In the

Supreme Court of the United States

INTERCOUNTY CONSTRUCTION CORPORATION ET AL.,

Petitioners

v.

NOAH C. A. WALTER ETC. ET AL

No 74-362

Washington, D. C.
April 23, 1975

Pages 1 thru 43

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v.	:	No. 74-362
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Washington, D. C.

Wednesday, April 23, 1975

The above-entitled matter came on for argument at 10:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN., JR, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN C. DUNCAN, III, ESQ., Suite 1010, 1000 Connecticut Avenue, N. W., Washington, D. C. 20036
For Petitioners

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Number 74-362, Intercounty Construction Company against Walter and others.

Mr. Duncan, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN C. DUNCAN, III, ESQ.

ON BEHALF OF PETITIONERS

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

The issue before the Court today arises under the Longshoremen's and Harbor Workers' Compensation Act and involves a construction of Section 22 of that Act which deals with time limitations provisions.

The Act as it now exists in Section 22 provides basically that upon his own initiative or upon the application of any party in interest on the ground of a change in conditions or a determination of the mistake in fact by the Deputy Commissioner, the Deputy Commissioner may at any time prior to one year after the date of last payment of compensation, whether or not a compensation order has been issued, review a compensation case.

The facts, briefly, are that Charles Jones was injured while working for Intercounty Construction in July of 1960. He filed a written claim for compensation benefits in August of 1960. The insurance carrier voluntarily paid

compensation without an award for a period extending into January of 1965.

At that point, the carrier filed a notice indicating that the claim would be controverted and it then reduced its benefits by 50 percent.

An informal conference was held before a claims examiner and the matter was adjourned without any resolution of the claim of Mr. Jones.

In January of 1968, the carrier stopped making compensation payments at all because the statutory limit of $17,280 had been reached, except for death cases and permanent total disability. More than two years later, Mr. Jones' attorney requested a hearing on his claim for permanent and total disability and it is the carrier's position that, by having let that time run, the claim is now barred. Principal --

QUESTION: What was the date?

MR. DUNCAN: We would say, Mr. Justice Brennan, that as of January, 1969 -- I believe the date would be the 23rd.

QUESTION: This would be a year after the carrier stopped making payments?

MR. DUNCAN: Yes, your Honor.

Now, we rely principally on the Strachan Shipping case from the Fifth Circuit where cert was denied by this Court in 1972. It appears phonetically as Stracan -- S-T-R-A-C-H-A-N I believe the correct pronunciation is Strong.

In any event, that case, considering the identical issue, came to the conclusion that, by statutory set-up and the regulations implementing it, Congress had evinced an intention that compensation payments were to be made voluntarily by the carrier and once payment had stopped, it was incumbent upon the Claimant to file a further claim if he sought additional benefits.

Now, it might seem at first blush that the filing of additional claims would be an onerous burden. However, there are numerous cases which have held that simple things such as a telephone call to a Deputy Commissioner or a claims examiner where a claimant complained that the carrier had stopped benefits and a memorandum was then placed in the file was sufficient to constitute a claim.

There are cases from the Benefits Review Board, for example, which have even held that the filing of an attending physician's report is sufficient to constitute the filing of a claim so that we do not believe it is unreasonable to require a claimant to pursue his claim with some degree of due diligence.

We have cited in our petition for certiorari at least three other decisions, two of which are unreported, which reflect basically the long-standing way the Act has been applied.

We have the 1942 case in the District of Columbia,

the McFadden decision. We have the O'Keefe decision decided by the Fifth Circuit in 1962 and we have just recently had a decision by an administrative law judge under the amended Act, all holding that if more than one year runs after the day of last compensation payment, whether or not a compensation order has been issued, the claim is barred.

Now, the Court of Appeals for the District of Columbia Circuit disagreed and rejected the holding in Strachan. They came to the conclusion, first of all, that Section 22 was ambiguous and then they said it was necessary to look at the legislative history behind Section 22 and that their interpretation suggested that Section 22 was only supposed to apply when the Deputy Commissioner had issued an actual compensation order, rather than a situation where a claim had been filed, had never been acted on, and the time had merely run subsequent thereto.

We believe that the legislative history is capable of more than one interpretation and we suggest that the Court of Appeals respectfully was in error.

I believe it is useful to go to the legislative history as it existed in 1927.

This is found at page 16 and 17 of the Government's brief.

After the Act was initially enacted, the U.S. Employees' Compensation Commission, which was charged with

overseeing the Act, complained that there were difficulties arising because, by the time the award had ceased, the Deputy Commissioner no longer had any power to do anything about it. The man would get his money and the Deputy Commissioner couldn't change it, even if there was some reason why he should change it and therefore, they suggested that there should be some amendments.

Now, in Appendix reference 3 we find -- and this is taken from the Court of Appeals' opinion -- we find the proposed recommendations of the U. S. Employees Commission.

Now, you will note that they are limiting this situation strictly to a situation where a deputy commissioner is reviewing a compensation order. They are not limiting it with any time framework at all so that what they have proposed, in effect, is, the deputy commissioner without regard to any time limitation, may review a compensation order and he may issue a new compensation order or he may make a change by virtue of a compensation order.

All of these, of course, requiring an action by the deputy commissioner with respect to a formal adjudicatory compensation order.

QUESTION: This is Section 22 on page 33 of the Appendix, was proposed but never enacted. Is that correct?

MR. DUNCAN: Yes, Mr. Justice Stewart, that is correct and I think it is significant because we then go to

Section 22 as it was actually enacted, which would be found at page 21 of the Government's brief and I think if we compare what was done with what was proposed, we see that there are significant differences.

First of all, they indicate that the deputy commissioner may, at any time prior to one year after the date of last payment of compensation -- that was not in the proposal from the U.S. Compensation Commission.

It also indicates that he may review a compensation case as opposed to review a compensation order so we feel it is very significant that what was enacted was not what was proposed and as a matter of fact, the House and the Senate reports for the 1934 Amendment indicate that the eventual enactments of 1934 were as a result of meetings and compromises between the employees' unions and the employers' shipbuilding organizations, so that we do not have a situation where the U.S. Employees Commission makes recommendations.

These are immediately adopted by Congress and then we take off from there. We have a meeting between interested parties. We have a compromise. We then have an enactment which is not at all similar to what was proposed by the U.S. Employees Commission.

Now, I also think that it is helpful to look at some of the testimony and some of the legislative history after 1934 because in 1938 we had another amendment to Section 22.

Now, the problem that arose after the '34 amendment was simply this: There was no provision with regard to a situation where a deputy commissioner had rejected a claim for him to review it again and so amendments were proposed which were eventually enacted in 1938 which would allow a deputy commissioner -- even after he had rejected a claim -- within one year to review the situation to see if he had made a mistake of fact or if there had been a change in condition.

Now, on July 31st, 1935 -- and this is House Subcommittee Number 3 on House Report 8293, 74th Congress, First Session, which is also referenced generally in the Government's brief -- we have testimony from Mr. Lewis Daldie, who is general counsel for the U.S. Employees Commission.

At page 14 of that House Subcommittee report, we have the following discussion about these proposed amendments.

QUESTION: Is this anywhere in the brief?

MR. DUNCAN: It is referred to, your Honor, but it is not reproduced.

QUESTION: Right.

MR. DUNCAN: Mr. Daldie indicates, Section 9 refers to the Amendment made last year involving Section 22 of the Longshoremen's Act. He is then asked by Mr. Emmanuel Seller, "Where does that limitation appear in the original act?"

"Mr. Daldie: That is in Section 5 of the amendatory act of May 26th, 1934 amending Section 22 of the original act.

"It was amended last year so as to provide for a reopening by the deputy commisaioner within a year after the last payment of compensation."

Now, the Government's position is that the deputy commissioner has to issue a formal compensation order.

Our position is that, regardless of whether the compensation order is issued or not, the time begins to run within one year from the date of last compensation payment.

QUESTION: What if this case had come up before the 1934 amendment? How would it have come out? With Section 22 reading as it did before Congress amended it.

MR. DUNCAN: I don't believe that there would have been any power in the deputy commissioner to do anything because we did not have the time situation involved.

QUESTION: Well, but you would have a claim filed and no award ever made. Wouldn't you have the power to make the award prior to 1934?

MR. DUNCAN: Oh, yes, I misunderstood. Yes, Mr. Justice Rehnquist. I think what would happen is, that we would have had the same situation except that we would eventually have had the ceiling of $7,500 which was the applicable maximum then, as I understand it, reach, and then the deputy commissioner would have had the power to act on the claim if the man had done something within a year.

QUESTION: Well, but what is it about the act before

1934 that prevents the deputy commissioner from acting after the expiration of a year from the payment of the last compensation if a claim was timely filed?

MR. DUNCAN: Well, my recollection is that, as long as money was continuing to be paid, there would be no occasion for him to act but if the man said, in effect, that the carrier had arbitrarily cut me back 50 percent, then he would have had the power to go ahead and act.

Now, as long as the money is continuing to be paid to the man, he can either make a request for a formal hearing because the amount he is receiving is inadequate, or he can sit back and be satisfied with it.

QUESTION: Well, can't the carrier always protect itself by having the -- having an order entered -- having an award entered if he -- if the carrier starts to pay voluntarily after a claim is filed which happens, I suppose, most of the time.

MR. DUNCAN: It does, your Honor. Well, I think that that sounds good, theoretically.

QUESTION: But it is additional paperwork, isn't it?

MR. DUNCAN: Not for the carrier. The carrier, as long as it gets protected consistent with what the man's rights are, the carrier is not concerned about the additional paperwork but the deputy commissioner is, I can assure you of that.

QUESTION: Well, the United States is against you,

aren't they?

MR. DUNCAN: Well, I think that they are looking at the statute from the standpoint of how they interpret it rather than how the deputy commissioner's perhaps actually administered it. You'll notice in this case, for example, the deputy commissioner actually rejected the claim the first time around.

QUESTION: Well, I suppose what you are suggesting is is that rather than ever start voluntarily, you are just going to wait until there is an order entered.

MR. DUNCAN: Well, this is correct. In other words, the whole purpose of the act is, the man gets hurt. If you have no issue with respect to his wages or arising out of the course of the employment, then you start making payments and if you have a situation where, eventually, if you cut the man back there is perhaps a dispute, let's say, on a rating for a leg or if you have a loss of wage-earning capacity dispute and the man can go all the way back to day one and get full benefits, what incentive is there for the carrier to comply with the voluntary provisions of the act?

They will always insist on a formal order so that they will be protected in the event more than one year runs after the compensation order is entered.

This is completely contrary to the way the act is administered. The informal conferences, for example -- we

have the statistics in our brief.

QUESTION: You would be protected after a certain length of time after you made the last payment required by the order?

MR. DUNCAN: Yes, right.

QUESTION: Yes.

MR. DUNCAN: But that is the only protection. Otherwise, the claim can be resurrected at any time. The Government's position is that if the man files his claim within one year and the carrier keeps on making payments and eventually at some point in time the man becomes dissatisfied with the rate at which he is paid and the man simply has to say, "I want a hearing" and he can go back to day one and run this thing out for X number of years. We think that this is not consistent with the purpose of the act.

The way the whole scheme of the act works, very simply, is this: If there is an issue which is controverted, the parties go to what is called an informal conference.

It is called, in the regulations, a prehearing conference. It typically is called an informal conference.

The claimant is there. If he is represented, his attorney is there and the carrier is there. Usually the carriers do not have attorneys present although I have been there in many instances.

The claims examiner will say, Mr. Soandso, what is

your claim?"

The man will say, "I'm claiming temporary total disability for X number of days."

The claims examiner then goes down all the various issues, "Are you contesting jurisdiction, statute of limitations, wages?" -- all these sorts of things.

He then says to the carrier, "What is your position?"

The carrier will then narrow the issue.

Typically what happens, as in the Strachan Shipping case, a recommendation is issued and this is sent out in the form of a letter to the carrier: "It is hereby recommended that you do this and you do that."

Either party is given the right to accept or reject that recommendation. Typically, if there is really no dispute, the carrier will sign it as being accepted, which is provided in the form, and return it to the bureau and this is the way things are typically handled and I think that the statistics show that formal hearings are definitely abnormal and informal adjudications which are consistent with the purpose of the act are the way these things are handled.

QUESTION: And that recommendation, even though accepted by the carrier, is not an order.

MR. DUNCAN: That is correct, Mr. Justice Brennan.

QUESTION: It is not an order.

MR. DUNCAN: It is not. It is simply a letter. It

is not sent out in conformity with Section 19 where you are required to send out notice by registered mail and all that sort of thing. It is simply a letter saying that we have had informal conference and based on the developments of the conference, this is what we recommend. And they have a place where it says, "You are expected to accept or reject this within 14 days. If you accept it, please sign it and return it to the bureau."

And that is the way the whole act works. But the Government is now coming in and saying, no, this isn't the way it is supposed to work. In every case, you are to insist on an order if you want the provisions of Section 22 to apply.

And we think that this is terribly inequitable in the typical case that is dealt with at the bureau.

I think that we must, if I may just go back one second, we -- we also have to look at how practical it is. The Government's brief, for example, suggests, well, you can always, if you want to protect yourself other than order, you can always get the matter settled.

Well, at the time of this act -- accident -- the only provision for a settlement was approval by the Secretary of Labor and I can assure you that to my knowledge there has only been one or two settlements ever approved by the Secretary of Labor so that is a very impractical suggestion.

Now, I think we must get back again to what happens

if this position of the Labor Department is adopted.

Let's assume that a claim is filed within the first year and the carrier pays without an award and nothing further is done.

This claim, under their position, can be resurrected at any time in the future. In the Strachan Shipping case, for example, there were 12 years that ran between the date of last compensation payment and when the claim was actually prosecuted.

Suppose we have a situation where, again, the claim is filed within a year and the carrier pays without an award and we reach a statutory maximum of -- in this case, $17,280 and there has been no adjudication by the deputy commissioner and then we have more than a year run.

Are we to say that the man's claim is still open? It is still not time-barred by the provisions of the act?

We feel that the Government's position is becoming very technical and is completely contrary to the way this act is administered and with the Court's permission, I would like to reserve my additional time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Duncan.

Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.

ON BEHALF OF RESPONDENTS

MR. EASTERBROOK: Mr. Chief Justice and may it please

the Court:

This case turns on the meaning of a single clause in Section 22 of the act. The clause appears to mark off a period of time. It reads, "Prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued."

Petitioners argue that because this clause refers to time, it must be the time within which an injured employee must file a piece of paper to prevent some effect on his claim for compensation.

We agree with Petitioners to this point. Any application for relief pursuant to Section 22 must be filed within the time established by that clause.

The more difficult question is, who is required to file that piece of paper?

We submit that the only people required to file within the time limit established by that clause are those who seek what the section title of Section 22 says it is about, a modification of an award.

Petitioner's argument rests on the premise that because some employees must file within the established time, then all employees must do so. Nothing in the statute supports that result.

The more accurate reading of the section is that those who seek to modify an award or a compensation order on the

grounds of mistake of fact or change in circumstances must file under Section 22 within one year after the date of the last payment of compensation, whether that compensation was paid with or without an award.

But those who seek, not modification but an initial adjudication of a claim timely filed long ago, need not do so. They are entitled to at least one adjudication by virtue of that claim and Respondent, in this case, filed a timely claim less than a month after his injury.

QUESTION: And he -- the original claim must be filed within a year after the accident.

MR. EASTERBROOK: The original claim must be filed within either a year after the injury or a year after the last payment of compensation without an award. There are two alternative provisions.

QUESTION: And that, I guess, is common ground between you and your adversary.

MR. EASTERBROOK: That's right. There is no disagreement on that and there is no disagreement on the fact that this claim was, in fact, timely filed.

Once that claim is timely filed, Section 19A of the act gives to the deputy commissioner power to adjudicate that claim. Section 19A provides that subject only to Section 13 -- subject only to Section 13, which provides for the timely filing of the claim, a deputy commissioner has full authority

to adjudicate any claim that has been filed.

QUESTION: Where is 19A in the brief there?

MR. EASTERBROOK: Section 19A is in the Government's brief in statutory section at page 3, procedure in respect of claims, subject to the provisions of Section 13, claim for compensation may be filed and the deputy commissioner shall have full power and authority to hear and determine all questions in respect to such claim.

The claim was timely filed in this case and Section 19A provides that the deputy commissioner shall have full power.

Petitioner's assertion is that a new application must be filed under Section 22 even though a timely claim has been filed under Section 13. The thrust of our argument is that that single clause in Section 22 has to be read in context, read alone, or solely within the bounds of the section, there is little indication who must file the piece of paper to which it refers.

QUESTION: What the clause is talking about is whether or not compensation order has been issued?

MR. EASTERBROOK: That's right.

QUESTION: That is the critical clause.

MR. EASTERBROOK: That is the critical clause in Section 22. That clause tells us when an application pursuant to Section 22 has to be filed. It does not tell us

and it does not purport to tell us who it is that must file it. As in most problems with statutory interpretation, we feel that it is necessary to look to the history of the act and to the language and structure of the act to understand who it is that must file.

QUESTION: How can you have a modification of the award which is the -- I guess the subtitle of Section 22 -- whether or not a compensation order has been issued?

MR. EASTERBROOK: Justice Rehnquist, if compensation is paid without an award, it may terminate before the award has been issued, or it may terminate prior to the award, after the award has been issued.

Suppose there is an injury suffered by an employee and under the generally voluntary and cooperative procedure used by the act, the employer begins to make payments, without awaiting any award, as the act says he should and must do.

Then payments may terminate at any time because the employer has decided that the disability has ended, has decided that he wants to controvert the claim and seek an adjudication now and so on.

After the payments have terminated, the deputy commissioner may well then make an award of compensation which might verify the compensation that has previously been paid without awarding new compensation so that the

compensation would have terminated without an award having been issued.

The date for which time must be computed runs from the date compensation is terminated, and not from the date of the injury.

QUESTION: Well, I can see that in connection with a payment of compensation but in Section 22 you have a title that says modification of awards.

MR. EASTERBROOK: That is correct.

QUESTION: Suggesting that everything you are talking about there is dealing with the modification of an award previously made and then you have this clause that both of you regard as critical in the middle of the thing that says whether or not a compensation order has been issued. Is the compensation order the same thing as an award?

MR. EASTERBROOK: Oh. The title originally was inserted in 1927 when the provisions applied only to awards and an award meant, in 1927, an order compelling an employer to pay compensation.

In 1938, an amendment was made in this section providing that a compensation order that denied compensation was also reviewable so there is one general class of beast here and that is the compensation order which may award compensation or deny compensation.

It used to be that under this section, you could get

review only of an award which --

QUESTION: But in this case you didn't have either. YOu didn't have an award either granting or denying compensation.

MR. EASTERBROOK: That is right.

QUESTION: By the deputy commissioner. You had voluntary payments.

MR. EASTERBROOK: That is correct.

QUESTION: And as I understand my brother Rehnquist's question, it is, how can you have a modification of an award when there hasn't been any award?

MR. EASTERBROOK: The answer is, you can't, which is why Section 22 does not apply to this case.

QUESTION: Well, I thought, on the contrary, that you were relying very, very heavily on the subtitle of Section 22, modification of awards, to explain the meaning of the language and yet the title simply is inapplicable for the reasons suggested by my brother Rehnquist's question.

MR. EASTERBROOK: The title is inapplicable in all cases in which there has been no award of compensation or any formal order denying compensation and that is precisely the point upon which we rely, Mr. Justice Stewart, that the title of the section is inapplicable and, indeed, the entire section is inapplicable in this case.

Nothing has occurred under Section 22 that would

trigger its applicability.

Because nothing has occurred under that section, there is no need to make an application for review, whether or not within a year after the last payment of compensation.

QUESTION: But you just read that language out of the section, then, whether or not a compensation order has been issued.

MR. EASTERBROOK: No, we do not.

QUESTION: You just ignore it.

MR. EASTERBROOK: No we don't, Justice White. I think we can make a good deal of sense of it. Suppose a compensation order had been issued --

QUESTION: Well, suppose it hasn't.

MR. EASTERBROOK: If it has not been issued --

QUESTION: Let's suppose it hasn't.

MR. EASTERBROOK: That's right.

QUESTION: And this reads right on it, whether or not -- and this covers the possibility an order hasn't been issued and nevertheless says, within one year after the date of the last payment you are supposed to file something.

QUESTION: Yes.

MR. EASTERBROOK: No, I think we can make a little bit more sense of it than that. Is that --

QUESTION: You must concede that is the plain reading of it.

MR. EASTERBROOK: I think there is a plain reading of it that bears on the case where an award has been issued.

Suppose an award had been issued in this case.

QUESTION: Well, I want to talk about where there hasn't been one.

MR. EASTERBROOK: Umn hmn.

QUESTION: And why doesn't this section apply to the situation where an award has not issued because it seems to apply to a case where a compensation order has not issued.

MR. EASTERBROOK: I think there is a --

QUESTION: YOu say it doesn't.

MR. EASTERBROOK: It is an easily understandable confusion. The language of the section --

QUESTION: Well, I don't know who is confused but that is the problem.

MR. EASTERBROOK: It is a question of interpretation. The language of the section certainly bears on cases where compensation orders have not been issued. The question is of the nature of the bearing. Does it bear on cases where compensation orders have not been issued so that it sets the time within which you have to apply in those cases?

Or does it bear on cases in which compensation orders have been issued to establish a time that runs from a time before when the order was issued?

Our interpretation is the latter. Suppose we can

make sense of it by saying, in all cases where compensation orders have been issued, the time runs from the time of the last payment of compensation, whether or not that compensation was pursuant to an award so that whether or not there has been an award determines the time for which you must apply when an award is eventually issued.

If the last payment of compensation terminates prior to an award, the one-year period begins to run prior to the award but unless there is actually an award entered, the compensation order entered, the time limit provision is completely inapplicable to that claimant.

I think this can be understood a little bit more simply by looking back at the history of this act in 1927. In 1927, the act, as enacted, clearly provided only for modification of awards. We think Petitioners have so conceded, the courts that understood it at that time so understood it.

So that in 1927, if compensation terminated prior to an award, there was no possibility of reviewing that award because the time for computation of review expired the moment the last payment of compensation, with or without an order --

QUESTION: Well, now, wait a minute. YOu say compensation terminated prior to an award?

MR. EASTERBROOK: That is correct.

QUESTION: There was no possibility of reviewing the award?

MR. EASTERBROOK: That is correct.

QUESTION: Well, but if there hadn't been any award, what would there be to review?

MR. EASTERBROOK: In many cases, Justice Rehnquist, employers would pay compensation without the necessity of an award. They are required to do so under the Act within 14 days of the injury.

The administrative process often took a good deal longer than that to enter a formal order, even when a formal order was requested.

In many cases disability is relatively short-term. Disability may last, be total but short time, say, two months of time lost from the job.

During those two months the employer is required to pay compensation benefits. It may be that the deputy commissioner would not have time to enter a formal order until six months later so that compensation had terminated prior to the entry of a formal award. In 1927 --

QUESTION: But then you wouldn't be reviewing an award if you look at something after that. You would be either giving an initial award or adjudicating the case but at least you wouldn't be reviewing an award.

MR. EASTERBROOK: If the award were actually entered, the only provision in the statute that would allow for any action was Section 22, which said that you could modify an

award. There was no provision for a new, initial consideration. There was no provision for a new, initial claim.

QUESTION: And that was in the original statute?

MR. EASTERBROOK: That was in the original version in 1927.

QUESTION: So it would modify an award. And what was the time limitation?

MR. EASTERBROOK: During the term of the award and after it has become final, so that if the payment --

QUESTION: And so often, by the time the award came, the term --

MR. EASTERBROOK: The term had already ended. The term had already ended.

QUESTION: All right, that was the original statute.

MR. EASTERBROOK: And it was no longer possible to review it.

QUESTION: And no review of a rejection claim.

MR. EASTERBROOK: That's right. Now, the act was amended in 1934 --

QUESTION: To allow review of a rejection.

MR. EASTERBROOK: No, that was in 1938.

In 1934 it was amended to expand the time for review.

QUESTION: To one year.

MR. EASTERBROOK: To one year but it used the same time for compensation of that year that it had previously.

That is, the date of the last payment of compensation.

QUESTION: What page is that on? I had that a little while ago, but --

MR. EASTERBROOK: It is at page 3 of our brief which still contains the operative language.

QUESTION: No, no, but this is the present one. You are talking about the '34 --

MR. EASTERBROOK: Right, as amended in '34, it is on page 21 of our brief.

QUESTION: Yes.

QUESTION: Mr. Easterbrook, as I read your brief, you have ignored Strachan Shipping. Now, are you going to ignore it in your argument, too?

MR. EASTERBROOK: In our view, we have devoted our entire brief to explaining why Strachan Shipping was incorrect. It simply misread the 1934 revision and the 1927 history of this act and Strachan Shipping also operated under a misapprehension of the available relief to an employer or his insurors.

Strachan Shipping assumed that if, after one year, the claim did not come to rest, there was no way it could be put to rest. That is simply incorrect under the statute.

The Fifth Circuit itself had earlier held, in the Donovan case, that under Section 19C of the act, the employer can demand an adjudication and receive a compensation order

at any time.

It is also true now that under Section VIII (i) of the amended act, the employer and the employee can settle a claim and,with the approval of the deputy commissioner, the case will come to rest.

There are other devices available to terminate a claim. Many claims expire because the disability has completely ended so it is not true, as with the operative assumption in Strachan Shipping, that these cases will linger forever unless they are automatically terminated after one year.

QUESTION: Well, when does this one end?

MR. EASTERBROOK: Pardon?

QUESTION: When will this one end?

MR. EASTERBROOK: This claim has now been adjudicated and the deputy commissioner sent an order.

QUESTION: I assume it hadn't been filed. I mean -- could he file it 20 years from now?

MR. EASTERBROOK: We discussed in our brief the possibility that if the employer or his insuror could show actual prejudice from the lingering of the claim, that the size of an award might be diminished because of that prejudice.

QUESTION: That is not the point I am talking about. That is extraordinary circumstance.

MR. EASTERBROOK: It is a doctrine very similar to

the doctrine of laches, your Honor; inequitable actions, in which there is no statute of limitations.

QUESTION: There is nothing in the statute putting in any such limitation.

MR. EASTERBROOK: There is nothing in the statute putting in any limitation.

QUESTION: As you read the statute.

MR. EASTERBROOK: That is correct.

QUESTION: The law statute, the result suggested by my brother Marshall's question would prevail, i.e., the no limitation at all.

MR. EASTERBROOK: There would be no formal limitation. It is very similar to the case in which you have filed a civil action in a federal district court within the statute of limitations. That case might linger on the docket of the district court for a very large number of years before it comes to adjudication if, as a result of informal conferences in the chambers of the judge, formal adjudication is postponed pursuant to what looks like it may be a settlement, that case is alive and will stay there for years, if necessary.

QUESTION: But this one hasn't been any place.

MR. EASTERBROOK: Pardon?

QUESTION: This one hasn't been in the court.

MR. EASTERBRROK: It has, however, been very similar to that. Formal claim was filed within a month of the

accident. That is very similar, your Honor, to filing a suit in the district court. That is what meets the statute of limitations of the act, the one-year statute of limitations.

A claim was filed in the office of the deputy commissioner seeking adjudication. It was not then adjudicated but the opportunity for adjudication created by that claim lingered on , we submit, and could not be terminated except by an adjudication of that claim, just as a suit in a federal district court cannot be terminated except by an adjudication of that claim by a dismissal, by an order, or by anything ~~else~~ of that nature.

QUESTION: I submit that it was dismissed for lack of prosecution. It is done every day.

MR. EASTERBROOK: Yes, and it might --

QUESTION: Well, is that procedure here for doing that?

MR. EASTERBROOK: Under Section 14 (H)(2), I believe is the number, the deputy commissioner has the power on his own initiative, to enter a compensation case in order to protect the rights of the parties. That section permits the deputy commissioner to enter a compensation order that would dismiss or otherwise terminate the claim for compensation and we submit that is identical to the district court's power to dismiss for want of prosecution.

QUESTION: And it said because of his inaction, this

man has a right at any time in his lifetime.

Yes,

MR. EASTERBROOK:/ Just as it would be if he filed in the district court. But at the same time, the employer --

QUESTION: You mean to tell me that if you file a case in the district court and you don't do anything with it, and then 20 years later you can come back and file another one?

MR. EASTERBROOK: Not another claim, your Honor.

QUESTION: I know you can't. You do, too.

MR. EASTERBROOK: You seek for adjudication of the first claim.

QUESTION: And if you don't --

MR. EASTERBROOK: The district court will often dismiss for want of prosecution.

QUESTION: Well, but the analogy, really, is here. When a complaint is filed in the district court and then the defendant voluntarily begins giving you ask for in the complaint, there is no analog between that situation and this, is there? Because that just doesn't happen.

MR. EASTERBROOK: It doesn't happen when there are --

QUESTION: When the complaint is filed in a district court, generally, the defendant doesn't voluntarily begin giving the relief that the plaintiff wants, to the plaintiff.

MR. EASTERBROOK: That is right.

QUESTION: If there is any such thing such as that,

it is wrapped up in a settlement and the lawsuit is dismissed.

MR. EASTERBROOK: Umm hmm. As it could have been done here, if the employer had sought a formal order based on its desire to pay a specified amount of money and he could have sought such an order.

QUESTION: Periodically, in the district court, the court calls all of the cases in and says, either move or drop and get out. They clean it. They keep a clean docket.

MR. EASTERBROOK: Yes, and other --

QUESTION: And these people don't keep it clean. They don't even pretend to do it. But you are relying on this.

MR. EASTERBROOK: The deputy commissioner has the power to do that.

QUESTION: You are relying on the fact that the deputy did not act. Is that what you are relying on?

MR. EASTERBROOK: That is correct and we are also relying on the fact that the employer could have sought action if he wanted. But I'd like to point out one other highly salient difference between this and an ordinary tort claim.

The evidence in a compensation action is uniquely persevering.

In a tort action, for example, the nature of the question is, what happened on the day of the injury? Who

saw this man being knocked off a beam and fall on the ground? Who was responsible for it? What happened back in 1960?

Now, that is simply not the question in this case, because this is a no-fault statute. The evidence that bears on a compensation claim is evidence that is available at any time, even long after the injury.

QUESTION: Well, it has to arise out of the employment, doesn't it?

MR. EASTERBROOK: That is right. The injury has to occur and arise out of the employment.

QUESTION: And it is --

MR. EASTERBROOK: There is no question about it.

QUESTION: -- and in this kind of a case, the carrier wouldn't have begun paying unless he had agreed that it had arisen out of employment.

MR. EASTERBROOK: That is correct. The question in this case is whether Mr. Jones was, in fact, disabled. The evidence that bears on that disability is available now by examining Mr. Jones. If, in fact, he is totally disabled, that evidence can be had by an examination today. It wasn't lost and forgotten from something that happened 15 years ago.

If he is, in fact, only partially disabled, that evidence is available today, too. Examinations can be held today.

QUESTION: Well, unless he has had another accident.

QUESTION: Yes.

MR. EASTERBROOK: Unless there has been an accident in the interim and there is a question of causality.

QUESTION: Right.

MR. EASTERBROOK: The causality question is very interesting because that often is the subject of separate motions for additional compensation before the deputy commissioner and the evidence that would be pertinent to that is not either preserved or dissolved because of the application to review this compensation case.

If it wasn't available, it would not be available if this application had been filed sooner, nor does it become less available if the application is postponed.

QUESTION: Mr. Easterbrook, what would be undue hardship on claimant if one were to read the language of Section 22 the way it seems to read and the way your brother says we ought to read it.

MR. EASTERBROOK: We are not sure that it seems to read that way.

QUESTION: Well, the way your brother says we ought to read it.

MR. EASTERBROOK: There are several things that might happen to claimants in situations of this sort. Probably the most important of them is that if Section 22 is applicable to every case in which compensation has been paid without an

award, then a large number of claimants will have their benefits terminated completely against their will, even if they file an application on the very day those benefits are terminated. They can never resurrect them. There is a very interesting reason why.

Section 22 gives two reasons to file an application under that section. The first reason is a mistake of fact by the deputy commissioner.

The second reason is a change in conditions.

If there has been no compensation order, there can have been no mistake of fact by the deputy commissioner. If the claimant has to allege that there has been a change of circumstances, the question then is, changed since when?

Changed since the deputy commissioner entered his order? No, there has been no order.

Changed since the time of the accident?

Why should there have been a change in circumstances since the time of the accident to entitle someone to benefits?

Jones, the claimant in this case, claimed that he was permanently and totally disabled from the date of the accident and that there has been no change in his circumstances.

QUESTION: Yes, but the payments were made on the basis of temporary total, weren't they?

MR. EASTERBROOK: The employer claims that there was

QUESTION: And that was the basis on which the voluntary payments were made.

MR. EASTERBROOK: Umn hmn.

QUESTION: And he accepted those payments.

MR. EASTERBROOK: He accepted those payments. Although he claims --

QUESTION: And now he comes in -- and then the payments stopped. The carrier stopped them. First, I guess, cut them in half and then stopped them. Wasn't that it?

MR. EASTERBROOK: That is correct.

QUESTION: And certainly he knew, when they were reduced by half and he certainly knew when the payments stopped.

MR. EASTERBROOK: That's right. And there was an informal conference.

QUESTION: And he had a year, then, to say, the change in condition is that I am now permanently and totally disabled.

MR. EASTERBROOK: No, he could not claim that, your Honor. He claimed, as early as 1966, two years before the payments were stopped, that he was permanently disabled and he has, in fact, claimed that since he filed his initial claim. He has never asserted that there has been a change in circumstances. He has asserted that he was disabled from the very beginning and that there is no relevant change.

QUESTION: Well, I think it is a little -- perhaps easier to read the change in circumstances language generously than it may be to read the critical clause as to the time limitations.

MR. EASTERBROOK: The only way we could read change in circumstances in that way, Justice Stewart, would be to say that the change in circumstance is a change in the positions of the parties.

QUESTION: Right.

MR. EASTERBROOK: And that is not a change in conditions.

QUESTION: And that is not a wholly tortured meaning, either.

MR. EASTERBROOK: Right. It is a change in circumstance that could arise whenever anybody said so and which then would be the equivalent of saying, you can file an application under Section 22 whenever you want to because you would assert that I now feel that I am entitled to something else. But it doesn't say that.

I think it requires some objective change of circumstance and not simply your assertion that you believe something different or want to assert something different.

But in any case, the change of circumstance that he would assert is not his own change of position. It would be somewhat anomalous for the claimant to assert that the

employer -- and let me take that back, too, because the employer hasn't changed his position, either.

QUESTION: No, but the change -- one change in -- it says, on the ground of a change in conditions. It doesn't say circumstance.

Now, one very objectively-measurable change in conditions is, that a carrier stop paying.

MR. EASTERBROOK: We think that it would probably be more consistent with the history of this act to read "changing conditions" as " change in the condition of the employee."

QUESTION: Well, you don't want to tie yourself to that in case this case goes against you, do you?

MR. EASTERBROOK: We have interpreted it that way in the past.

QUESTION: Well, Mr. Easterbrook, from the Govern" ment's point of view, taking a look at Section 22 as it appears on page 3 of your brief, the language in about the 8th line from the bottom of the page -- "issue a new compensation order." From the Government's point of view, isn't it perhaps a better argument to say that that is the critical language rather than concentrating on this whether or not a compensation order has been issued and say that Jones, here, didn't ask for the issue of a new compensation order and that is all that Section 22 applies to?

MR. EASTERBROOK: We think that is highly important that the -- all it gives the deputy commissioner power to do is enter a new compensation order and if there has been no old compensation order, we don't understand that new compensation orders could have any meaning.

And as I also suggested to Justice Stewart, the language in the act providing for the reasons for review under Section 22 has the same import; a mistake of fact by the deputy commissioner can't have occurred unless there was a previous compensation order.

And we think that the better reading of Section 22 is that a change of circumstances refers to a change of circumstances since a compensation order was issued.

QUESTION: In any event, something is going to have to be read generously, however the case is decided.

MR. EASTERBROOK: That's right. I think so. But our position, to summarize it once more, is that that language "one year after the date of last compensation, whether or not an order has been issued," simply fixes the time from which the year begins to run and it does not establish for whom the year runs so that in many cases where an order is entered after the last payment of compensation, the year begins to run before the order is entered and it may be that the year sometimes expires before the order is entered.

QUESTION: Does that apply to all of the cases that

are informally closed?

MR. EASTERBROOK: So that an application for review or a resurrection of the claim, if you will, could be made at some later date?

QUESTION: Yes, it is close to a million -- 900 and some thousand.

MR. EASTERBROOK: In most of those cases, your Honor, the payments of compensation are no longer due because there is no longer any disability attributable to the act.

QUESTION: I betcha there are a considerable number.

MR. EASTERBROOK: And in the vast majority of those cases, no Section 13A claim was ever filed so that within a year after the injury, or within a year after the last payment of compensation, in cases in which no formal claim was filed, it expired.

QUESTION: Well, let me ask you; are some of those like Jones?

MR. EASTERBROOK: We estimate that several hundred a year are in a position similar to Jones.

QUESTION: Several? No, that means several hundred in the past.

MR. EASTERBROOK: Umn hmn, for each of past years as well.

QUESTION: For each of the past years.

MR. EASTERBROOK: That is correct.

QUESTION: You don't have the slightest idea how many.

MR. EASTERBROOK: There may be a large number or a small number.

QUESTION: How many or for how many years, do you? You don't have any idea.

MR. EASTERBROOK: We can't tell with certainty.

QUESTION: Mr. Easterbrook, I take it that before he is locked into his -- if more than a year has passed since the injury, he is locked into the claim that he has originally filed. He can't amend that claim and claim permanent disability when he originally filed for temporary.

MR. EASTERBROOK: The -- he can, indeed, although it is not in the nature of an amendment. Claims are construed rather liberally under this act, and the duty to pay compensation does not depend technically upon what is pleaded in the claim, but on the actual extent of disability.

The function of the claim is to notify the employer that compensation will be demanded formally if it is not forthcoming otherwise and to otherwise avail himself of his right to an adjudication and it is exactly that right to an adjudication that has dissipated in this case.

If, because compensation has terminated, the employee can no longer receive it.

QUESTION: Do you think that the Government's

position here would encourage employers to make prompt and informal dispositions of these cases?

MR. EASTERBROOK: We believe it would. In fact, we believe that if the employer's disposition is adopted, it will create an interesting incentive to terminate payments of compensation without an award. The employer will be able to terminate the compensation and if the employee does not protest within a year, even meritorious claims are extinguished, so we think it is an incentive to cease paying compensation.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Duncan?

MR. DUNCAN: Nothing further, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:53 o'clock a.m., the case was submitted.]