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The Longshoremen's and Harbor Workers' Compensation Act: Award Requirement for Statutory Assignment of Longshoreman's Third Party Claim

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: AWARD REQUIREMENT FOR STATUTORY ASSIGNMENT OF LONGSHOREMAN'S THIRD PARTY CLAIM

Workmen's compensation statutes generally assure workmen of quick, certain, medical and disability payments for work-related injuries.[1] Workmen's compensation, however, is ordinarily an injured employee's exclusive remedy against his employer.[2] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[3] follows the exclusive remedy scheme of workmen's

1. *See* Theriot v. Gulf Oil Corp., 427 F. Supp. 50, 53 (E.D. La. 1976) (Louisiana Workmen's Compensation Act provides remedy to injured workmen to avoid trouble and delay of litigation process); Busey v. Washington, 225 F. Supp. 416, 423 (D.D.C. 1964) (Federal Employee's Compensation Act provides government employees with expeditious remedy independent of proof of fault); Steed v. Liberty Mutual Ins. Co., 355 So.2d 1239, 1241 (Fla. App. 1978) (legislature intended Florida Workmen's Compensation Act to provide immediate relief for injured workmen with little delay or deliberation); Crilly v. Ballou, 353 Mich. 303, ____, 91 N.W.2d 493, 496 (1958) (injured workmen entitled to limited but certain and adequate compensation without recourse to litigation under Michigan Workmen's Compensation Act); Naseef v. Cord, Inc., 48 N.J. 317, ____, 225 A.2d 343, 346 n.1 (1966) (legislature intended Workmen's Compensation Act to provide quick, dependable financial assistance to injured workmen); Grello v. Daszykowski, 58 A.D.2d 412, 414, 397 N.Y.S.2d 396, 397 (1977) (New York legislature intended workmen's compensation act to provide quick, certain, and adequate relief to workmen injured in course of employment), *rev'd on other grounds*, 44 N.Y.2d 894, 407 N.Y.S.2d 633, 379 N.E.2d 161 (1978); Humphries v. Boxley Bros. Co., 146 Va. 91, 95-96, 135 S.E. 890, 891 (1926) (Virginia Workmen's Compensation Act provides injured workmen with quick and expeditious relief); *see also* FLA. STAT. ANN. §§ 440.01-.60 (West 1981) (Florida Workmen's Compensation Law); LA. REV. STAT. ANN. §§ 23:1021-:1351 (West 1964) (Louisiana Workmen's Compensation Act); MICH. COMP. LAWS ANN. §§ 411.10-.50 (West 1967) (Michigan Workmen's Compensation Act); N.J. STAT. ANN. §§ 34:15-1 to -127 (West 1959) (New Jersey Workmen's Compensation Act); N.Y. WORK. COMP. LAW §§ 1-401 (McKinney 1965) (New York Workmen's Compensation Law); VA. CODE §§ 65.1-1 to -163 (1980 & Cum. Supp. 1983) (Virginia Workmen's Compensation Act).

2. *See* United States v. Demko, 385 U.S. 149, 151 (1966) (compensation statutes act as substitute for, rather than supplement to, common law tort action); Gaudet v. Exxon Corp., 562 F.2d 351, 356 (5th Cir. 1977) (Congress intended Longshoremen's and Harbor Workers' Compensation Act to provide injured worker with compensation benefits in place of potential recovery in tort action against employer), *cert. denied*, 436 U.S. 913 (1978); 33 U.S.C. §§ 901-950 (1982) (Longshoremen's and Harbor Workers' Compensation Act); *see also* 5 U.S.C. § 8116(c) (1982) (liability of government under Federal Employee's Compensation Act is exclusive and in place of all other liability to injured government employees); FLA. STAT. ANN. § 440.11 (West 1981) (employer's liability to injured employee exclusive and in place of all other liability); LA. REV. STAT. ANN. § 23:1032 (West 1964) (workmen's compensation remedies are exclusive of all other rights to compensation of injured workman); MICH. COMP. LAWS ANN. § 411.40 (West 1967) (workmen's compensation recovery is workman's exclusive remedy against employer); N.J. STAT. ANN. §§ 34:15-7 to -8 (West 1959) (workman choosing workmen's compensation remedy surrenders all other rights to indemnification against his employer); N.Y. WORK. COMP. LAW § 11 (McKinney 1965) (employer's liability under workmen's compensation law is exclusive and in place of any other liability); VA. CODE § 65.1-40 (1980) (employer's payment to employee of workmen's compensation excludes employee from all other rights and remedies against employer).

3. Longshoremen's and Harbor Workers' Compensation Act (LHWCA), ch. 509, 44 Stat.

compensation, limiting a stevedore-employer's[4] total liability for a longshoreman-employee's[5] injuries to fixed compensation payments under the LHWCA.[6] The stevedore-employer, however, is not always the party actually responsible for a longshoreman's injury because of the customary employment pattern followed by the stevedoring industry.[7] Longshoremen perform a significant portion of their work, loading or unloading cargo, on third party-owned vessels.[8] Consequently, a large number of injuries received by longshoremen occur on third party vessels.[9] Although the stevedore-employer carries workmen's compensation covering injuries to its employees receive both on the wharf and on third party vessels,[10] the employer's LHWCA coverage does not absolve a negligent shipowner or charterer of liability for a longshoreman's injury.[11]

1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1982)). Congress amended the LHWCA in 1938, 1959, and again in 1972. *See* ch. 685, 52 Stat. 1164 (1938 amendment); Pub. L. No. 86-171, 73 Stat. 391 (1959 amendment); Pub. L. No. 92-576, 86 Stat. 1251 (1972 amendment); *infra* notes 66-73 and accompanying text (discussion of 1938 and 1959 amendments to § 33(b) of LHWCA).

4. *See* 33 U.S.C. § 902(4) (1982). Section 2(4) of the LHWCA defines an employer as any individual or business concern that hires workers for maritime employment in any area customarily used for loading, unloading, repairing, or building a vessel. *Id.* A stevedoring company employs longshoremen to load and unload vessels. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-4, at 251 (1957) (master stevedore or independent contractor, not shipowner, hires harbor workers).

5. *See* 33 U.S.C. § 902(3) (1982). Section 2(3) of the LHWCA defines an employee as any person engaged in maritime employment involving longshoring operations or shipbuilding and repair. *Id.* A shipmaster or crew member of a vessel, however, is not an employee for purposes of the LHWCA. *Id. See generally* 1 M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES 3D §§ 3-8, at 6-16 (3d ed. 1975) (discussion of status of maritime employee as longshoreman or harbor worker).

6. *See* 33 U.S.C. § 905(a) (1982) (benefits employer pays under LHWCA are exclusive and in place of all liability of employer to employee); *see also* Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 350 (5th Cir. 1966) (Congress intended LHWCA compensation to indemnify injured worker in place of any common law damages against employer), *cert. denied*, 385 U.S. 1020 (1967).

7. *See* G. GILMORE & C. BLACK, *supra* note 4, § 6-4, at 251 (stevedoring company hires workers to load or unload vessels owned by third parties).

8. *See* Ray, *The Liability of the Shipowner for Injuries Aboard Ship to Shoreside Workers and the Shipowner's Right to Indemnity Against Such Workers' Employers*, 27 INS. COUN. J. 642, 642 (1960) (nature of longshoring operations requires longshoremen frequently to work aboard third party-owned vessels).

9. *Id.* Ray characterized the merchant vessel as an inherently dangerous work place, thereby accounting for the frequent occurrence of longshoremen's injuries aboard third party vessels. *Id.*

10. *See* 33 U.S.C. § 902(2) (1982). The LHWCA covers all accidental injury or death resulting from or during the course of employment. *Id.* Additionally, the LHWCA entitles a worker or his beneficiaries to compensation for injury or death arising out of employment-related diseases and out of the wilful acts of third persons toward the worker because of the worker's status as an employee. *Id.* The LHWCA does not cover injuries which a worker receives as a result of that worker's intoxication or as a result of that worker's wilful attempt to injure himself or another person. *Id.* § 903(b). *See generally* 1 P. EDELMAN, MARITIME INJURY AND DEATH at 265-71 (1960) (discussion of general provisions of LHWCA coverage).

11. *See* Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1042 (4th Cir. 1980) (provi-

Sections 5 and 33 of the LHWCA permit an injured longshoreman who receives LHWCA compensation from his employer to pursue a common law tort action against a third party shipowner for injuries the longshoreman received as a result of the shipowner's negligence.[12] If the longshoreman does not institute proceedings against the shipowner within six months of the longshoreman's acceptance of LHWCA compensation,[13] section 33(b) of the LHWCA automatically assigns to the longshoreman's employer the longshoreman's right of action against the shipowner.[14] Assignment under section 33(b), however, cannot occur unless the longshoreman received compensation under procedures fulfilling section 33(b)'s requirement of an award in

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sions of LHWCA serve to place ultimate burden of liability for longshoreman's injury on company whose fault caused injury); 33 U.S.C. §§ 905(b), 933(a) (1982) (providing injured longshoremen with remedy against third party tortfeasor).

12. *See* 33 U.S.C. §§ 905(b), 933(a) (1982) (providing injured employee with right of indemnity against negligent third party shipowner). Subject to the provisions of § 33(a) of the LHWCA, § 5(b) of the LHWCA permits an injured longshoreman to recover through a tort action damages against a negligent third party shipowner or ship charterer. *See id.* Section 33(a) of the LHWCA permits an injured longshoreman to both receive LHWCA compensation from his employer and pursue a tort action against a negligent third party shipowner. *See id.* § 933(a). The LHWCA currently requires actual negligence on the part of the third party shipowner or charterer before a longshoreman may recover against the third party for injuries the longshoreman received on board the third party vessel. *See id.* § 905(b) (longshoremen cannot base actions against third party shipowners on warranty of seaworthiness or breach thereof). The LHWCA, however, does not require an injured longshoreman to prove that the third party shipowner's negligence alone was the cause of the longshoreman's injury. Landon v. Lief Hoegh & Co., 521 F.2d 756, 763 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). Negligence on the part of the longshoreman's employer, therefore, does not preclude a longshoreman from maintaining an action against a negligent shipowner. *Id.* Section 5(b), nonetheless, does not permit a longshoreman to recover against a third party if negligence on the part of the longshoreman's employer alone caused the longshoreman's injury. *See* 33 U.S.C. § 905(b) (1976).

Prior to the 1972 amendments to the LHWCA that abolished application of the doctrine of seaworthiness in longshoremen's actions against third parties, a third party shipowner was liable to the longshoreman for injuries resulting from a vessel's unseaworthiness, regardless of whether the shipowner was in fact negligent. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946) (longshoremen, like merchant seamen, may maintain action against non-negligent shipowner to recover damages for unseaworthiness); *see also* Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837, 839 (2d Cir. 1977) (Congress intended 1972 amendments to eliminate doctrine of liability without fault for shipowners); Pub. L. No. 92-576, 86 Stat. 1263 (1972 amendment to § 5(b) of LHWCA). Under the warranty of seaworthiness, a vessel's owner has a duty to prepare his vessel, its parts, and equipment reasonably for their purposes. 1B BENEDICT ON ADMIRALTY § 23, at 3-63 (7th ed. 1982); *see* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960) (shipowner has duty to furnish vessel and appurtenances reasonably fit for intended use); The Osceola, 189 U.S. 158, 175 (1903) (shipowner must indemnify seaman for injuries seaman receives as result of general unseaworthiness of vessel or owner's failure to maintain or repair vessel's necessary equipment). Applying the doctrine of unseaworthiness to longshoremen under the LHWCA, the Supreme Court in *Sieracki* transformed the shipowner's duty of reasonable diligence to provide a seaworthy vessel to an absolute duty of liability without fault. *See* 328 U.S. at 94-95.

13. *See* 33 U.S.C. § 933(b) (1982) (explicit language of § 33(b) of LHWCA requires acceptance of compensation by longshoreman pursuant to Department of Labor deputy commissioner's entry of award in compensation order before provisions of § 33(b) operate); *infra* note 18 and accompanying text (defining compensation order).

14. 33 U.S.C. § 933(b) (1982). Section 33(b) of the LHWCA provides that a longshoreman's

a compensation order.[15] A compensation order is a document concluding an informal conference[16] or a formal hearing[17] on a longshoreman's LHWCA compensation claim, and contains findings of fact, conclusions of law, and an order for appropriate relief.[18] If the longshoreman's acceptance of com-

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acceptance of LHWCA compensation "under an award in a compensation order filed by the deputy commissioner" of the Department of Labor or the Department of Labor's Benefits Review Board operates as an assignment of the longshoreman's third party claim to the longshoreman's employer. *Id.* No assignment occurs, however, if the longshoreman pursues his right of action against the third party within six months of the LHWCA award of compensation. *Id.*

After assignment, the stevedore-employer may sue the shipowner to recover from the shipowner any amounts the employer paid to the longshoreman as LHWCA compensation. *See id.* § 933(d) (authorizing employer, following assignment under § 33(b), either to recover damages against third party or to settle tort claim with third party). Following a stevedore-employer's successful recovery in an action against the third party tortfeasor, the stevedore-employer may apply the proceeds of the suit to offset any payments made to the longshoreman under LHWCA compensation. *See id.* § 933(e) (controlling use of proceeds of stevedore-employer's third party suit). The stevedore-employer also may claim 20% of the balance remaining after covering the longshoreman's LHWCA payments and must turn over the remaining 80% of the balance to the longshoreman as supplementary compensation. *See id.* (controlling stevedore-employer's use of proceeds from employer's successful third party claim). Under operation of § 33(e) of the LHWCA, therefore, the longshoreman has a continuing interest in any suit against the third party tortfeasor even though the longshoreman does not institute the action. *See* Susino v. Hellenic Lines, Ltd., 551 F. Supp. 1080, 1082 (E.D.N.Y. 1982) (noting longshoreman's continued personal interest in stevedore-employer's third party suit).

15. *See* 33 U.S.C. § 933(b) (1982) (§ 33(b) allows assignment of third party claim only after passage of six months from longshoreman's receipt of compensation under award in compensation order).

16. *See* 20 C.F.R. § 702.301 (1983) (authorizing deputy commissioner to resolve in informal conferences misunderstandings, clerical or mechanical errors, or mistakes of fact or law pertaining to longshoreman's disputed LHWCA claim). The deputy commissioner conducts informal conferences in the office of the deputy commissioner without stenographic record or witnesses. *See id.* § 702.314. The deputy commissioner concludes any agreement reached through an informal conference with the drafting of a memorandum embodying the agreement. *See id.* § 702.315(a) (memorandum requirement for memorializing agreements reached at informal hearings). Additionally, either party may request that the deputy commissioner enter a formal compensation order consummating the agreement reached at the informal hearing. *See id.* (noting option of compensation order concluding informal conference at request of either party).

17. *See id.* § 702.301 (formal hearing procedures resolve serious claims disputes). When a genuine issue of fact or law exists that the deputy commissioner in conference with the parties cannot dispose of informally, the dispute advances to informal hearings before an administrative law judge. *See id.* (genuine dispute of fact or law advances to formal hearing for resolution); *id.* § 702.316 (serious dispute at informal conference merits transfer of dispute to hearing before administrative law judge); *see also id.* § 702.317 (detailing procedure for transfer of case for formal hearing). Formal hearings are open to the public, are stenographically reported, and may include testimony by expert witnesses if necessary. *See id.* § 702.338, .343 to .344 (detailing formal hearing procedures). Within 20 days following termination of the formal hearing, the administrative law judge renders a final decision and order in the form of a formal compensation order rejecting the longshoreman's LHWCA claim or making an award of benefits. *See id.* § 702.348 (decision of administrative law judge embodied in compensation order).

18. *See id.* (setting forth general contents of compensation order). Following entry of a formal compensation order concluding either informal conferences or formal hearings, the deputy commissioner files the order and mails copies to each of the interested parties. *See id.* § 702.349 (deputy commissioner's procedures for filing and mailing compensation orders). Once filed in

pensation satisfies the section 33(b) award requirement,[19] and section 33(b) produces an assignment of the longshoreman's third party claim to the stevedore-employer,[20] the longshoreman no longer has standing to sue the shipowner.[21] In longshoremen's actions against shipowners, therefore,

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the office of the deputy commissioner, the compensation order becomes effective, binding the employer or insurance carrier to follow the instructions for compensation, if any, contained in the compensation order. *See id.* § 702.350 (finality of compensation orders); *see also* 33 U.S.C. § 914(f) (1982) (employer required to conform to payment procedures embodied in compensation order or risk penalty). The Department of Labor's Benefits Review Board may review the compensation order, but a longshoreman or employer challenging the decision contained in an order must institute review proceedings within 30 days of the filing of the order in the deputy commissioner's office. *See* 20 C.F.R. § 702.350 (1983) (application for review of compensation order required within 30 days of compensation order filing date); *see also* 33 U.S.C. § 921(b)(3) (1982) (authorizing Benefits Review Board to review compensation orders); *id.* § 921(b)(1) (establishing a three-member Benefits Review Board); 20 C.F.R. § 801.201 (1983) (describing composition of Benefits Review Board). After passage of the review deadline, federal courts have the power to enforce the compensation order. *See* 33 U.S.C. § 921(d) (1982) (authorizing federal courts to enforce compensation orders). The LHWCA places a substantial penalty on an employer who fails to make payments under the terms of a compensation order. *See id.* § 914(f) (employer failing to make LHWCA payments under terms of compensation order within 10 days of payment due date subject to pay employee additional compensation in amount 20% of approved compensation); *cf. id.* § 914(e) (employer failing to make payments under terms of agreement without award within 14 days of payment due date subject to penalty of 10% of approved compensation, payable as additional compensation to employee).

19. *See id.* § 933(b) (requiring award in compensation order to trigger § 33(b) assignment provisions); *supra* note 14 (text of § 33(b) of LHWCA).

20. *See* 33 U.S.C. § 933(b) (providing for statutory assignment of employee's third party claim upon satisfaction of limitation requirements); *supra* note 14 (text of § 33(b) of LHWCA).

21. *See* Rodriguez v. Compass Shipping Co., 617 F.2d 955, 958 (3d Cir. 1980) (employer and not employee is real party in interest after assignment of employer's third party claim to employer), *aff'd*, 451 U.S. 596 (1981); 33 U.S.C. § 933(b) (1982) (satisfaction of § 33(b) requirements results in assignment of employee's third party claim to employer); FED. R. CIV. P. 17(a) (every action shall be prosecuted in name of real party in interest).

Prior to the Supreme Court's *Rodriguez* decision, if § 33(b) operated to assign a longshoreman's claim to his employer and the employer failed to pursue the claim, the longshoreman successfully could argue that the employer's failure to sue permitted reassignment of the claim to the longshoreman. *See* Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 532 (1956) (longshoreman may maintain third party action after assignment of claim to employer upon showing that conflict of interest caused employer's failure to pursue third party claim); Johnson v. Sword Line, Inc., 257 F.2d 541, 544 (3d Cir. 1958) (courts may presume conflict of interest to exist whenever assignee failed to pursue third party claim). *But see* Rodriguez v. Compass Shipping Co., 451 U.S. 596, 617-18 (1981) (rejecting claim that conflict of interest resulted in reassignment of third party claim to employee), *aff'g* 617 F.2d 955 (2d Cir. 1980); *see also* Susino v. Hellenic Lines, Ltd., 551 F. Supp. 1080, 1081, 1083 (E.D.N.Y. 1982) (where one company is both shipowner and stevedore-employer, actual and demonstrable conflict of interest exists, permitting longshoreman to sue shipowner even after assignment of third party claim to employer).

The conflict of interest contemplated by courts such as *Czaplicki* resulted where, for example, the insurance carrier for the shipowner also insured the stevedore-employer, thereby discouraging the employer from suing the shipowner. *See Czaplicki*, 351 U.S. at 530 (noting circumstances of conflict of interest). Although a longshoreman loses his legal interest in a third party claim following a § 33(b) assignment of the claim to his employer, the longshoreman has a continued personal interest in the outcome of the employer's suit. *See id.* at 530-31 (employee has continued interest in third party claim even after § 33(b) assignment); 1 M. NORRIS, *supra* note 5, § 97,

shipowners seeking to avoid liability often argue that section 33(b) automatically had assigned the longshoreman's claim to the stevedore-employer because some procedure under which the longshoreman received LHWCA compensation constituted a proper award for purposes of section 33(b).[22] Courts hearing such an argument consequently must determine whether the longshoreman received compensation in a manner sufficient to satisfy section 33(b)'s requirement of an award in a compensation order triggering the six-month limitation period leading to assignment.[23]

Confusion often has arisen concerning satisfaction of the section 33(b) award requirement because several avenues exist by which a longshoreman may receive LHWCA compensation.[24] A longshoreman may receive LHWCA

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at 176 (operation of § 33(e) of LHWCA results in continued personal interest of employee in third party claim after § 33(b) assignment of claim to employer); *see also* 33 U.S.C. § 933(e) (1982) (employee entitled to certain percentage of employer's recovery from third party tortfeasor); *supra* note 14 (detailing operation of § 33(e)). When a conflict of interest exists between an employer and employee resulting in the employer's inaction on a third party claim, the employer's failure to sue the third party defeats the employee's interest in any potential recovery. *See Czaplicki*, 351 U.S. at 531 (noting effect of employer's failure to sue third party). The *Czaplicki* conflict of interest exception to § 33(b) assignment, therefore, permitted the employee to bring a third party action after assignment on the ground that the employee was the only party with sufficient adverse interest to maintain the action. *Id.*

The Supreme Court, in *Rodriguez*, rejected the reassignment argument, ruling that once § 33(b) results in an assignment of an employee's third party claim, the employee loses the claim irrevocably to his employer. 451 U.S. at 603. The *Rodriguez* Court reasoned that an employer's failure to bring a third party action following assignment is a risk an employee must consider in the employee's decision whether to pursue the third party claim before assignment. *Id.* at 613-14. The *Rodriguez* Court, however, declined to resolve whether § 33(b) assignment barred a longshoreman's third party suit in the event of a very serious conflict of interest. *Id.* at 618.

22. *See, e.g.*, Rodriguez v. Compass Shipping Co., 617 F.2d 955, 958 (2d Cir. 1980) (defendant shipowner argued longshoreman's lack of standing as real party in interest due to assignment of longshoreman's claim to employer after longshoreman's receipt of compensation pursuant to settlement agreement), *aff'd*, 451 U.S. 596 (1981); Hall v. International Union Lines, Inc., 552 F. Supp. 816, 817 (E.D. La. 1982) (defendant shipowner moved for dismissal of longshoreman's action on ground that longshoreman's third party claim assigned to employer by virtue of longshoreman's acceptance of compensation without award); Rother v. Interstate & Ocean Transport Co., 540 F. Supp. 477, 483 (E.D. Pa. 1982) (defendant shipowner alleged that plaintiff employee not real party in interest because employee brought suit more than six months after receipt of LHWCA payments, resulting in § 33(b) assignment of employee's third party claim); Collier v. John Mendis, Inc., 526 F. Supp. 459, 459 (D.D.C. 1981) (defendant ship charterer entered motion for summary judgment on ground that § 33(b) assigned employee's claim to employer after passage of six months from time employee received LHWCA compensation); Larson v. Associated Container Transp. Ltd., 459 F. Supp. 561, 562 (E.D. Va. 1978) (defendant shipowner moved for summary judgment on ground that § 33(b) assigned longshoreman's claim to employer following passage of six months from longshoreman's receipt of compensation).

23. *See, e.g.*, Simmons v. Sea-Land Serv., Inc., 676 F.2d 106, 108 (4th Cir. 1982) (issue in § 33(b) assignment question is whether certain events create award in compensation order sufficient to trigger six month limitation period), *vacated and remanded*, ___ U.S. ___ (1983); Hall v. International Union Lines, Inc., 552 F. Supp. 816, 817 (E.D. La. 1982) (§ 33(b) assignment issue is whether longshoreman received compensation under award in compensation order as § 33(b) requires); Larson v. Associated Container Transp., Ltd., 459 F. Supp. 561, 562 (E.D. Va. 1978) (determination of § 33(b) assignment issue dependent on when and if award was made).

24. *See generally* 20 C.F.R. § 702.231-.350 (1983) (procedures for resolving longshoremen's

compensation through his employer's voluntary payment of benefits, which the employer must begin within fourteen days of initial notification of the longshoreman's injury.[25] When an employer disputes its LHWCA liability or a longshoreman contests his employer's reduction, suspension or termination of benefits, however, a series of adjudicative procedures commences.[26] If the dispute is minor the deputy commissioner for the longshoreman's compensation district[27] will hear the dispute in an informal conference[28] and issue a memorandum embodying the compensation agreement,[29] or if either the longshoreman or stevedore-employer requests, issue a formal compensation

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LHWCA claims); *supra* notes 17 & 18 (describing adjudication of LHWCA claims in informal hearings or formal conferences); *see also supra* note 18 (discussing contents and effect of award in compensation order).

25. *See* 20 C.F.R. § 702.231 (1983) (employer must pay LHWCA benefits unless employer disputes employee's LHWCA claim); *id.* § 702.232 (first compensation payment to longshoreman due on 14th day after employer has knowledge of longshoreman's injury or death). Upon the initiation of voluntary LHWCA payments, or in the event the employer later terminates payments, federal regulations require the employer to file with the deputy commissioner notice of either commencement or termination of payments. *See id.* § 702.234 (requiring employer to file commencement and suspension notices with deputy commissioner). The official administrative forms for notice of commencement or suspension of LHWCA payments are Form LS-206—Payment of Compensation Without Award and Form LS-208—Compensation Payment Stopped or Suspended. *See* Pallas Shipping Agency v. Duris, 461 U.S. 529, 531 (1983) (noting official forms required for notice of commencement or suspension of LHWCA payments). Payment of compensation without award under Form LS-206 signifies that the employer has agreed to pay the injured longshoreman LHWCA benefits without having disputed the longshoreman's right to compensation. *Id.* at 532.

Federal regulations permit an employer and employee to settle claims independent of the LHWCA claims process. *See* 20 C.F.R. § 702.241(a) (1983) (authorizing agreed settlements between longshoreman and employer with approval of deputy commissioner). A deputy commissioner, however, must approve all agreed settlements that discharge the liabilities of the employer for LHWCA compensation. *See id.* (deputy commissioner must approve agreed settlements between employer and employee); *id.* § 702.241(b) (interested parties must apply for approval of agreed settlements in writing to deputy commissioner); *id.* § 702.241(c) (deputy commissioner must file compensation order making necessary findings of fact prior to approving settlement discharging employer from LHWCA liability). Federal regulations permit agreed settlements, notwithstanding provisions of § 15(b) and § 16 of the LHWCA, which prohibit settlements discharging an employer from LHWCA liability. *Id.* § 702.241(a); *see* 33 U.S.C. §§ 915(b), 916 (1982) (prohibiting settlements discharging employers from LHWCA liability).

26. *See* 20 C.F.R. § 702.251-.252 (1983) (deputy commissioner commences proceedings for adjudication of claim following employer's notice of dispute of employee's claim to LHWCA benefits); *id.* § 702.301 (deputy commissioner settled minor claims disputes through informal conferences and administrative law judge decides major disputes through formal hearings).

27. *See id.* § 702.101 (establishing 18 specific compensation districts); *id.* § 702.212 (requiring injured longshoreman to file compensation claims with deputy commissioner of compensation district where injury occurred).

28. *See id.* § 702.301 (deputy commissioner has authority to resolve minor LHWCA disputes through informal conferences). Minor LHWCA claims disputes usually involve clerical or mechanical errors, misunderstandings between the parties, or mistakes of fact or law. *See id.* (noting common subject matter of minor LHWCA disputes); *supra* note 16 (detailing informal conference process).

29. *See* 20 C.F.R. § 702.315(a) (1983) (memorandum required memorializing agreements reached at informal conferences).

order.[30] If, however, the conflict involves a major claim dispute, an administrative law judge will resolve the dispute in a formal hearing[31] and will render a final decision and order of compensation payment, if any, in a formal compensation order.[32] The longshoreman, therefore, may receive voluntary LHWCA benefits payments or ordered LHWCA compensation through the memorandum or compensation order consummating an informal conference or through the compensation order concluding a formal hearing.[33]

Although section 33(b)'s compensation order requirement implicitly limits the operation of section 33(b) to disputed claims[34] since compensation orders ordinarily follow only claims disputes resolved in either informal conferences or formal hearings,[35] at least one court, until recently, has applied section 33(b) to a longshoreman's acceptance of compensation that his stevedore-employer paid voluntarily without an award.[36] The United States Court of Appeals for the Fourth Circuit, in a series of cases, held that a section 33(b) assignment does not require a formal award in a compensation order but merely requires payment and acceptance of compensation.[37] For example, in *Simmons*

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30. *See id.* (noting option of compensation order concluding informal conference); *supra* note 18 (discussing nature and significance of compensation orders).

31. *See* 20 C.F.R. § 702.301 (1983) (genuine dispute of fact or law advances to formal hearings for resolution); *id.* § 702.316 (serious dispute of informal conference merits transfer of dispute to hearing before administrative law judge); *supra* note 1 (detailing formal hearings process); *see also* 20 C.F.R. § 702.317 (1983) (detailing procedure for transfer of case for formal hearing).

32. *See id.* § 702.348 (decision of administrative law judge embodied in compensation order); *supra* note 18 (discussing nature and significance of compensation orders).

33. *See supra* notes 25-32 and accompanying text (discussing various processes for LHWCA claims resolution).

34. *See* Pallas Shipping Agency v. Duris, 461 U.S. 529, 534 (1983) (compensation order is administrative award of compensation following proceedings with respect to claim). *But see id.* at 538 (interpreting 20 C.F.R. § 702.315(a) as authorizing employer making voluntary compensation payments to obtain compensation order upon consent of all interested parties); *see also* 20 C.F.R. § 702.315(a) (1983) (authorizing deputy commissioner to enter compensation order concluding informal conference upon request for either party).

35. *See* 20 C.F.R. § 702.315(a) (1983) (authorizing option of compensation order concluding informal conference at request of either longshoreman or employer); *id.* § 702.348 (administrative law judge embodies formal hearing decision in compensation order).

36. *See* Simmons v. Sea-Land Serv., Inc., 676 F.2d 106, 109 (4th Cir. 1982) (longshoreman's acceptance of payments without formal award of benefits sufficient to trigger § 33(b) assignment provisions), *vacated and remanded*, ___ U.S. ___ (1983); Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097, 1103 (4th Cir. 1977) (longshoreman's acceptance of voluntary payments and employer's filing of notice of commencement of payment sufficient to trigger § 33(b) six-month limitation); *see also* Larson v. Associated Container Transp., Ltd., 459 F. Supp. 561, 564 (E.D. Va. 1978) (longshoreman's mere acceptance of compensation and employer's filing of commencement of payment notice triggered § 33(b) assignment provisions).

37. *See* Simmons v. Sea-Land Serv., Inc., 676 F.2d 106, 109 (4th Cir. 1982) (mere acceptance of compensation sufficient to trigger assignment under § 33(b)); Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037, 1041-42 (4th Cir. 1980) (acceptance of compensation without award by deputy commissioner triggers § 33(b) assignment provision); Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097, 1102 (4th Cir. 1977) (mere acceptance of compensation without award sufficient to trigger § 33(b) assignment). *But cf.* 33 U.S.C. § 933(b) (1982) (requiring deputy

v. Sea-Land Services, Inc.,[38] the Fourth Circuit suggested that a requirement of a formal award would frustrate the LHWCA's purpose of providing quick and fully adequate relief to an injured longshoreman.[39] The *Simmons* court explained that a stevedore-employer desiring to preserve its future right to pursue a third party claim would have to dispute every longshoreman's LHWCA claim in order to force the adjudication proceedings necessary to produce an award in a compensation order.[40] The Fourth Circuit reasoned

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commissioner to file award in compensation order for operation of § 33(b) six-month limitation leading to automatic assignment); *supra* note 14 (text of § 33(b)).

The Fourth Circuit, in *Liberty Mutual Ins. Co. v. Ameta & Co.*, decided that a § 33(b) assignment does not require a formal award but merely payment and acceptance of LHWCA compensation. 564 F.2d at 1102. In *Liberty Mutual*, the Fourth Circuit considered the claim of an employer's insurance carrier that an assignment of a longshoreman's third party claim to the longshoreman's employer entitled the insurance carrier to bring suit against the third party tortfeasor. *Id.* at 1101; *see* 33 U.S.C. § 933(h) (1982) (subrogating employer's claim against third party tortfeasor to employer's insurance carrier when carrier assumes payment of LHWCA compensation). The third party shipowner countered the insurance carrier's claim, arguing that the longshoreman's receipt of his employer's voluntarily compensation payments without a formal award did not result in an assignment of the longshoreman's third party claim. 564 F.2d at 1101. The lack of an assignment, argued the shipowner, precluded the insurance carrier from suing on the longshoreman's right of action. *Id.* The Fourth Circuit disagreed with the shipowner, noting two cases decided prior to the 1959 amendment of § 33(b) as illustrating a broad definition of the term "award" for purposes of § 33(b). *Id.* at 1102; *see* Grasso v. Lorentzen, 56 F. Supp. 51, 54 (S.D.N.Y. 1944) (holding that affirmative act or determination by deputy commissioner meets assignment requirements of § 33(b)), *aff'd*, 149 F.2d 127 (2d Cir.), *cert. denied*, 326 U.S. 743 (1945); Didier v. Crescent Wharf & Warehouse Co., 15 F. Supp. 91, 93 (S.D. Cal. 1936) (holding that compensation order in LHWCA § 21(a) means any order relating to compensation). Relying on *Grasso* and *Didier*, the *Liberty Mutual* court focused on acts of ratification of compensation, whether formal or informal, and the longshoreman's subsequent acceptance of compensation as primary indicators of an award within the § 33(b) requirement. 564 F.2d at 1102. The *Liberty Mutual* court determined that the employer's filing of LHWCA compensation documents and the subsequent grant of benefits to the longshoreman constituted sufficient ratification and acceptance to produce an award in a compensation order without entry of a formal award. *Id.* at 1103. In *Liberty Mutual*, the employer filed with the deputy commissioner Form BEC-202—Employer's First Report of Accident or Occupational Illness, Form BEC-206—Payment of Compensation Without Award, Form No. 6—Attending Physician's Report, and Form BEC-208—Compensation Payment Stopped or Suspended. *Id.* at 1101 n.10.

The Fourth Circuit strengthened *Liberty Mutual*'s effect on Fourth Circuit jurisprudence in *Simmons v. Sea-Land Serv., Inc.*, which set forth three specific events necessary to constitute an award sufficient to trigger the § 33(b) assignment provision. 676 F.2d at 109. The *Simmons* court required as a minimum that the employer voluntarily offer compensation payments to the longshoreman, that the deputy commissioner file appropriate LHWCA notice documents, and that the longshoreman accept any LHWCA payments. *Id.* The *Simmons* court noted that the three events combined to create an award triggering the § 33(b) six-month limitation independent of a formal award in a compensation order. *Id.*

38. 676 F.2d 106 (4th Cir. 1982), *vacated and remanded*, ____ U.S. ____ (1983).

39. *See* 676 F.2d at 109 (formal award requirement operates indirectly to hinder purpose of LHWCA to provide speedy relief to injured employees); *see also Liberty Mutual*, 564 F.2d at 1103 (award requirement obstructs purpose of LHWCA to provide longshoremen with quick, adequate relief).

40. *See* 676 F.2d at 109 (suggesting that requirement of formal award creates need for employer's mechanical dispute of employee's LHWCA claim to force award in compensation

that the six-month limitation under section 33(b) provided the longshoreman with sufficient time to consider his option to pursue an action against a third party tortfeasor.[41] The *Simmons* court concluded that the six-month limitation served as an adequate safeguard of the longshoreman's rights under the LHWCA in the place of a formal award requirement.[42]

The United States Supreme Court, however, in *Pallas Shipping Agency, Ltd. v. Duris*,[43] explicitly rejected the Fourth Circuit's rule that mere acceptance of LHWCA compensation and the routine filing of compensation forms constitute an award triggering the running of the section 33(b) six-month limitation.[44] In *Pallas Shipping*, a longshoreman received injuries while performing work aboard a chartered vessel.[45] The longshoreman for nearly two years accepted compensation payments made without contest by the longshoreman's employer.[46] Upon termination of LHWCA benefits, the longshoreman attempted to recover further compensation from the third party ship charterer.[47] Although no formal compensation order existed, the charterer argued that section 33(b)'s assignment provision barred the longshoreman's claim[48] since the longshoreman's acceptance of compensation payments and the employer's routine filing of administrative forms[49] constituted an award in a compensation order for purposes of section 33(b).[50] The charterer contended that the passage of six months following the award created an assignment of the longshoreman's third party claim to the longshoreman's employer,

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order guaranteeing operation of § 33(b) six-month limitation); *Liberty Mutual*, 564 F.2d at 1103 (employers must dispute every LHWCA claim to force entry of formal award under § 33(b) award requirement). The *Liberty Mutual* court suggested that an employer's challenge of LHWCA claims to preserve the employee's § 33(a) assignment rights would result in needless delay at the expense of the longshoreman. 564 F.2d at 1103.

41. *See Simmons*, 676 F.2d at 109 (six-month limitation period provides longshoreman with sufficient time to consider his options to compensation).

42. *See id.* (six-month limitation serves as protection to longshoremen). The *Simmons* court's reasoning that the § 33(b) six-month limitation adequately safeguards a longshoreman's rights in the absence of an award in a compensation order demonstrates a § 33(b) interpretation that ignores the significance of the 1938 amendment to § 33(b) that added the requirement of an award in a compensation order. *See id.* (six-month limitation affords longshoremen adequate protection of rights, thereby implicitly eliminating need for award in compensation order); Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164, 1168 (1938 amendment to § 33(b)); *infra* note 67 and accompanying text (discussing nature and significance of 1938 amendment to § 33(b)).

43. 461 U.S. 529 (1983).

44. *Id.* at 532.

45. *Id.* at 531.

46. *Id.*

47. *Id.*

48. *Id.* at 534.

49. *See id.* In *Pallas Shipping*, the deputy commissioner filed Form LS-206—Payment of Compensation Without Award, and Form LS-208—Compensation of Payment Stopped or Suspended. *Id.; see* 33 U.S.C. § 914(c) (1982) (requiring that employer file notice forms with deputy commissioner to notify Department of Labor of commencement or suspension of LHWCA compensation); 20 C.F.R. § 702.234 (1983) (requiring notification to deputy commissioner of commencement or suspension of LHWCA payments).

50. 461 U.S. at 534.

barring the longshoreman from pursuing a third party action instituted two years after the longshoreman received the award.[51]

The *Pallas Shipping* Court rejected the charterer's argument, ruling that no assignment of the longshoreman's third party claim occurred.[52] The *Pallas Shipping* Court recognized that the plain language of section 33(b) requires a longshoreman's acceptance of an award in a compensation order filed by the deputy commissioner before section 33(b) operates to assign the longshoreman's third party claim to his employer.[53] The Court noted that a compensation order is an administrative compensation award concluding a LHWCA claims proceeding.[54] The *Pallas Shipping* Court emphasized that since the employer in *Pallas Shipping* made voluntary LHWCA payments,[55] not only had no claims proceedings taken place, but no official had entered a compensation order.[56] The Court, therefore, rejected the charterer's argument that mere acceptance of voluntary LHWCA payments triggered section 33(b) assignment.[57]

The *Pallas Shipping* Court then reasoned that the employer's filing of required administrative compensation forms did not satisfy the section 33(b) requirement of an award in a compensation order.[58] The Court noted that administrative filings are distinct from compensation orders in several respects.[59] First, the Court stated that both the deputy commissioner and administrative law judges issue compensation orders, but not administrative forms.[60] Second, the Court maintained that unlike administrative filings, compensation orders are administratively reviewable and judicially enforceable.[61] Finally, the Court stated that an employer failing to comply with the terms of a compensation order faces a more substantial penalty than an employer failing to meet the voluntary payments set in the administrative forms.[62] The *Pallas Shipping* Court added that no part of the LHWCA suggested a construction of the term "compensation order" to include administrative filings.[63]

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51. *Id.*

52. *Id.*

53. *Id.; see* 33 U.S.C. § 933(b) (1982) (requiring longshoreman to receive award in compensation order before assignment provisions of § 33(b) operate); *supra* note 14 (text of § 33(b)).

54. 461 U.S. at 534; *see supra* note 18 (detailing nature and significance of compensation orders).

55. 461 U.S. at 531.

56. *Id.* at 534.

57. *Id.* at 539.

58. *Id.* at 534.

59. *Id.*

60. *See* 20 C.F.R. § 702.315 (1983) (deputy commissioner prepares compensation order following informal conference if parties request order); *id.* § 702.348 (administrative law judge prepares compensation order following formal hearings).

61. *See* 33 U.S.C. § 921(b) (1982) (Benefits Review Board may review compensation orders); *id.* § 921(d) (federal courts have power to enforce compensation orders).

62. *See supra* note 18 (comparing penalties for employer's failure to comply with either administrative filings or compensation order).

63. 461 U.S. at 535.

The *Pallas Shipping* Court next reasoned that the legislative history of section 33(b) precluded any interpretation of the statute that disregarded the requirement of an award in a compensation order.[64] The original language of section 33(b) made mere receipt of compensation payments in any form and at any stage of compensation proceedings an automatic assignment to the longshoreman's employer of the longshoreman's right of action against a third party shipowner.[65] Aware of problems inherent in the immediate assignment provision of the 1927 version of section 33(b),[66] Congress in 1938 amended section 33(b) by adding an award clause that limited immediate assignment to those situations in which a longshoreman accepted compensation under an award in a compensation order issued by a deputy commissioner.[67] Congress

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64. *Id.* at 535-38.

65. *See* Act of Mar. 4, 1927, § 33, 44 Stat. 1424, 1440 (original version of § 33 of LHWCA). The 1927 version of § 33(b) assigned the employee's third party claim to the employer as soon as the employee accepted LHWCA compensation. *Id.* Assignment occurred regardless of whether the employee had notified the deputy commissioner of the employee's election to receive LHWCA compensation rather than to pursue a third party claim. *Id.*

66. *See* H.R. REP. No. 1945, 75th Cong., 3d Sess. 9 (1938) (1938 amendment will remove problems in operation of § 33(b)). Congress noted that under the 1927 enactment of the LHWCA, § 33(b) operated to treat unjustly an employee who lost his right of action against a third party tortfeasor because the employee accepted compensation without fully understanding the effect such acceptance would have upon his rights to further indemnification. *Id.* Congress reasoned that an award requirement in § 33(b) would provide employees with the opportunity to carefully consider the option of whether to accept compensation under an award or refuse compensation to pursue a third party action. *Id.; see Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary*, 74th Cong., 1st Sess. ____ (1935) (statement of Lewis Dalby, chief counsel for the United States Employment Compensation Commission) (discussing merit of proposed award requirement). Dalby, in his report to the Subcommittee on the Judiciary, commented that employees often accept compensation without realizing how acceptance affects their rights to further indemnification from third party tortfeasors. *Id.* Dalby explained that the process of formal hearing and issuance of an award would operate to inform the employee of his rights beyond LHWCA compensation. *Id.* Dalby suggested that an award requirement was necessary to prevent an employee from unknowingly losing his rights against third parties by acceptance of compensation that the employer or insurance carrier offered to the employee immediately upon notice of the injury. *Id.*

67. *See* Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164, 1168 (1938 amendment to § 33(b)). Under the 1938 amendment, an employee's acceptance of LHWCA compensation under an award in a compensation order filed by a deputy commissioner automatically assigned to the employer any rights the employee had against a third party tortfeasor. *Id.* The 1938 amendment permitted a longshoreman accepting compensation without an award to maintain a tort action against a third party shipowner. *Id.; see* 1 M. NORRIS, *supra* note 5, § 95, at 172 (1938 amendment required some official action by deputy commissioner explicitly establishing compensation award before employee's acceptance of compensation operated as assignment of employee's third party claim to employer). When a deputy commissioner granted a longshoreman LHWCA compensation under an award in a compensation order, however, the 1938 version of § 33(b) continued to require an injured longshoreman to elect whether to accept compensation under an award, with a resulting immediate assignment of his third party claim to the stevedore-employer, or to reject LHWCA compensation completely in order to pursue independently an action against the shipowner. *See* Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1164, 1168 (1938 amendment continued to require election of remedies for longshoreman's receipt of compensation under award in compensation order); *see also* Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74, 79 (1980)

again amended section 33(b) in 1959 by adding a six-month limitation provision which effectively authorized a longshoreman both to receive compensation under an award in a compensation order and to pursue within six months of receipt of compensation a tort action against the third party shipowner.[68]

The *Pallas Shipping* Court noted that the 1938 amendment's requirement of an award in a compensation order served to inform a longshoreman of the full extent of his rights to compensation.[69] The Court explained that Congress intended a formal award requirement to protect injured longshoremen from any unexpected loss of rights against third party tortfeasors and to enable longshoremen to make informed elections of remedies.[70] The *Pallas Shipping* Court emphasized, however, that Congress made no indication that the 1959 amendment was to supersede the 1938 amendment's award requirement.[71] Rather, the *Pallas Shipping* Court noted that Congress intended the pre-1959 judicial construction of those phrases of section 33(b) retained under the 1959 amendment to continue.[72] The *Pallas Shipping* Court recognized the pre-1959 construction of the 1938 award requirement to permit statutory assignment after a longshoreman accepted nothing less than an award of compensation by the deputy commissioner.[73] In the *Pallas Shipping* Court's opinion, therefore, the legislative history of section 33(b) did not support an interpretation of section 33(b) which, on the basis of the 1959 six-month limitation amendment, disregarded the 1938 amendment's award requirement.[74]

(under 1938 amendment, § 33(b) required no election of remedies unless employer paid compensation pursuant to award in compensation order).

68. *See* Act of Aug. 18, 1959, Pub. L. No. 86-171, 73 Stat. 391, 391 (1959 amendment to § 33(b)). In the 1959 amendment to § 33(b), Congress added a phrase making automatic assignment of the longshoreman's claim conditional on the passage of six months after the longshoreman's receipt of an award in a compensation order. *Id.; see* Pallas Shipping Agency v. Duris, 461 U.S. 529, 537 (1983) (1959 amendment allows longshoreman both to receive compensation in award in compensation order and to pursue third party claim within six months of award). Congress intended the 1959 amendment to § 33(b) to provide longshoremen with an increased ability to receive fully adequate indemnification for the longshoreman's injury. *See* S. REP. No. 428, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2134, 2134-35 (amendment adding six-month limitation period allows employee to bring third party claim without forfeiting right to LHWCA compensation). The Senate noted that the 1938 version of § 33(b) caused hardship for an injured longshoreman because the statute effectively operated to force the employee immediately to elect LHWCA compensation rather than to face the uncertainty and expense involved in an independent third party claim. *Id.*

69. 461 U.S. at 536.

70. *Id.*

71. *See id.* at 537 (Congress demonstrated no intent to alter prerequisites of award in compensation order for proper assignment); 105 CONG. REC. 9226 (1959) (statement of Sen. Kennedy) (1959 amendment necessitates no change in current judicial construction of retained phrases of 1938 version of § 33(b)).

72. *See* 461 U.S. at 537 (noting congressional intent in passage of 1959 amendment to § 33(b)).

73. *Id.* at 536-37; *see* American Stevedores, Inc. v. Porello, 330 U.S. 446, 454-56 (1947) (representing pre-1959 construction of § 33(b) that mere acceptance of compensation benefits does not trigger immediate assignment under § 33(b)).

74. 461 U.S. at 537.

The *Pallas Shipping* Court, supporting the continued vitality of the 1938 amendment's award requirement, reasoned that the requirement of an award in a formal compensation order still serves the 1938 amendment's original basic legislative purpose of protecting the interests of injured longshoremen.[75] The Court explained that a formal award places the longshoreman on certain notice that he has six months to pursue an action against a third party.[76] The Court added that a formal award apprises a longshoreman of the final, fixed amount of LHWCA compensation to which he is entitled, enabling the longshoreman to make a well-informed decision on whether to sue the third party tortfeasor.[77] Responding to the argument that the award requirement encourages employers mechanically to dispute all LHWCA claims in order to force proceedings necessary to produce an award in a compensation order,[78] the *Pallas Shipping* Court suggested that under current federal regulations, an employer making voluntary benefits payments can request entry of a compensation order with the longshoreman's consent.[79] The Court also noted that an employer can pursue a third party action for payments the employer made to the longshoreman even absent a section 33(b) assignment of the longshoreman's third party claim.[80] The *Pallas Shipping* Court, finding no persuasive arguments for disregarding the section 33(b) award requirement, concluded that acceptance of voluntary compensation payments without a compensation award was not sufficient to trigger the section 33(b) assignment provision.[81]

The Supreme Court decided *Pallas Shipping* on the limited question of whether mere acceptance of compensation paid voluntarily triggers the six-month limitation and subsequent assignment provisions of section 33(b).[82] The

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75. *Id.* at 537-38.

76. *Id.* at 538.

77. *Id.*

78. *See* Simmons v. Sea-Land Serv., Inc., 676 F.2d 106, 109 (4th Cir. 1982) (suggesting that strict adherence to § 33(b) award requirement encourages employers to challenge automatically all longshoremen's LHWCA claims), *vacated and remanded*, 103 S. Ct. 3079 (1983); Liberty Mutual Ins. Co. v. Ameta & Co. 564 F.2d 1097, 1103 (4th Cir. 1977) (formal award requirement forces employer to dispute every LHWCA claim in order to force proceedings necessary to produce compensation order); *supra* notes 39-40 (discussing Fourth Circuit's argument that award requirement encourages employers' perfunctory challenge of employees' LHWCA claims).

79. 461 U.S. at 538; *see* 20 C.F.R. § 702.315(a) (1983) (authorizing deputy commissioner to enter compensation order concluding informal conference upon request of either party).

80. 461 U.S. at 538; *see* Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 412-13 (1969) (nothing in language of § 33 or in legislative history of LHWCA limits employer's remedy against third party tortfeasors to subrogation to the longshoreman's third party claim). The *Burnside* Court noted that federal maritime law recognizes that a shipowner has a duty of care under the circumstances, which, if breached by the shipowner's negligence, provides a longshoreman's employer a direct tort action to recover the amount of LHWCA payments that the employer made to the longshoreman. 394 U.S. at 415; *see* Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp., 696 F.2d 703, 706 (9th Cir. 1983) (affirming continued use of the *Burnside* cause of action).

81. 461 U.S. at 539.

82. *Id.* at 531. In *Pallas Shipping*, the Court specifically stated that the Court granted certiorari to resolve an inter-circuit conflict between the Fourth and Sixth Circuit. *See id.; compare*

Supreme Court did not explicitly consider the question of whether acceptance of compensation plus some functional equivalent of an actual award in a compensation order would trigger the section 33(b) six-month limitation.[83] Nonetheless, the United States Court of Appeals for the Second Circuit has considered the question of functional equivalency in two major section 33(b) decisions, *Rodriguez v. Compass Shipping Co.*[84] in 1980 and *Verderame v. Torm Lines*[85] in 1982.[86]

In *Rodriguez*, the Second Circuit examined whether a settlement agreement between a longshoreman and stevedore-employer constituted an award in a compensation order triggering the section 33(b) assignment provision.[87] In *Rodriguez*, a longshoreman received injuries while unloading a third party-owned and chartered vessel.[88] The longshoreman filed a LHWCA claim against his employer.[89] A claims examiner in an informal conference with both the longshoreman and the stevedore-employer reached an agreement settling the longshoreman's claim.[90] The parties executed a written agreement that finalized the extent of the longshoreman's disability, the amount of compensation due the longshoreman, and the amount of the longshoreman's attorneys' fees.[91] Although federal regulations at the time of the agreement required the claims examiner to file a compensation order following an informal conference,[92] the claims examiner failed to do so.[93] Soon after the agreement, the

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Duris v. Erato Shipping, Inc., 684 F.2d 352, 355 (6th Cir. 1982) (mere receipt of LHWCA compensation without formal award does not trigger § 33(b) six-month limitation period leading to assignment), *aff'd sub. nom.* Pallas Shipping Agency v. Duris, 461 U.S. 529 (1983) *with* Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097, 1102 (4th Cir. 1977) (mere acceptance of compensation without award sufficient to trigger six-month limitation leading to assignment under § 33(b)).

83. *See* 461 U.S. at 539 (*Pallas Shipping* Court explicitly held that longshoreman's acceptance of voluntary compensation payments not sufficient to constitute award in compensation order triggering § 33(b) six-month limitation).

84. 617 F.2d 955 (2d Cir. 1980), *aff'd on other grounds*, 451 U.S. 596 (1981); *see supra* note 21 (discussing grounds on which Supreme Court affirmed *Rodriguez*).

85. 670 F.2d 5 (2d Cir. 1982).

86. *See id.* at 7 (setting forth requirements meeting functional equivalent of award in compensation order); *Rodriguez*, 617 F.2d at 959 (decision that official action meeting purpose of formal award is sufficient to trigger § 33(b) assignment creates rule of functional equivalency).

87. 617 F.2d at 958.

88. *Id.* at 956-57.

89. *Id.* at 957.

90. *Id.*

91. *Id.*

92. *See* 20 C.F.R. § 702.315 (1983) (requiring deputy commissioner to file compensation order following informal conferences). *But see id.* § 702.315(a) (making compensation order optional following informal conferences).

93. 617 F.2d at 957. The *Rodriguez* court determined that the federal regulations existing prior to the September 9, 1977 amendments to the Code of Federal Regulations applied to the claims in Rodriguez because the causes of action under consideration accrued before 1977. *Id.* at 960 n.2. The *Rodriguez* court, however, suggested that a different outcome might result under application of federal regulations as amended in 1977. *Id.* The Second Circuit in *Ambrosino v. Transoceanic S.S. Co.*, resolved the uncertainty of the effect of the 1977 amendments on the

longshoreman's employer paid to the longshoreman the compensation due under the agreement.[94] Three and one half years after execution of the agreement, the longshoreman brought suit against the owner and charterer of the vessel aboard which the longshoreman received his injuries.[95] The defendants contended that the settlement agreement between the longshoreman and his employer amounted to a compensation order for purposes of section 33(b).[96] The defendants, accordingly, motioned for summary judgment on the grounds that the longshoreman's failure to bring a third party suit within the six-month limitation of section 33(b) barred the longshoreman from later maintaining an action against the defendants.[97]

The *Rodriguez* court accepted the defendants' contention that the settlement agreement constituted a section 33(b) compensation order, reasoning that, although the settlement agreement did not constitute a formal award *per se*, the settlement agreement fulfilled the function of an award in a compensation order.[98] The *Rodriguez* court explained that a compensation order serves to notify a longshoreman of the full extent of his rights, including the right to sue a third party tortfeasor within six months of the longshoreman's acceptance of compensation under a compensation order.[99] The Second Circuit suggested that under the settlement agreement, the longshoreman was fully aware of his rights to the same extent the longshoreman would have been aware of his rights had the claims examiner filed a compensation order.[100] The Second Circuit added that the claims examiner's failure to comply with the federal regulations compensation order requirement[101] should have no significance concerning the substantive rights of the parties when a compensation agreement already effectively established those rights.[102] The *Rodriguez* court concluded that because the settlement agreement fulfilled the function of an award in a compensation order, the settlement agreement triggered the six-month limitation leading to an assignment under section 33(b).[103]

Rodriguez decision. *See* 675 F.2d 470, 472 (2d Cir. 1982) (under revised federal regulations, agreement embodied in memorandum of informal conference still constitutes award in compensation order for purposes of § 33(b)).

94. 617 F.2d at 957.

95. *Id.*

96. *Id.* at 957-58.

97. *Id.* at 957.

98. *Id.* at 959.

99. *Id.*

100. *Id.*

101. *See* 20 C.F.R. § 702.315 (1983) (requiring deputy commissioner to enter compensation order concluding informal conferences).

102. 617 F.2d at 959.

103. *Id.* at 959-60. The *Rodriguez* court did not specifically use the term "functional equivalent" in its decision, but functional equivalency describes the *Rodriguez* rule. *See id.* at 959 (actions of parties meeting purpose but not form of compensation order requirement sufficient to trigger § 33(b) six-month limitation period); Rodriguez v. Compass Shipping Co., 456 F. Supp. 1014, 1020 (S.D.N.Y. 1978) (informal equivalent of compensation order sufficient to trigger § 33(b) assignment provisions), *aff'd*, 617 F.2d 955 (2d Cir. 1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

The *Rodriguez* court utilized the functional equivalency argument essentially to ensure that a simple administrative lapse would not govern the substantive rights of the parties when a settlement agreement fully established those rights.[104] The Second Circuit in *Verderame v. Torm Lines*[105] expanded the *Rodriguez* decision by allowing section 33(b) assignment whenever some official procedure fixed the substantive rights of the parties, without regard for the particular circumstances underlying the absence of a compensation order.[106] The *Verderame* court considered whether a longshoreman's acceptance of interim payments prior to a settlement of the longshoreman's LHWCA claim triggered the six-month limitation provision in section 33(b).[107] In *Verderame*, the longshoreman filed a LHWCA claim against his employer following injuries the longshoreman received aboard a third party vessel.[108] The employer's insurance carrier paid to the longshoreman interim payments of compensation until the longshoreman and his employer reached an agreement and stipulation.[109] Prior to the agreement and accompanying compensation order,[110] however, the longshoreman had filed suit against the third party shipowner, seeking damages for the longshoreman's injury.[111] The defendant shipowner subsequently contended that the longshoreman's acceptance of interim compensation one and one half years prior to the longshoreman's suit triggered the six-month limitation of section 33(b).[112] Arguing that section 33(b) operated to assign the longshoreman's third party claim to the longshoreman's employer, the defendant successfully motioned for summary judgment.[113]

On appeal, the *Verderame* court acknowledged that Congress intended section 33(b) to provide a longshoreman with six months in which to make a well-considered decision whether to pursue an action against a third party tortfeasor after the longshoreman was apprised completely of his rights to compensation.[114] The Second Circuit reasoned that a longshoreman cannot make a fully informed decision to sue until the longshoreman knows the full extent of his injuries and the full amount of compensation to which the LHWCA entitles him.[115] The Second Circuit determined that no assignment can occur under section 33(b) until a compensation order, stipulation of the parties,[116] or informal award fixes the amount of the longshoreman's LHWCA

104. *See* 617 F.2d at 959 (administrative lapse can have no legal significance concerning substantive rights of interested parties).

105. 670 F.2d 5 (2d Cir. 1982).

106. *See id.* at 7 (§ 33(b) assignment provisions begin to operate when order, stipulation of parties, or informal award fixes longshoreman's LHWCA benefits).

107. *Id.*

108. *Id.* at 6.

109. *Id.*

110. *See* 20 C.F.R. § 702.241(c) (1983) (requiring deputy commissioner to file compensation order approving settlement between employer and employee).

111. 670 F.2d at 6.

112. *Id.*

113. *Id.*

114. *Id.* at 7.

115. *Id.*

116. *See* 20 C.F.R. § 702.241(a) (1983) (permitting agreed settlements, or stipulations, on

compensation.[117] The *Verderame* court, therefore, rejected the defendant shipowner's contention that interim compensation payments constituted the equivalent of an award for purposes of a section 33(b) assignment because no action or procedure had yet fixed the amount of recovery.[118]

The *Verderame* court's expanded application of *Rodriguez* is of questionable validity in light of the *Pallas Shipping* decision.[119] Although *Pallas Shipping* explicitly resolves only the question of whether mere acceptance of compensation triggers section 33(b) assignment,[120] an increasing number of courts are interpreting *Pallas Shipping* as presenting an absolute standard[121] that requires a longshoreman to receive, in all cases regardless of the circumstances, an actual award in a compensation order before an assignment under section 33(b) is effective.[122] The first circuit to render a decision based on *Pallas Shipping*, the Third Circuit, in *Costa v. Danais Shipping Co.*,[123] interpreted *Pallas Shipping* as adopting an absolute standard.[124] In *Costa*, a longshoreman injured aboard a third party vessel received LHWCA compensation pursuant to a memorandum that a claims examiner filed, embodying a claims agreement which the longshoreman and his employer reached during an informal conference.[125] After termination of the agreed compensation payments, the longshoreman sought further compensation, but a claims examiner determined that the LHWCA entitled the longshoreman to no further compensation.[126] The claims examiner, through another memorandum of informal conference, placed the longshoreman's claim in an inactive file,[127] whereafter the

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approval of deputy commissioner following investigation of effect of settlement terms on rights of employee).

117. 670 F.2d at 7.

118. *Id.*

119. *See supra* text accompanying notes 105-106 (*Verderame* decision effectively expanded *Rodriguez* decision).

120. *See Pallas Shipping*, 461 U.S. at 531 (Supreme Court considered and decided question whether longshoreman's acceptance of voluntary compensation payments triggers § 33(b) assignment); *supra* notes 43-83 and accompanying text (discussion and analysis of *Pallas Shipping* decision).

121. *See* Costa v. Danais Shipping Co., 714 F.2d 1, 4 (3d Cir. 1983) (interpreting *Pallas Shipping* as requiring strict interpretation of compensation order requirement in § 33(b)); Brunetti v. Cape Canaveral Shipping Co., 572 F. Supp. 854, 857 (S.D.N.Y. 1983) (*Pallas Shipping* adopts strict interpretation of compensation order for purposes of § 33(b)).

122. *See* Costa v. Danais Shipping Co., 714 F.2d 1, 4 (3d Cir. 1983) (*Pallas Shipping* standard requires nothing less than actual award in compensation order to satisfy § 33(b) award requirement).

123. 714 F.2d 1 (3d Cir. 1983).

124. *See id.* at 4 (*Costa* court interpreted *Pallas Shipping* as requiring strict interpretation of compensation order requirement in § 33(b)).

125. *Id.* at 1; *see* 20 C.F.R. § 702.315(a) (1983) (requiring deputy commissioner to file memorandum embodying agreement reached in informal conference).

126. 714 F.2d at 2.

127. *See id.* (claims examiner's determination of no further entitlement to LHWCA compensation results in inactivity of employee's compensation claim, leading to referral of claim to inactive file).

longshoreman requested a formal hearing before an administrative law judge.[128] Before the hearing took place, however, the longshoreman brought suit against the owner of the vessel aboard which the longshoreman received his injuries.[129] The defendant shipowners motioned for dismissal on grounds that a section 33(b) assignment barred the longshoreman's claim because the longshoreman instituted proceedings more than six months after the claims examiner filed the memorandum placing the longshoreman's LHWCA claim in inactive status.[130] The United States District Court for the District of New Jersey denied the shipowner's motion, reasoning that no assignment had occurred because the memorandum of informal conference was not an award in a compensation order necessary to begin the six-month limitation period of section 33(b).[131]

On appeal, the Third Circuit affirmed the district court's decision, recognizing the *Pallas Shipping* decision as adopting a strict interpretation of the term "compensation order."[132] The defendant shipowners in *Costa* argued that an informal conference memorandum constitutes the functional equivalent of a compensation order because such a memorandum is subject to administrative review, a quality the Supreme Court emphasized in *Pallas Shipping* as being significant to the nature of a compensation order.[133] The defendants based their argument on a federal regulation which provides that if significant problems arise in an informal conference creating an impasse between the parties, the disputed LHWCA claim advances to a formal hearing.[134] The defendants contended that this advancement, in effect, constitutes a review of the informal conference.[135] The *Costa* court, however, noted that federal regulations did not authorize the deputy commissioner to transfer to an administrative law judge for formal hearing any memoranda prepared pursuant to an informal conference.[136] The Third Circuit recognized that the Department of Labor did not design formal hearings to review informal conferences, but rather, to provide the claimant with a separate avenue by which to resolve his LHWCA claim.[137] The *Costa* court, therefore, rejected the defendants' argument that

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 4; *see supra* notes 43-83 and accompanying text (discussion of *Pallas Shipping* decision).

133. 714 F.2d at 3; *see* Pallas Shipping Agency v. Duris, 461 U.S. 529, 534 (1983) (distinguishing administrative filings from compensation orders because Benefits Review Board may review latter but not former); *supra* note 18 (discussing nature and significance of compensation order).

134. 714 F.2d at 3; *see* 20 C.F.R. § 702.316 (1983) (claim advances to formal hearing if serious dispute of fact or law arises in informal conference); *supra* notes 16-17 (discussing procedures for informal conferences and formal hearings).

135. 714 F.2d at 3.

136. *Id.; see* 20 C.F.R. § 702.317(c) (1983) (deputy commissioner transferring case to formal hearing may not include with informal conference any memoranda that deputy commissioner prepared pursuant to informal conference); *id.* § 702.318 (deputy commissioner may not transfer administrative file to formal hearing).

137. *See* 714 F.2d at 4 (formal hearing affords longshoreman second opportunity to present evidence on claim and obtain favorable decision from administrative law judge).

a memorandum is reviewable in the same manner that a compensation order is reviewable,[138] and concluded that anything less than an actual compensation order does not satisfy the requirement in section 33(b) of an award in a compensation order.[139] Acknowledging *Pallas Shipping* as presenting an absolute standard, the *Costa* court held that a memorandum of informal conference is not sufficient to trigger the section 33(b) six-month limitation because the memorandum is not an award in a compensation order.[140]

An absolute requirement under every circumstance of an award in a compensation order serves to remove all doubt concerning the finality of a LHWCA claims agreement.[141] As the *Costa* court noted, the operation of section 33(b) will be more effective if every party can be certain that one specific action alone begins the six-month limitation period.[142] An absolute standard intended to remove all uncertainty in the application of section 33(b) has its merits in comparison to the rule applied in the Fourth Circuit, until *Pallas Shipping*, that section 33(b) requires merely payment and acceptance of compensation to trigger a section 33(b) assignment.[143] The Fourth Circuit's application of the section 33(b) compensation order requirement was so broad that it effectively created a large degree of uncertainty in the operation of section 33(b) assignment.[144] In rejecting the Fourth Circuit's application of section 33(b), however, the Supreme Court in *Pallas Shipping* may have responded too rigorously to the problem of uncertainty in section 33(b)'s operation.[145]

Pallas Shipping approves section 33(b) assignments only after a deputy commissioner files a compensation order concluding either formal or informal administrative proceedings.[146] If courts such as the *Costa* court continue to apply the *Pallas Shipping* decision as presenting an absolute standard, the

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138. *See id.* at 3-4 (discussing difference between *Costa* defendant's contention of reviewability and *Pallas Shipping* Court's definition of reviewability); *Pallas Shipping*, 461 U.S. at 533 (defining review as act of Benefits Review Board occurring after conclusion of formal hearing); *see also* 33 U.S.C. § 921(b) (1982) (authorizing review of compensation orders by Benefits Review Board).

139. 714 F.2d at 4.

140. *Id.*

141. *See id.* (*Costa* court reasoned that strict interpretation of § 33(b) leaves no doubt among longshoremen or employers concerning what action or procedure begins running of § 33(b) six-month limitation period).

142. *Id.; see* Brunetti v. Cape Canaveral Shipping Co., 572 F. Supp 854, 857 (S.D.N.Y. 1983) (citing *Costa* acknowledging that strict § 33(b) interpretation allows certainty in application of assignment provisions).

143. *See* Simmons v. Sea-Land Serv., Inc., 676 F.2d 106, 109 (4th Cir. 1982) (longshoreman's acceptance of payments without formal award sufficient to trigger assignment under § 33(b)), *vacated and remanded*, 103 S. Ct. 3079 (1983); Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097, 1103 (4th Cir. 1977) (longshoreman's acceptance of voluntary compensation and employer's filing of notice sufficient to trigger § 33(b) six-month limitation period).

144. *See supra* notes 37-42 and accompanying text (Fourth Circuit's application of § 33(b) assignment provision without regard for award requirement).

145. *See infra* text accompanying notes 147-56 (discussing effect of *Pallas Shipping* absolute standard on Second Circuit functional equivalency rule).

146. 461 U.S. at 534.

Second Circuit's broad allowance of a functional equivalent to a compensation order in *Rodriguez* and *Verderame* becomes untenable.[147] This result is not entirely desirable, especially considering the practical importance of the Second Circuit's functional equivalency rule.[148] The Second Circuit's *Rodriguez* decision allowed a section 33(b) assignment when a claims examiner, in a simple administrative lapse, failed to file a compensation order following a claims agreement fixing the longshoreman's LHWCA benefits.[149] To allow such an administrative lapse to control the substantive rights of the parties, the *Rodriguez* court reasoned, would exalt form over substance, possibly creating an unreasonable result.[150] *Rodriguez* occurred in the context of a claims settlement following administrative proceedings requiring the entry of a compensation order.[151] The Second Circuit's expanded application of the *Rodriguez* decision in *Verderame*[152] extends to situations where an employer and a longshoreman, outside of administrative proceedings and without dispute, agree on a fixed amount of LHWCA compensation without entry of a compensation order.[153] The Second Circuit's expanded application of *Rodriguez* in *Verderame* however, may extend too far beyond the *Pallas Shipping* decision to warrant serious future consideration, especially in view of the *Pallas Shipping* Court's intent to promote certainty in the operation of the section 33(b) assignment provision.[154] Matched against the desire to provide certainty, nonetheless, is the rationale that an administrative error, like a claims examiner's failure to file a compensation order when regulations required him to do so, should not control the legal significance of a signed claims agreement to create an unreasonable result.[155] If the Supreme Court's *Pallas Shipping* decision

147. *See* 714 F.2d at 4 (holding that anything less than actual award in compensation order insufficient to meet § 33(b) award requirement). *But cf.* Verderame v. Torm Lines, 670 F.2d 5, 7 (2d Cir. 1982) (order, stipulation of parties, or informal award sufficient to meet § 33(b) award requirement); Rodriguez v. Compass Shipping Co., 617 F.2d 955, 959 (2d Cir. 1980) (informal equivalent of compensation order triggers § 33(b) assignment provisions), *aff'd on other grounds*, 451 U.S. 596 (1981).

148. *See infra* note 150 and accompanying text (functional equivalency allows courts to avoid possibly unreasonable results created by rigid application of § 33(b) award requirement).

149. *Rodriguez*, 617 F.2d at 959.

150. *Id.; see supra* notes 87-103 and accompanying text (discussion of *Rodriguez* decision).

151. 617 F.2d at 957.

152. *See Verderame*, 670 F.2d at 7 (order, stipulation of parties, or informal award sufficient to trigger § 33(b) six-month limitation period); *supra* notes 105-18 and accompanying text (discussion of *Verderame* decision).

153. *See* 670 F.2d at 7 (action fixing longshoreman's compensation benefits serves purpose of compensation order requirement and therefore is sufficient to trigger § 33(b) assignment); *supra* notes 105-106 and accompanying text (*Verderame* expanded *Rodriguez* decision).

154. *Compare Pallas Shipping*, 461 U.S. at 534 (award in compensation order necessary to trigger § 33(b) six-month limitation period) *with Verderame*, 670 F.2d at 7 (order, stipulation of parties, or informal award sufficient to begin running of § 33(b) six-month limitation); *see* 461 U.S. at 538 (*Pallas Shipping* notes significance of service of compensation order as certain notice to longshoreman that six-month limitation period has begun).

155. *See Rodriguez*, 617 F.2d at 959 (failure of claims examiner to file required compensation order should have no significance concerning previously established substantive rights of interested parties).

presents an absolute requirement of an award in a compensation order, the decision creates an inflexible rule that fails to accommodate the inevitable administrative error like that in *Rodriguez*.[156]

A narrow, revised application of the *Rodriguez* functional equivalency rationale may remain feasible, however, allowing an exception to a *Pallas Shipping* absolute standard that would apply in situations where an unreasonable result would arise if a court were to comply literally with the section 33(b) award provision as *Pallas Shipping* requires.[157] Other recent court decisions have followed the *Rodriguez* functional equivalency rationale, a fact which suggests that the Second Circuit's position is not an unreasonable application of section 33(b)'s compensation order requirement.[158] Additionally, when the Supreme Court in 1982 denied certiorari on a section 33(b) case from the Fourth Circuit,[159] the two dissenting justices indicated that they were prepared to resolve

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156. *See Pallas Shipping*, 461 U.S. at 534 (six-month limitation cannot begin until deputy commissioner enters award in compensation order); *Costa*, 714 F.2d at 4 (*Pallas Shipping* requires nothing less than award in compensation order for running of § 33(b) six-month limitation period); *see also Rodriguez*, 617 F.2d at 957 (simple administrative lapse resulted in failure of entry of compensation order concluding informal conference).

157. *See infra* text accompanying note 161 (explaining possible future application of functional equivalency rationale as exception to *Pallas Shipping* absolute requirement of compensation award).

158. *See, e.g.*, D'Amico v. Compania De Nav. Mar. Netumar, 677 F.2d 249, 251 (2d Cir. 1982) (action that in practical and legal effect constitutes award in compensation order satisfies requirement of compensation order under § 33(b)); Ambrosino v. Transoceanic S.S. Co., 675 F.2d 470, 472 (2d Cir. 1982) (agreement reached at informal conference fixing employee's LHWCA compensation constitutes award in compensation order for purposes of § 33(b)); Verderame v. Torm Lines, 670 F.2d 5, 7 (2d Cir. 1980) (order, stipulation of parties, or informal award must fix longshoreman's LHWCA benefits to trigger running of § 33(b) six-month limitation); Rodriguez v. Compass Shipping Co., 617 F.2d 955, 959 (2d Cir. 1980) (when signed agreement apprises employee of full rights to compensation, absence of compensation order is immaterial in operation of § 33(b) assignment provision), *aff'd on other grounds*, 451 U.S. 596 (1981); Keller v. United States, 557 F. Supp. 1218, 1223 (D.N.H. 1983) (order, stipulation of parties, or informal award must fix longshoreman's full rights to LHWCA compensation to trigger § 33(b) assignment provision); Hall v. International Union Lines, Inc., 552 F. Supp. 816, 819 (E.D. La. 1982) (suggesting that agreement, stipulation of parties, or informal order may trigger § 33(b) assignment if such action settles employee's LHWCA claim); Rother v. Interstate & Ocean Transp. Co., 540 F. Supp. 477, 485-86 (E.D. Pa. 1982) (formal order or even approved settlement agreement may provide longshoreman with full notice of his rights to compensation, but when no action has resolved longshoreman's claim, § 33(b) assignment cannot operate); Klitznsky v. Pakistan Shipping Corp., 530 F. Supp. 326, 328 (E.D. Pa. 1981) (absence of formal action by deputy commissioner or informal official action providing longshoreman with notice of full extent of rights to compensation precludes operation of § 33(b) assignment provision); Dunbar v. Retla S.S. Co., 484 F. Supp. 1308, 1311 (E.D. Pa. 1980) (some proceeding must function as indication that longshoreman knew full extent of his rights to compensation before § 33(b) assignment operates); Panzella v. Skou, 471 F. Supp. 303, 307 (S.D.N.Y. 1979) (memorandum issued pursuant to informal conference settling longshoreman's LHWCA claim constitutes award for purposes of § 33(b) in absence of actual compensation order); Francavilla v. Bank Line, Ltd., 470 F. Supp. 94, 97 (S.D.N.Y. 1979) (informal conference concluded with memorandum settling longshoreman's LHWCA claim sufficient to trigger § 33(b) assignment provisions).

159. *See Simmons*, 676 F.2d 106 (4th Cir.), *cert. denied*, 459 U.S. 931 (1982), *vacated and remanded*, 103 S. Ct. 3079 (1983).

the section 33(b) award issue between the two alternative section 33(b) applications presented by the Second and Fourth Circuits.[160] The functional equivalency argument, therefore, is a widely-accepted idea that may possess continued vitality as a narrow exception to *Pallas Shipping*, especially when applied to cases in which a literal application of the section 33(b) compensation order requirement would itself produce an unreasonable result.[161]

Although the Supreme Court in *Pallas Shipping* may leave unanswered questions posed by the Second Circuit's assertion of a functional equivalency scheme,[162] the *Pallas Shipping* decision resolves a basic question concerning section 33(b) assignment. In *Pallas Shipping*, the Supreme Court rejected the Fourth Circuit's determination that a longshoreman's acceptance of voluntarily paid LHWCA compensation and the filing of routine LHWCA forms constituted an award in a compensation order for purposes of section 33(b).[163] Additionally, the *Pallas Shipping* Court implicitly limited section 33(b) assignments to those situations in which some form of agreement fixing compensation concludes with the actual entry of an award in a compensation order.[164] The *Pallas Shipping* decision, therefore, may create an absolute standard requiring under every circumstance the entry of an award in a compensation order before assignment under section 33(b) is possible.[165] A broad Second Circuit functional equivalency argument consistent with *Pallas Shipping* is not feasible, especially in view of the *Pallas Shipping* Court's emphasis on the literal form of an award requirement[166] rather than on the function of an award requirement.[167] The Third Circuit, basing its decision in *Costa* on *Pallas Shipping*, implicitly rejected the functional equivalency argument expounded by the Second Circuit.[168] Whether other circuits will follow the

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160. *See Simmons*, 459 U.S. 931, 931-32 (1982) (White, O'Connor, J.J., dissenting) (acknowledging that § 33(b) conflict between Second and Fourth Circuits warrants resolution).

161. *See supra* notes 158-60 (extent of acceptance of functional equivalency rule as alternative to absolute standard in application of § 33(b) award requirement).

162. *See supra* notes 82-83 and accompanying text (Supreme Court in *Pallas Shipping* did not explicitly address Second Circuit functional equivalency rationale).

163. 461 U.S. at 532.

164. *See id.* at 534 (*Pallas Shipping* Court's emphasis on literal requirement of award in compensation order indicates strict interpretation of § 33(b) award provision); *supra* notes 54-58 and accompanying text (discussing *Pallas Shipping* Court's emphasis on actual language of § 33(b) requiring award in compensation order).

165. *See* Costa v. Danais Shipping Co., 714 F.2d 1, 4 (3d Cir. 1983) (interpreting *Pallas Shipping* as requiring strict application of § 33(b) requirement of award in compensation order); Brunetti v. Cape Canaveral Shipping Co., 572 F. Supp. 854, 857 (S.D.N.Y. 1983) (following *Costa* in interpreting *Pallas Shipping* as requiring strict interpretation of § 33(b) award requirement).

166. *See* 461 U.S. at 534 (*Pallas Shipping* Court emphasized literal requirement of award in compensation order).

167. *See* 461 U.S. at 534, 536 (*Pallas Shipping* Court acknowledged function of award requirement but based reasoning more heavily on literal form of award requirement as set forth in § 33(b)).

168. *See* Costa v. Danais Shipping Co., 714 F.2d 1, 4 (3d Cir. 1983) (interpretation of *Pallas Shipping* as requiring strict interpretation of award requirement in § 33(b) precludes further vitality of Second Circuit functional equivalency rule).

Third Circuit's lead in interpreting *Pallas Shipping* as creating an absolute standard,[169] or permit an exception to *Pallas Shipping* grounded loosely on the Second Circuit's functional equivalency test is still uncertain.[170]

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169. *See id.* (*Costa* court's interpretation of *Pallas Shipping* as requiring strict interpretation of § 33(b) award requirement creates absolute standard); *see also* Brunetti v. Cape Canaveral Shipping Co., 572 F. Supp. 854, 857 (S.D.N.Y. 1983) (following *Costa* court's absolute standard for application of § 33(b) award requirement); MacKenzie v. Caldwell Shipping Co., 561 F. Supp. 739, 740 (M.D. Fla. 1983) (deputy commissioner's entry of formal award necessary to trigger § 33(b) six-month limitation).

170. *See supra* note 161 and accompanying text (*Rodriguez* functional equivalency rule may possess continued vitality as narrow exception to *Pallas Shipping* rule in appropriate circumstances).