In the

# Supreme Court of the United States

JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, et al.,

Appellants,

--vs--

TURNER ELKHORN MINING COMPANY, et al.,

Appellees.

No. 74-1302

----------and----------

TURNER ELKHORN MINING COMPANY, et al.,

Appellants,

--vs--

JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, et al.,

Appellees.

No. 74-1316

Washington, D. C.
December 2, 1975

Pages 1 thru 42



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| JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, et al., Appellants, v. TURNER ELKHORN MINING COMPANY, et al., Appellees. | No. 74-1302 |
| and TURNER ELKHORN MINING COMPANY, et al., Appellants, v. JOHN T. DUNLOP, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, et al., Appellees. | No. 74-1316 |

Washington, D. C.,

Tuesday, December 2, 1975.

The above-entitled matters came on for consolidated argument at 1:18 o'clock, p.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:

R. R. McMAHAN, ESQ., Lord, Bissell & Brook, 135 South LaSalle Street, Chicago, Illinois 60603; on behalf of Turner Elkhorn Mining Co., et al.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Federal Parties.

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C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-1302, Dunlop against Turner Elkhorn, and we'll hear the argument on the cross-appeal, 74-1316, first.

Mr. McMahan.

ORAL ARGUMENT OF R. R. McMAHAN, ESQ.,

ON BEHALF OF TURNER ELKHORN MINING CO., ET AL.

MR. McMAHAN: Mr. Chief Justice, may it please the Court:

The issue raised by these cross-appeals is one of the constitutional rationality of the means that Congress has chosen to achieve the purposes, clearly the legitimate purposes, of the Black Lung Benefits provisions of the Coal Mine Health and Safety Act of 1969.

The Coal Mine Health and Safety Act, as counsel for the government no doubt will point out to you in much greater length, was originally conceived and enacted to redress some very real grievances among mine workers. It was designed, at its original conception, to deal with health and safety aspects of mining, to control dust levels, to prevent accidents. Later, toward the end of the congressional consideration of the legislation, provisions were inserted for providing economic relief to disabled, retired coal miners, principally in the Southern United States.

Then, at the very end of the consideration of the Act,

provisions were inserted to create a workmen's compensation program, a fairly elaborate three-part program, the third part of which would impose liability on former and present employers of retired and active coal mine workers suffering from occupational disease, a single occupational disease known as coal workers' pneumoconiosis; a disease which is caused by breathing dust.

The disease actually is a physiological condition that develops from breathing dust at certain levels and certain concentrations over given periods of time. The more dust that is breathed, the longer it is breathed, the more likely it is that the disease will develop.

This suit arose out of a -- this appeal arose out of a suit brought by 22 mine operators in the Eastern District of Kentucky to enjoin the enforcement of the legislation, the workmen's compensation provisions of the legislation.

The three-judge court in the Eastern District upheld the major portions of the law against plaintiffs' attack, plaintiffs' challenge to their validity under the due process clause of the Fifth Amendment of the United States Constitution.

The court, however, did strike down two presumptive provisions that were included in the law, and I will describe those in greater detail. That is why these cases are before the Court now on cross-appeal.

The Act, the benefits provisions of the Act, which is

all that we are concerned with here today, create a three-part program, the first part beginning in -- well, the first part ending in June, the end of June of 1973, under which former and present coal mine employees could apply for benefits which would be paid by the federal government through the Department of Health, Education, and Welfare, administered by the Social Security Administration.

The six months following the end of that program, which will be referred to here frequently as the Part B program, involved a dual administration of claims for benefits to be carried out by the Department of Labor and HEW jointly; the Department of Health, Education, and Welfare establishing the benefits, the diagnostic criteria, the medical criteria for determining whether a miner or a former miner has the disability occupational disease the Act was designed to cover.

Claimants filing within that time would be paid by the government for six months, and thereafter by a former employer or present employer, a coal mine operator.

The crucial part of this legislation, and the part that plaintiffs here consider constitutionally objectionable is Part C of the Act, which imposes upon mine operators, the former employers of former miners and the present employers of present miners, the obligation to pay benefits in connection with this single occupational disease.

Plaintiffs maintain that, to the extent that this

portion of the Act indiscriminately imposes liability for former -- for the claims of former employees based upon employment periods that are terminated long prior to the enactment of the legislation, that it constitutes a completely irrational means for achieving what is admittedly the legitimate purpose of providing economic relief to a large population of elderly retired and ill coal miners and their survivors.

QUESTION: Mr. McMahan, are you talking now about those who were employed by a particular mining operator and who are presumed to have contracted the disease during the period of that employment, although their symptoms showed much later?

MR. McMAHAN: I'm talking about all applicants for benefits, payable by a former employer, whose employment terminated prior to the enactment of the law that imposed this obligation.

It must be recognized in this case that this is not a typical workmen's compensation law that imposes liability in respect of occupational disease that develops after an employment relationship has terminated, when there has been a workmen's compensation law in effect during the employment relationship.

Now, there's no question that that is a rational legislative program, because an employer, if he knows that the liability, potential liability is there, can insure against it and then it doesn't make any difference if the disability

results, the work-related disability results following termination of the employment.

That is not the case here.

What this law has done, what Congress has done, has lost sight of the fact that in attempting to accomplish two purposes here, through the use of workmen's compensation type law, that they have chosen a completely irrational means of delivering relief to former retired miners.

QUESTION: Well, I don't see what's irrational about it. Certainly the retired miners are getting the money. I take it your contention of irrationality tends from who -- is based on the source of the money.

MR. McMAHAN: Yes, my contention -- unless the Court is prepared to accept that the only question of rationality here is whether the money actually reaches the miners, I think that the means has to be examined more carefully. And we say that it is irrational to single out former employers to deliver what is really economic relief, as a result of disability due to a disease which no one knew existed in the United States at the time these men were employed, and that has been recognized repeatedly in the legislative history of the Act as being a national obligation, recognized as being a moral obligation, by the government --

QUESTION: But those are just suggesting different ways Congress might have treated it. Isn't our scope of

inquiry extremely narrow here, so that we would have to say, in effect, that Congress just lost its head when it passed this statute, in order to hold it unconstitutional?

MR. McMAHAN: I think that the scope of the inquiry here is narrow, but not as narrow as it would be in the case of more conventional economic regulatory legislation.

I think that the means chosen by Congress to deliver relief to these former and retired miners in this instance deserve a closer scrutiny because it involves the suspect imposition of new rights and obligations on transactions, and on the basis of conduct that was closed in the past.

QUESTION: What's suspect about it?

MR. McMAHAN: It is suspect because this Court has recognized that laws that have that effect are suspect, not necessarily unconstitutional; but worthy of close examination.

QUESTION: Well, are coal mine operators now in the classification of racial minorities and aliens?

MR. McMAHAN: No, certainly not. But coal mine operators, to the extent that they are now being held responsible to pay benefits to former employees in connection with exposure in the production of a product in the past, and the creation of a disease that could not be anticipated, and could not be passed on, the pricing are carved out as a class.

I am not --

QUESTION: Well, what is your constitutional argument?

What clause of the Constitution? Is it a due process argument?

MR. McMAHAN: The due process and the equal protection. In this area they merge, as the Court well knows. It is due process in the sense that a workman -- our contention is that a workmen's compensation law is an irrational means, no matter upon what basis it is analyzed; it is an irrational means for delivering benefits to persons who were not in the work force at the time that the law was passed.

It might well be a rational means to impose this burden, this economic burden on the industry as a whole.

QUESTION: Well, this is your best and only constitutional argument, irrationality of the means to achieve this end?

MR. McMAHAN: No, there is -- we also argue that carving out former employers within the industry as a class, to bear the burden and to bear the arbitrary consequences of -- that that burden will have, competitive consequences, is an irrational classification.

QUESTION: Well, that still is irrationality is your argument.

MR. McMAHAN: That is our argument as far as the, what has come to be known as the retroactive provisions of the law go.

QUESTION: Don't you also, in effect, argue that you're being deprived of your property without due process of

law?

MR. McMAHAN: Yes, that's implicit in the whole irrationality argument.

We do not -- we contend that the irrationality of the means chosen is what deprives us of our property. No, there is no contention that we're suffering any other deprivation, for lack of due process.

But it's definitely the property, a definite property deprivation is occurring.

QUESTION: Are you saying the government is -- are you relying on that other part of the Fifth Amendment that -- in saying the government is taking your property without adequate compensation? You're not relying on that, are you?

MR. McMAHAN: No. No. I'm saying that we are suffering the deprivation of property by the enforcement against us of irrational legislation, and discriminatory --

QUESTION: You're being irrationally deprived of your property.

MR. McMAHAN: That's correct.

QUESTION: Well, is part of the irrationality the proposition -- this is a question to you -- that it is irrational to put all the liability in one place, where it might have derived from many places? The responsibility, the fault.

MR. McMAHAN: The crux of the irrationality of the workmen's compensation approach in trying to serve these two

different ends is that workmen's compensation law cannot rationally function to spread that risk, when you're dealing with former employers.

Now, the reason that is irrational, and we think unconstitutional irrational, as a means is that it will have an impact that is entirely unwarranted and unnecessary. And a competitive impact on present mine operators will impose economic obligations on them to pay very large benefits in respect of work forces in the past that may have been very much larger.

QUESTION: What happens to a coal mine operator who went into business, let's say the year, six months or two months before the Act took effect, and his work force includes men who have been in the mining work for twenty or thirty years; to what extent is he liable for the totality of their condition?

MR. McMAHAN: I think actively under this Act he'd become almost immediately liable to pay benefits to all of them.

QUESTION: Even though he just went into business, the mining business?

MR. McMAHAN: Yes. Principally because anyone who has been in the work force that long could qualify, virtually anyone could qualify under the Act for benefits, and the Act attaches liability to active work forces on the basis of the present employer or the last responsible operator, as the concept

in the Act, for whom the claimant has worked for a cumulative year.

There is a second major basis upon which we object to the constitutionality of the Act, and it applies not only to liability imposed for paying benefits to former miners, but to the present miners as well. And that is the elaborate presumptions and limitations on medical diagnosis and diagnostic criteria included in the Act, which the government concedes -- this is one area where we agree, although we might differ as to the extent -- concedes is over-inclusive, in the sense that through the operation of these presumptions in the adjudication of claims miners who suffer from non-work-related diseases, respiratory diseases, and who are not actually totally physically disabled, may qualify for benefits.

Now, I will be frank that the legislative history here is voluminous, and the question of whether there is any occupational disease arising out of the breathing of coal dust other than coal workers' pneumoconiosis, was subject to dispute.

We believe that if the record were analyzed, and if the proper weight were given to all of the expert testimony, that we would find that that dispute is more apparent than real, it's a matter of volume, and that all of the medical experts in the area, including principally the Secretary of Health, Education, and Welfare, and the Secretary of Labor, the defendants here, agree that this is the only disease arising

out of the breathing of coal dust that can be defined as occupationally related and disabling.

But there is evidence in --

QUESTION: One used to hear a good deal about silicosis in miners. Is this a -- is that a generic term of which this is a specifically included disease, or is that something else?

MR. McMAHAN: Silicosis, as I understand it, is what -- is a much broader form of physical, physiological condition, and coal workers' pneumoconiosis, until the Fifties in this country, was thought to be silicosis. There are -- there is a condition or conditions called the pneumoconioses which develop from breathing dust of various sorts. Coal workers' pneumoconiosis is an expressly identifiable physiological condition arising out of the breathing of coal dust, as opposed to flax dust or stone dust.

The presumptions in this Act are deemed rebuttable, for the most part. There is one that the lower court struck down, which creates a presumption of total disability from a complicated form of the disease, and the court found that an irrational presumption because the Act expressly set up determination, required determination of total disability, of the existence of the disease, and the total disability from it, as two separate factors.

I think the court was clearly right in reaching that

conclusion. I, however, think that the court seriously misapplied the law and misunderstood the impact of these presumptions, of the rebuttable presumptions, which are primarily responsible for the over-inclusiveness of the diagnostic criteria that the Department of Labor is forced to apply in its adjudication of claims, and it results in many, many people, we believe, being paid compensation for diseases such as chronic bronchitis and emphysema, which exist in 25 percent of the general population.

There were six percent of social security disability benefits to the general public, that are payable with respect to respirable diseases.

It was believed by the Public Health Service and by the government that when this Act was first enacted, that there would only be about 53,000 beneficiaries, and that that would cost the government about $120 million a year, and to this point there have now been 500,000 people found eligible for benefits, and it's costing $1 billion annually.

This is -- we do not believe that this is a paradox resulting from an epidemic of the disease, we think it results purely from the inclusion of great numbers of people in the benefits eligibility criteria who simply were not made ill by coal mining.

Now, this Court has struggled in recent years with how to treat presumptions, and especially irrebuttable pre-

sumptions, and especially implicit presumptions, that we really don't have that problem in this case. These are plain evidentiary presumptions.

The question is, is there a rational connection between the fact proved to be proved, to establish the fact to be presumed? And is that presumption, the fact presumed, fairly rebuttable?

We claim that it isn't fairly rebuttable, that they aren't fairly rebuttable in this case, because the Congress has written into the legislation limitations on rebuttal which make it impossible to distinguish non-work-related respirable diseases from this single work-related disease.

Now, if this Court is going to --

QUESTION: Mr. McMahan, what if Congress had said, because of the difficulty in distinguishing between all these diseases, any former coal miner who comes up with any sort of a respiratory disease is going to have to be compensated by his former employer? It might not be this coal miner pneumoconiosis, but there is some substantial chance that it might be, and we're going to resolve doubts in favor of the miner?

MR. McMAHAN: I think that -- I think that you put your finger on the crucial problem here. I would agree with you completely that it would be within the power of Congress to pass a law saying that all coal miners, past or present, who have a respirable disease, regardless of whether it's

work-related, should receive benefits.

But I do not think it's within the authority of Congress to say that all such persons having such diseases should be paid by coal mine operators.

QUESTION: Why not?

MR. McMAHAN: Because the coal mine operators would then certainly be singled out as a class to pay benefits to substantial numbers of persons who are suffering from a disease that they would have, regardless of their employment, and it would be just as rational or irrational to single out any class, as long as there is not that nexus.

QUESTION: Not necessarily, because these people, let's say, were employed by the coal miners for a substantial period of time, there's medical evidence that shows that pneumoconiosis does develop in people so employed, and it's very hard to tell from other respiratory diseases.

Now, you're resolving many doubts against the coal miners; but I don't see how that makes it irrational.

MR. McMAHAN: There you're changed the question somewhat. You are saying that if there is a possibility that their diseases develop out of coal mining, that that is sufficient to attach that liability through presumptions.

I think that that is probably a reversal of what legislative presumptions have always been designed to do. Far more often, except in cases of intent or subjective un-

determinable questions, presumptions are only appropriate when they are used to forego evidence of fact that is clearly inferable, and for administrative convenience.

We would submit in this case that where the evidence -- if the Court should only find that the evidence is 50/50 on whether any other respirable diseases are caused by coal minin, that finding, in itself, should be sufficient to suggest that it's not appropriate for Congress to proceed by presumptions at all.

Because there is no question, the government will admit that these same respirable diseases exist in non-mining employees, in the general population, and therefore there is no way to determine actual causation; and in that case it would seem sensible and it would not seem to impose this Court's values on Congress at all, to simply say that this is a case where, instead of redefining a disease in a way that no doctor would accept, absent the compulsion of law, simply say you will compensate for the occupational disease and those which may or may not be compensable.

And then, we believe, that if Congress is forced to do this, it might examine more carefully the legislative means it chooses to achieve that end, and, in so doing, might, we hope, discover that it is not rational to impose that liability on former employers of those people, that it might more rationally be imposed on the industry and ultimately on the

consumer of the product, or that it might more rationally be paid out of public funds.

Thank you, Your Honors.

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

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE FEDERAL PARTIES

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

This case brings before the Court issues for re-examination on plenary review which were decided last term in the Court's summary affirmance of a three-judge court decision in the District of Columbia, in a case called National Independent Coal Operator's Association v. Brennan.

The chief difference between the two cases is that in the National Independent Coal Operator's Association case, the three-judge District Court exercised pendent jurisdiction over challenges to the implementing regulations of this Act, as well as the statutory challenges, and upheld both the statutory provisions at issue and the regulations; and that judgment was summarily affirmed by this Court.

The three-judge court in the present case declined to exercise pendent jurisdiction over the challenge to the regulations. The issues with respect to the regulations have been remitted to a single District judge and are presently

being litigated before him, and reached only the statutory issues, and for the most part upheld the Act, although in two respects it ruled that the Act was unconstitutional, subsequent to this Court's summary affirmance last term.

In a way the case is reminescent also of this Court's decision last term in Weinberger v. Salfi, which reiterated and elaborated upon many of the governing principles which we think apply here.

Congress was faced, in this legislation with extensive medical and other evidence developed through a lengthy series of hearings, both in connection with the 1969 Act and in connection with the 1972 amendments, which were concerned only with the compensation aspects of the program.

With the problems of respiratory diseases among coal miners, and particularly pneumoconiosis, which is a chronic disease, an irreversible disease, which in its later stages becomes progressive and inevitably fatal. It's true that Congress first gave attention to these problems in the 1960's, and found at that time the State Workmen's Compensation laws were grossly inadequate to take care of these problems; but the disease wasn't entirely unknown up until that time, it was first recognized in England and elsewhere in Europe in the 1930's, as the hearings pointed out.

So I do take exception to the statement that no coal mine operator could have known of these dangers for the miners.

And it came to be recognized in the medical profession in this country in the 1950's.

Be that as it may, it was in the late 1960's and again in the early Seventies that Congress attempted to find a legislative solution to these serious problems.

And in doing so, Congress was concerned, first of all, to strike a proper balance of the burden between the Federal Treasury, the industry, and the victims of this disease in attempting to provide for the very large backlog of cases that had not previously been provided for.

We have summarized some of the results of the balance Congress struck on page 25 of our brief. The figures at the top, in the hundreds of thousands, are figures that have been brought into the part of the program paid for entirely from the Federal Treasury, with respect to the compensation claims. 352,000 of these claims have been approved out of 550,000 applied for.

Then you get down, in the second paragraph on page 25, to the portion of the burden, a prospective burden largely, which Congress thought fit to assign to the industry, and we're talking about 70,000 claims that have been filed thus far, with an estimated yearly rate of five to six thousand claims, and of the 70,000 claims filed, only 21.6 percent have been approved for payment.

The approvals are running at a rate slightly above

20 percent.

Many of them are claims that were already rejected under the federally financed portion of the program.

Congress was solicitious toward the industry, and, particularly as a result of the 1972 amendments, set up the program so that it's doubtful if any truly retroactive claims will be made against any of the companies because of the three-year statute of limitations and the extension of the federally financed portion of theprogram to three and a half years, followed then by a half-year transitional program, partially financed by the Federal Treasury.

We have, on pages 30 and 31 of our brief, noted that retrospective aspects to legislation do not necessarily invalidate it. Far from it, there are numerous cases cited there, and in footnote 29 of the brief, in which the Court has upheld retrospective application of laws in appropriate circumstances.

QUESTION: Well, if I could go back a moment to what you were saying earlier, I notice at the top of page 26 you have a statement that 97 percent of these cases have been where an administrative review has been sought.

MR. WALLACE: That is correct.

QUESTION: And only 12 of them reviewed so far; why is that?

MR. WALLACE: By the Review Board. Well, these

proceedings can be lengthy. It was anticipated at the time they were established that the awards would not be contested, in so large a percentage of cases, and as a matter of fact Congress was hopeful, in enacting this legislation, that it would be temporary legislation, that State Workmen's Compensation laws would be amended to make adequate provision for this disease, and that a federal program would not be necessary.

QUESTION: And that's not happening yet?

MR. WALLACE: That is not happening, Your Honor; far from it.

QUESTION: Well, conventional workmen's compensation can hardly take care of this problem. This is basically reparations, isn't it?

MR. WALLACE: Well, for the --

QUESTION: I mean, this part of the legislation.

MR. WALLACE: For the former miners, yes.

QUESTION: Yes.

But future, of course, ordinary conventional workmen's compensation can take care of it.

Well, we're not dealing here with that aspect; are we?

MR. WALLACE: Well, we're not in the principal challenge here, although the figures that Mr. Justice Brennan is referring to are the figures from Part C of the program, which has just taken effect quite recently.

QUESTION: And that is workmen's compensation.

MR. WALLACE: That is -- yes, that's the part that is financed under Workmen's Compensation Insurance by the former employers.

QUESTION: And that's the five to six thousand annual claims now being made?

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: And 97 percent of all determinations are being appealed?

MR. WALLACE: They are being administratively appealed.

Now, this is the early administration of the Act, at a time when the constitutionality has not been authoritatively settled, even after we won summary affirmance by this Court, and perhaps there won't be quite as many appeals once the matter is --

QUESTION: Is there a reason, Mr. Wallace, why it takes so long to try one of these administrative reviews?

MR. WALLACE: Well, none that I could give you. I can't say I've looked into that question with any depth.

QUESTION: Well, it seems such a small number, only 12.

MR. WALLACE: Yes, I'm sure they are progressing now. At the time the brief was written, this part of the Act had been in effect a relatively short time. And the jurisdiction was moving over to the Department of Labor from --

QUESTION: But for the States to pick this up as part of the State Workmen's Compensation systems, would amendments of State laws be required?

MR. WALLACE: That is correct.

QUESTION: And the States are simply not amending their statutes?

MR. WALLACE: Some amendments are being made, but not amendments that meet the federal statutory standard that would remove the federal program --

QUESTION: Is this limited to a few States?

MR. WALLACE: No, it's quite a few. As a matter of fact, it's a nationwide program when the miners, they may have moved to any State. But --

QUESTION: But I mean of the current ones, the five to six thousand a year. Would they still be widespread throughout the country?

MR. WALLACE: I think there are about 25 States in which there is some coal mining that amounts to something. I haven't really looked into that figure, but I am getting an affirmative nod here.

QUESTION: Well, it's really not important.

QUESTION: Mr. Wallace, did I understand you to say earlier that you thought there would be relatively few claims made on a retroactive process?

MR. WALLACE: Well, on a truly retroactive basis, --

QUESTION: How would you define retroactive basis here?

MR. WALLACE: That would be a claim against the former employer which had fully ripened before enactment of the statute. In other words, the disease had become manifest.

QUESTION: The employee must have ceased to be a miner before the effective date of the Act, and must have made his claim of disability after the effective date, is the way I understood your brief.

MR. WALLACE: As what we would consider a completely retroactive claim for purposes of the usual way of looking at tort and workmen's compensation laws, would be a claim by an employee, a former employee, who knew he had the disease, at least should have known it, that the symptoms arose prior to the enactment of the Act.

That's when the claim ripens. There's a long time between contraction of this disease and its detection. And because the Act is set up with a three-year statute of limitations, and it isn't until three and a half years after its enactment that employer liability comes into the picture.

QUESTION: There's a reference in the brief to an employee who quit being a coal miner in 1920. When does the statute of limitations run as to him, for example? Three years from the date of the effective date of the Act?

MR. WALLACE: Three years from when the disease

becomes manifest to him. That doesn't mean a medical diagnosis of it, but it's when the symptoms become manifest, and that he would know he had the disease. And it's very unlikely that it would have that long an incubation period, if he didn't expose himself to coal dust.

QUESTION: But do the presumptions, the irrebuttable presumptions operate against the man who comes in with a claim 20, 30, 40 years old, in his favor?

MR. WALLACE: Well, the presumption would operate if he's spent the requisite amount of time in the mine.

QUESTION: Yes.

MR. WALLACE: The presumpations are a matter of evidentiary proof, to which I'll turn in a moment.

QUESTION: And there are claims in the brief already, if the claims have been filed as my brother Powell says, by people who left the coal mines in the Twenties or in the Thirties or in the Forties, and the benefits run not only to these people, if they're alive, but also to their widows and whildren, do they not?

MR. WALLACE: Until the Act, until the expiration date, which is now December 30, 1981, and it may be amended.

QUESTION: Is that true even if emphysema might be the disease they really have?

MR. WALLACE: Well, that's a matter of proof. If they meet the standards of proof, the Act awards benefits only for

pneumoconiosis, as defined --

QUESTION: Aided by statutory presumptions.

MR. WALLACE: Aided by statutory presumptions.

QUESTION: And by the disallowance of X-ray evidence as the exclusive reason for disallowing the claim.

MR. WALLACE: As the exclusive reason --

QUESTION: Right.

MR. WALLACE: -- if the claim can be established by means of the other pertinent evidence, which there is an opportunity to contest.

X-rays have proven to have a 25 percent error rate, based on the other really reliable evidence, which is autopsy evidence, as to this disease.

But --

QUESTION: Mr. McMahan suggests that over a period of time this broad-scale approach of Congress will have considerably more than a 25 percent error, if I understood the sum total of his argument.

That the presumptions are going to reach a great many people here.

MR. WALLACE: Well, if we'll turn to the presumptions now. Congress was faced with the problem under this Act of a disease that is difficult to prove and difficult to disprove, and it wanted to set up what it thought would be a fair system of compromising between bringing more people into eligibility

than an ideal system might bring, make eligible for the benefits if proof were easier, and denying benefits to those that it felt needed them, and that it wanted to help. And so it set up a scheme which we have tried to summarize briefly on pages 37 and 38 of our brief.

Let me talk first about the evidentiary presumptions, which are the ones that begin at the bottom of page 37, and the first thing to be said about them is I don't think that the scheme of the Act was fully understood by the District Court in its concern about these presumptions. It seemed to overlook or fail to understand that Section 422(c) of the Act contains a proviso that is applicable to any claim for benefits against any operator, and that is on page 7a of the appendix to the consolidated brief for the plaintiffs in this case, and that proviso says that no benefits shall be payable by any operator on account of death or total disability due to pneumoconiosis which did not arise at least in part out of employment in a mine during the period when it was operated by such operator.

So that there's always the possibility of making a defense to any of these claims, to begin with, by showing that the conditions in your mind were such that pneumoconiosis could not have been contracted by the claimant in your mind.

Second, the Court seemed to overlook that these evidentiary presumptions attach only after the elements that

triggered them have been established in an administrative hearing in which the employer is free to participate and contest the existence of those elements. So we're not talking about failure of an opportunity for the employer to contest any of these matters; but the first of the presumptions applying -- as we summarize it on page 38 -- (a) there: a miner who has worked in the mines for ten years or more and shows that he has contracted pneumoconiosis, and that proof can be contested as to whether or not he actually has that disease. And that is the disease that is occupationally related only to work in the coal mines. Then there is a rebuttable presumption --

QUESTION: Then, Mr. Wallace, he has to prove in any event, when he sues a particular operator, that at some time he worked for that operator.

MR. WALLACE: Oh, yes, definitely, then he can contest it also.

QUESTION: Then, had he worked for some operator who has long since disappeared, that's the only one, so he could recover from nobody.

MR. WALLACE: That is a problem under the current Act, and Congress has amendments under consideration now.

QUESTION: I see.

MR. WALLACE: They may change the whole scheme of it for the future. They are considering setting up an industrywide

fund. There have been hearings held this year on that.

QUESTION: But to pursue that, if he had worked for one operator for two years and another operator for thirty years, and the thirty-year operator was out of business, who pays the bill?

MR. WALLACE: Under the regulations he could still make a claim for liability against the one who is still in business. But --

QUESTION: The one for two years?

MR. WALLACE: -- the question of who is liable is remitted by the Act entirely as a solution in the regulations, the regulations are not before the Court.

The only thing that's established in the Act are methods of showing eligibility. The question of who, then, is liable to pay the benefits is a matter that's been worked out in the regulations.

QUESTION: Well, if there are only two, and one of them is gone, the answer is very simple, isn't it?

MR. WALLACE: Yes, the regulations say the last one that you worked for is presumed to be the one that has to pay if you worked a year there. But if he can show that you couldn't have contracted the disease in his mines because of conditions in his mines, then it reverts back to the next one before him, if I understand the regulation.

As I say, the validity of the regulations are not

before the Court in this case.

QUESTION: Well, there is before the Court in this case, of course, who is going to pay for this. If this -- we wouldn't even have a problem if the Good Lord was going to pay for this; the people who are hurt are the people who are paying it.

MR. WALLACE: Congress decided that eligibility for compensation from the industry can be established this way, and who in the industry pays is worked out in the regulations. That's --

QUESTION: But the point is, we know it's not industrywide, it's not a charge on the industry as a whole.

MR. WALLACE: No, it's the particular former employer, --

QUESTION: Right.

MR. WALLACE: -- who is singled out in the regulations. But these provisions that are at issue are the provisions about how you establish eligibility for benefits.

QUESTION: All right, take a claimant against a particular employer, where that employer proved he was only a desk clerk, never exposed to any of these conditions; then he left that employer and went to another employer, worked for him for thirty years and was exposed, contracted the disease, he could not recover if the second employer is out of business.

MR. WALLACE: Well, of course, this is always a defense to the award of benefits against a particular employer. That's showing that he couldn't have contracted pneumoconiosis in the work that he did for you.

QUESTION: Mr. Wallace, taking examples like this, does the Act provide for this sort of situation? Coal is a depleting product, obviously. You would have a mining company that, 20 or 25 years ago, may have had a thousand employees; it may have gradually depleted its coal, and today may have 50 to 100 employees. Is it not possible that that miner might have more claimants than it has employees today?

MR. WALLACE: It is possible.

QUESTION: Is there anything that would protect that company from being put out of business by claims as against which it has had no opportunity to set up reserves or carry insurance?

MR. WALLACE: It is possible that an instance could arise in which a company could be put out of business. The main protection against it is the fact that the three and a half year period of exclusive federal responsibility was set up to take care of the backlog of former employees. The principal part of the backlog. And it would have had to be a very rapid reduction in a company's employment that would result in the situation that you are mentioning.

And this problem has been complained of by the

industry and it's one that Congress considered. And one may agree or disagree with the solution that Congress reached, but I think the Court's decisions make it clear that putting someone out of business for an appropriate reason in the public interest is not a constitutional violation. That's exactly what Ferguson v. Skrupa was. A complaint by someone who was in the debt adjusting business, that a new State statute saying that only lawyers could be in that business, was depriving him of his rightful occupation; and that he was a fine, upstanding businessman providing a service to the community.

The Court unanimously held that that's a legislative concern, whether it's in the public interest to restrict that business in the circumstances that concern the Legislature.

So I really think it's a legislative argument rather than a constitutional one --

QUESTION: Well, what do you --

MR. WALLACE: -- that some companies will be hurt more than others. It's very reminescent of the argument in Williamson v. Lee Optical Company, that competition was being affected between the makers of prescription glasses and the makers of ready-to-wear glasses by applying the regulation only to the maker of prescription glasses.

QUESTION: Of course, it may be one thing to be put out of business just in the sense of not being able to carry on your traditional occupation, but another thing to be put out of

business by having a large indebtedness which you're unable to pay saddled on you.

MR. WALLACE: But if it results from the fact that it was through working for you that these injuries were incurred, through your profit-making activities, it's a permissible legislative judgment that that burden should be placed on a company.

QUESTION: You can answer Justice Rehnquist's question, proposition, for which by traditional due process standards no recovery might be had in some of those cases.

MR. WALLACE: That, and then there's another legislative solution undoubtedly would be found for such examples.

But I do want to point out that these are, at the moment, highly speculative concerns. The brief, an amicus brief filed in our support by the United Mine Workers of America, points out quite cogently, beginning on page 13 of that brief, through page 17, that the economic impact thus far has been minimal.

And it cites hearings in 1973 that first began consideration of amendments in which it was reported that all of the companies have thus far been enabled to provide additional workmen's compensation coverage under their regular Workmen's Compensation insurance, and the increases in premiums thus far have been modest and, in the case of Kentucky, nonexistent thus far.

QUESTION: Is it true, Mr. Wallace, from what you suggested earlier, that the government takes on the whole financial burden for the first three and a half years, under the A Part of the program?

MR. WALLACE: Yes, largely.

QUESTION: And that that itself has had the effect of minimizing the financial burden --

MR. WALLACE: By and large it has, and of course the industry is in a relatively strong economic position now, as was pointed out quite persuasively in a footnote in the same brief. That's footnote 37 on page 16 of that brief, dealing with the recent profits of some of the plaintiffs here.

QUESTION: Is that 37?

MR. WALLACE: Footnote 37, yes, Your Honor.

But, in addition to that, there is some time lag involved here, which is true of doing business under any workmen's compensation scheme. And this takes us back to the retroactivity argument for a moment. The plaintiffs' brief in this Court is premised on the notion that in order for a program to be fair, it must apply only to current employees, so that while they are doing work, the company can price its products in a manner that will cover the cost of compensating them.

But that isn't actually the way workmen's compensation

laws work in the economy at all.

The fact is, insurance rates are adjusted after claims experience will cause them to be adjusted upwards.

QUESTION: You don't suggest that the accountants who handle the work for these employers don't set up reserves to take this into account on the pricing?

MR. WALLACE: Undoubtedly they set up reserves as best they can to anticipate these matters. But the fact of the matter is if they had a large number of workers disabled, through injury, in the employment, who become no longer employees, it's only in the following year that what is known in the industry as retrospective rating will cause an increase in their workmen's compensation premiums.

And any impact that the company feels comes after these people are no longer employees. There was no extra cost that the company had to pay while they were employees.

QUESTION: It's not true of a self-insurer, though.

MR. WALLACE: It's not true of a self-insurer, but the prevalent practice is that there's a retrospective effect that's very similar to the effect under this statute.

Not only that, but the argument by analogy would carry over to increases in benefits to be paid to former employees, which Congress, inextriodically, because of the severe inflation that we've had, for workers who have been disabled under the Longshoremen and Harbor Workers Act, this

program has an automatic escalator feature. .It says that the compensation shall be one-half of what a disabled government worker, Grade GS-2, will receive. That goes up as inflation goes up.

And, by analogy, the same argument could be made with respect to any of these increases. The retroactivity argument would really be an argument that would freeze the benefits to be paid based on contributions that may be -- and salaries that may be woefully out of date in terms of the living costs for disabled persons.

It's commonplace to have these increases under State Workmen's Compensation laws, and they're not even challenged.

QUESTION: Well, I think the challenge here is not to what the claimants get, but, rather, who has to pay.

What do you conceive to be the provision of the Constitution that's in issue here?

MR. WALLACE: Well, the only provision that's been referred to is the Fifth Amendment due process clause --

QUESTION: Substantive due process?

MR. WALLACE: Well, it seems to me that it basically is substantive due process.

QUESTION: Well, that's my question.

MR. WALLACE: It seems to me basically a substantive due process claim of the kind that was made in Ferguson v. Skrupa, Williamson v. Lee Optical Company, that an unfair

burden is being placed on particular competitors in the economy.

QUESTION: Do you think -- and you say that that's really an invalid constitutional claim, almost a frivolous one?

MR. WALLACE: Well, I basically think that the arguments are legislative arguments, even if some of the premises of them weren't faulty, which it seems to me they are.

That workmen's compensation typically has retrospective consequences, and it's long been upheld in that context, anyway.

But even if the premises weren't faulty, it seems to be to be a legislative rather than a constitutional --

QUESTION: Well, what if Congress here had set up these benefits and these same presumptions, and then said that the payments are to be made, the people who are going to be financially responsible for paying these are all the corporations in the United States whose names, corporate names begin with the first thirteen letters of the alphabet?

MR. WALLACE: Well, but there's nothing arbitrary of that nature involved here.

QUESTION: Well, let's take my hypothetical case, would that be constitutionally invalid?

MR. WALLACE: Well, I don't like to concede away the powers of Congress, but certainly there would be a much more substantial argument in that --

QUESTION: Under what provision of the Constitution?

MR. WALLACE: It would be under that provision, under the Fifth Amendment due process clause, because it's hard to see any other provision that would be valid.

It might be upheld as a taxing provision, and I don't say it's necessarily constitutionally vulnerable. But here you've got a system that is rationally based in the sense that it's tied -- it's compensation for a work-related disease by definition, and the only people who can possibly be liable are employers who subjected the claimant to the risk of that disease.

And adjustments have been made in the kind of medical evidence that will carry various kinds of weight because of detailed medical testimony before Congress that showed that certain kinds of evidence, such as X-rays, are not in themselves reliable. If, through contested other tests, it can be proved that you have this disease. And there's an opportunity to contest all of these other kinds of medical evidence.

QUESTION: To take Justice Stewart's hypothetical, and assume that instead of being paid by all corporations whose names begin with the first thirteen letters of the alphabet, it is to be paid by all corporations who have a net worth of a billion dollars or more.

MR. WALLACE: Well, that might be less arbitrary, and --

QUESTION: It's fairly rational in a sense, these

people are probably better able to pay than just every corporation in the country.

MR. WALLACE: Well, that may be a valid exercise of the taxing power, in the form of a compensation system. But that is not that --

QUESTION: But certainly if you wanted to just impose a surtax, income tax on all such corporations of ten percent, and ultimately use -- pay out of the public treasury from the general funds compensation to coal miners; there wouldn't be much anybody could do about it.

MR. WALLACE: Well, that is correct, Your Honor. But I --

QUESTION: Isn't it true, Mr. Wallace, that if Congress now said, or had said in this legislation, that beginning on that date in 1973 a tax of two dollars per ton of every tone of coal mined in the United States would be put into a fund, that would --

MR. WALLACE: That would be a permissible legislative means of taking care of this problem.

But I do think it should be recognized that there is nothing novel in workmen's compensation about presumption. The ordinary rule in workmen's compensation is that if you can show the injury, it's presumed that it arose out of your employment. And it's up to the employer to rebut that.

In a way, the first of the evidentiary presumptions

cuts back on that rule, by saying that you have to show also that you were employed for ten years in the coal mine in order for that presumption to come into force.

In the ordinary workmen's compensation case, all you have to show is that you had the injury, and it would be presumed that it arose out of your employment, unless that were rebutted.

There's nothing that novel about this scheme of compensating injured employees.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. McMahan?

REBUTTAL ARGUMENT OF R. R. McMAHAN, ESQ.,

ON BEHALF OF TURNER ELKHORN MINING CO., ET AL.

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

I would only feel compelled to clear up a very dangerous and mistaken impression that counsel for the government has left you with.

The Part C program, to answer Mr. Justice Stewart's question, the Part C program is not just a compensation program. The Part C program is a reparations program.

This business about the three years' statute of limitations is an illusion. It's an illusion for substantial numbers of these former miners' claims, because the Act has redefined the disease.

Now, that means, in effect, that a man could have had emphysema for thirty years. He could have quit mining in the Forties. He could have been diagnosed as having emphysema for thirty years. But he can come in and qualify for benefits under this Act because the three years runs from discovery of the disease, and suddenly his emphysema is diagnosed under this Act as coal worker's pneumoconiosis.

We have many, many claims against the 22 plaintiffs in this case; some 80 percent so far are from people who have not worked in mining for years and yearsprior to the enactment of the law.

This is not at all comparable to retrospective rating or adjusting your insurance rates from year to year, even if you happen to be one of the few operators in one of the few States that allows that kind of compensation. This is purely reparation, and we believe that it's an irrational -- that this legislation is an irrational way of delivering those reparations.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:22 o'clock, p.m., the case in the above-entitled matter was submitted.]

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