well established that an employer in these circumstances may bring an action in its own name against the United States under the Federal Tort Claims Act. *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 36 (1949). The Supreme Court has held that the Federal Tort Claims Act may also permit third-party indemnity actions against the United States. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983). When one sees how broad the Federal Tort Claims

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[12]Section 33(b) provides:

> Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

Act is in permitting suits against the United States, the absurdity of the Director's argument becomes manifest. The Director suggests that Congress excluded the United States from the definition "person" in the Longshore Act, thereby denying employers general subrogation rights when claimants settle with the United States, in order to permit the United States to settle for inadequate sums (Brief for Director at 5-6). Needless to say, there is no authority for the proposition that Congress seeks either to settle claims "on the cheap" or to deny employers subrogation rights.

The instant case arises within the jurisdiction of the United States Court of Appeals for the First Circuit which has avoided determining the degree of deference, if any, owed the Director in his interpretation of the Longshore Act. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 757 (1st Cir. 1992). The Director's interpretation, that the United States is not a "person" under the Longshore Act, is superficial and contrary to a fundamental purpose of the Act; it is entitled to no deference because it is plainly wrong. *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 831 (5th Cir. 1991). The Director's construction is superficial because he fails to consider the significance of the term "individual" in the Act's definition of "person" at Section 2(1) and that Congress has declared in the Federal Tort Claims Act that the United States should be held liable as an "individual" under certain circumstances. Moreover, the Director's interpretation undermines one of the basic purposes of the Longshore Act, *i.e.*, to provide employer with a credit for third-party settlements. *See* 33 U.S.C. §933(b), (f), (g); *see generally Peters v. North River Ins. Co.*, 764 F.2d 306 (5th Cir. 1985). The extent to which the Federal Tort Claims Act vindicates the rights of subrogees and third-party defendants demonstrates the falseness of the Director's suggestion that Congress sought to undermine those rights in the Longshore Act when claimants settle with the United States. In sum, considering the Longshore Act in light of the Federal Tort Claims Act, it is clear that the United States is a person, other than employer, liable in damages for claimant's disability under Section 33(a) and that claimant's failure to obtain employer's written approval of a settlement with the United States for an amount less than the compensation owed terminated claimant's entitlement to compensation and medical benefits under Section 33(g)(1), (2).

Accordingly, I would affirm the administrative law judge's Decision and Order terminating claimant's compensation and medical benefits.

REGINA C. McGRANERY
Administrative Appeals Judge