ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Petitioner,	)	
V.	)	No. 77-1465
GENEVIEVE O. RASMUSSEN, ET AL., Respondents.	)	
and	)	and
GEO CONTROL, INCORPORATED AND NEW HAMPSHIRE INSURANCE COMPANY, Petitioners,	)	
V.	)	No. 77-1491
GENEVIEVE O. RASMUSSEN, ET AL., Respondents.	)	

Washington, D. C.
November 28, 1978

Pages 1 thru 35

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v.	:	
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Washington, D. C.
Tuesday, November 28, 1978

The above-entitled matter came on for argument at 1:14 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

KENT L. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of Petitioner in 77-1465 -- pro hac vice.

ALBERT H. SENNETT, ESQ., 681 Market Street, Suite 300, San Francisco California 94105, on behalf of Petitioners in 77-1491.

JAMES BUCKLEY OSTMANN, ESQ., Ogden & Coyle, 1820 Jefferson Place, N.W., Washington, D.C. 20036, on behalf of Respondents.

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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 next in 77-1465 and 77-1491 consolidated.

Mr. Jones, you may proceed.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF PETITIONER IN NO. 77-1465

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

This case concerns the proper construction of the benefit provisions of the Longshoremen's and Harbor Workers' Compensation Act. The facts have been stipulated. In 1973, William C. Rasmussen was employed by Petitioner Geo Control, Incorporated, under a public works contract with United States. Dr. Rasmussen was killed during the course of his employment and it is undisputed that the Respondents, Dr. Rasmussen's surviving widow and son, are entitled to receive weekly death benefits under the Act.

A dispute arose, however, concerning the amount of benefits to be paid. Respondents claim that under Section 9 (b) of the Act they are entitled to receive two-thirds of Dr. Rasmussen's weekly wages, without limitation, or a total benefit of approximately $530 per week. The employer and the insurer, however, have taken the position that this proposed award exceeds a ceiling on benefits under the Act. They contended, and the Director of the Office of Workers' Compensation

programs agreed, that the ceiling on disability benefits set forth in Section 6(b)(1) of the Act is made applicable to death benefits as well by Section 6(d).

The dispute came before the Benefits Review Board which rejected the Director's position. The Board concluded that when Congress amended Section 9 in 1972 to delete a fixed dollar maximum on death benefits, Congress expressed its intention to free death benefits from any ceiling restriction. The decision of the Board was upheld on review by the Ninth Circuit.

It is our position that when Congress deleted the fixed dollar maximum on death benefits in 1972 from Section 9 of the Act, they did so as part of an extensive revision of the Act and that a significant effect of that revision was to reformulate and transfer from Section 9 to Section 6 of the Act the ceiling on death benefits.

As I will discuss, the legislative history shows that Congress intended to retain a ceiling on both death and disability benefits, and that the effect of Section 6(d) is to make the ceiling applicable to both.

In order to place the amendments within their proper context, I will first briefly review their legislative history and then discuss the way in which the provisions accomplish what Congress intended.

QUESTION: I take it then that your entire case rests

on 6(d)?

MR. JONES: We believe that Section 6(d) provides for the ceiling, the application of the 6(b)(1) ceiling to death benefits. We rest exclusively on 6(d), except we regard 6(d) as explained by the other provisions of the Act, of course.

One of the deficiencies the 1972 Amendments were designed to correct was the inadequacy of the fixed dollar maximums that were then applicable to death and disability benefits. From 1961, the maximum limited compensation to $70 per week. The National Commission on State Worker's Compensation Laws which was chartered by Congress to recommend reforms in Workers' Compensation programs, reported to Congress in 1972 that a substantial percentage of covered workers received wages that placed them above the fixed maximum limitations. The Commission concluded that ceilings are justified as a means of containing the costs of the program and because high-income employees can and do obtain supplementary insurance from private sources. They concluded, however, that in order to keep the ceilings current with inflation the ceiling should be stated as a percentage of national average wages, rather than as a fixed dollar maximum. And, therefore, they recommended specifically that the ceiling for disability and death, both, be initially established at 125% of national average wages, with phased-in increases over a three-year period to an ultimate ceiling of 200% of average wages.

The legislation adopted by Congress in 1972 reflects the substantial imprint of this recommendation. Indeed, the Senate report suggests that the legislation is fully consistent with the Commission's recommendation. In particular, Congress removed the fixed dollar maximum on both death and disability benefits and amended Section 6(b)(1) of the Act to incorporate for disability benefits a phased-in ceiling based on increasing percentages of national average wages, just as the Commission had proposed.

If Congress had then simply added an additional provision stated expressly that the phased-in ceiling was applicable to death benefits as well, this case would not have arisen. Congress did not do that, however. The legislative history shows that in drafting Section 6(d) though Congress intended to achieve this result and an additional objective at the same time.

The Senate and House reports note that in drafting Section 6(d) Congress was concerned that during the interval before the Commission's proposed phased-in ceiling reached its ultimate maximum of 200%, workers receiving an initial award of benefits would find their benefits unfairly limited in future years to the lower percentage ceiling then prevailing at the time of their initial award.

The reports state that the drafters of Section 6 intended -- and I quote: "To the extent that employees

receiving compensation for total permanent disability, or survivors receiving death benefits, receive less than the compensation they would receive if there were no phase-in. Their compensation is to be increased as the ceiling moves to 200%."

The language of Section 6(d) gains its meaning from this expression of Congressional understanding. Section 6(d) provides, in not these words but to this effect, that determinations made pursuant to Section 6, which include the determination of the phased-in ceiling for each period in Section 6(b)(1) -- and now I am quoting: "Shall apply to employees or survivors currently receiving permanent total disability or death benefits, as well as to those newly awarded compensation during that period."

It seems from the legislative history that Congress understood Section 6(d) to accomplish two results. It provides that the periodic determination of ceiling benefits, pursuant to Section 6(b)(1), shall apply to survivors receiving death benefits. It further provides that as the phased-in ceiling is increased toward the ultimate maximum of 200% of average wages, the newly determined ceiling is to be applicable to survivors and to the permanently totally disabled, whether or not they received their initial award in that year. Thus, if a person were to receive a survivor or a disability award in a year when the ceiling was 125% of national average wages, three years

later, when the ceiling moved up to 200% of national average wages, their compensation would be adjusted up to that new ceiling.

Certainly the language in Section 6(d) can be understood the way Congress understood it. The Section cannot adequately be understood any other way.

The Court of Appeals dismissed Section 6(d) as only referring to the annual computation of national average wages, which is performed by the Secretary under 6(b)(3) of the Act. And the court concluded that this computation was relevant only to the determination of minimum benefits. The court said that Section 6(d) merely assures that minimum benefits are adjusted annually to reflect inflation. This construction of Section 6(d) deprives the provision of any meaning.

In amending the Act in 1972, Congress adopted the additional recommendation of the National Commission and provided in Section 10 that the recipients of permanent total disability compensation and survivors benefits, the precise people referred to in Section 6(d), are to receive an annual increase in their benefits equal to the percentage increase in national average wages.

As we discussed in detail in our brief and as the Third Circuit fully described in their opinion, in the O'Keefe case, the Section 10 inflation adjustment accomplishes precisely the result that the Court of Appeals in this case

assigned to Section 6(d).

If Section 6(d) means only what the court concluded, the Section is surplusage to the statute. It is, of course, the Court's responsibility to give meaning to every word and clause of the statute where possible. And this is especially true, we submit, in a situation such as this, where the legislative history reflects that the section was intended to have an active role. That role is articulated in the Senate and the House reports which state their understanding that the adjustment under Section 6(d) will make the redetermination of the phased-in ceiling on disability benefits applicable to both classes of beneficiaries.

QUESTION: I suppose you must concede that Congress, as is so often the case, could have drafted it a little more intelligably?

MR. JONES: We, indeed, wish it had. I think that the basic problem is that Section 6(d) -- Congress tried to do too much. I think the legislative history reflects though what Congress' understanding of what it was doing -- and even though the language is ambiguous, the expression of congressional understanding should be controlling.

The Respondents claim that --

QUESTION: Mr. Jones, while you are interrupted, where is Section 10 in the brief?

MR. JONES: It is on page 16 of our brief in the text.

Its effect is discussed in our brief on pages 30 and 31 and in the O'Keefe case, I believe, it is discussed toward the end of the opinion.

QUESTION: It is cited as 10(f).

MR. JONES: Well, 10(f) and 10(h) are both relevant, as we discuss briefly in our brief. 10(f) applies the annual inflation adjustment to the recipients of benefits who received their initial award following the date of the amendments. 10(h) requires that the same adjustment be made for persons who received their awards in prior years.

QUESTION: Do you quote 10(h) in your brief?

MR. JONES: 10(h), as you can see, is a compendious provision, but the provision that is relevant in this regard is 10(h)(3), which is at the bottom of the right-hand column on page 31, which makes subsection 10(f) applicable to awards of benefits prior to the effective date of the amendments.

Respondents say that the language in Section 6(d) is ambiguous and that because of the remedial nature of the act that the statute should be construed in their favor. We, of course, agree that the Act is remedial, but the question here is what the purpose of Congress was in enacting this legislation.

There is certainly no general remedial policy that's ever been expressed that favors unrestricted ceilings on workers' compensation benefits. The consistent course of state and federal legislation in this area has been to provide equivalent

ceiling limitations on both permanent disability and death benefits.

The few states that have departed from that consistent course have provided higher ceilings for disability and for death benefits. I think that reflects the underlying objectives or rationale for the ceiling restrictions. Ceilings have consistently been understood as justified by the need to contain the cost of the program and because high-income employees can and do obtain insurance to protect their supplemental needs.

Death is the risk that's most often insured against, as the brief submitted by Petitioner Geo Control notes, approximately 95% of upper income employees obtain death insurance. So, if Congress were concerned with a choice as to which -- where the remedial need were greater, they would presumably have concluded that disability was the greater need.

Moreover, the need of the family is greater when the benefit must support not only the family but the disabled worker as well.

In the light of all of these concerns, I think, Chief Judge Wright was correct in the Boughman case in stating that it would have been anomalous for Congress to have left, departed from that consistent remedial understanding, the consistent treatment of death and disability benefits, without ever so stating.

I would like to note that the legislative history on

which the Court of Appeals relies for its contrary conclusion simply doesn't focus on the question that is presented here. The portions of the committee reports that the Court of Appeals refers to state only the literal effect of the amendment to Section 9, by stating that the fixed dollar maximum on death benefits was removed from that section. It was, of course, necessary to remove the fixed dollar maximum on death benefits from Section 9 to allow the substantially higher ceiling benefits established in Section 6 to have effect. Moreover, the statement of the literal effect of the removal of the fixed dollar maximum from Section 9 follows the Committee's explanation that the phased-in ceiling in Section 6 will be applicable to both the permanently disabled and to survivors.

QUESTION: Mr. Jones, isn't it correct that if you were drafting the statute and you wanted to substitute a different maximum on death benefits, you would have put it in the new 9(e)?

MR. JONES: I think that if I had done it the simplest way would have been to add it to 6(b)(1), rather than to have an entire additional clause paralelling 6(b)(1) -- could have added the words to 6(b)(1).

QUESTION: Don't you think they ought to just put it back in the same place it came out of before? It seems to me when I read 9(e), I said, "Well, gee, they just left something out here," if that's what you meant.

MR. JONES: No, I think that the legislative history suggests that what Congress thought it was doing and what it intended to do in Section 6(d), was to bring into Section 6 the limitation on death benefits because of the economy. If you look at Section 6(b)(1), it is a fairly good sized provision, and to repeat the provision entirely in Section 9 would have served no purpose that isn't served just by referring to the Section 6(b)(1) limit and making it applicable in Section 6, itself, to death benefits.

MR. CHIEF JUSTICE BURGER: Mr. Sennett.

ORAL ARGUMENT OF ALBERT H. SENNETT, ESQ.,

ON BEHALF OF PETITIONERS IN NO. 77-1491

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

My name is Albert Sennett and I represent Geo Control and the New Hampshire Insurance Company.

The task of statutory construction is one of discerning the intent of the legislature. We submit that the intent of Congress in this particular matter, to provide the same maximum limits for disability and death benefits, can be discerned from the following considerations.

Both bills, Senate Bill 525, introduced in the 92nd Congress, and House Bill 3505, introduced in the same Congress, provided for identical maximums. The report of the National Commission of State Workmens' Compensation Laws recommended the

same maximum weekly benefits for disability and death benefits. And the report accompanying Senate Bill 238 states that the Committee believes that the provisions of the bill presented are fully consistent with the recommendations of the National Commission in its report issued July 21, 1972.

As my brother has stated, the reference in 6(d) of the Act to death benefits and disability benefits is also a fact to be considered by this Court. This coupled with the fact that 10(f) of the Act makes all the adjustments necessary, makes the only separate, independent meaning to 6(d) as presented to this Court a few minutes ago.

The fact that the identical maximums are fully consistent with all state workers compensation laws is another fact to consider. The concept of payments to injured workers who have been deprived of their wages by reason of industrial injury is a concept to provide replacement of wage loss. The consideration for replacement of wage loss, in return, calls for some limitation in the upper limits of liability of the employer. This has been consistent with the type of trade-off and type of political bargaining process that is the history of this Act and the history of every other state workers compensation act.

It has generally been felt, and we believe it is demonstrated again in this particular series of sections, that the upper limits are the places where the cutoff becomes

effective, the theory being that the higher paid employees are capable of providing against the impact of death, capable of providing against the impact of disastrous losses to their families. The concern Congress showed in this particular instance was for the lower paid employees and the impact of this particular act guarantees certain basic returns to lower paid employees which were not present in the old act. And that seems to be the major thrust of many of the changes that were promulgated in 1972.

The fact is that if Congress wished to depart from this traditional and historic and consistent pattern it would appear that some very clear expressed statement had been made with respect to the law. Basically, the Respondent's position here is an attempt to interpret the fact that in one section of the Act there is an omission with reference to these benefits.

The other point that I wish to take in a few minutes that I have left is that the argument advanced in the Respondent's brief at page 28 suggests that the no-ceiling limit is justified in industrial deaths because this represents only approximately 1% of all industrial injuries, and perhaps some special exception would be required.

The fact of the matter is that death benefits are defined under Section 9 of the Act, as applying both to deaths which occur directly as a result of industrial injury, as well as deaths which occur by reason of unrelated causes, if at the

time of the person's demise he is suffering a permanent and total disability. This is a much larger class of people and would give an even increased anomalous situation than the ones that have been demonstrated in the briefs.

In sum then, we respectfully submit that in light of the consistent pattern of providing for maximum limits, in light of the fact that this is a compensation system meant to replace wage loss, there would be no consistency and no logic in assuming that Congress intended to depart from the traditional way of solving compensation loss cases and substituting them with an entirely anomalous situation.

I intended to reserve about two minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ostmann.

ORAL ARGUMENT OF JAMES BUCKLEY OSTMANN, ESQ.,

ON BEHALF OF RESPONDENTS

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

We believe that there are really two questions in this case. One, did the Congress eliminate the death benefit maximum payments from the statute in the 1972 Amendments? And if they did so, was the elimination a conscious and deliberate act?

Respondents answer both questions yes. Yes, the Congress did eliminate the death benefit maximum payments from

the Act and yes the elimination was a conscious and deliberate act by the Congress.

When the statute is read as amended, one thing is apparent. In no section is there a clear death benefit maximum. In Section 9, where the death benefit maximums had been set out traditionally and exclusively, specifically at 9(e), it has been eliminated, excised from the statute.

At Section 6(b), there are maximums set out, phase-in maximums, but they are applied only to disability, by the clear language of 6(b). Section 6(d) does mention both death benefits and permanent total disability, but does not contain any maximum. It does have a purpose, we submit, which we will discuss in a few moments.

Because there had been some obscurity in Section 6(d) and because eliminating death benefit maximums is a departure from this Act's history, and in fact from general Workmens' Compensation, prior tribunals have looked at the legislative history to determine what the intention of Congress was.

In the legislative history, it is important to note that from the very beginning, when S. 2318 was first introduced by Senator Eagleton, maximums for disability and death were excised from the recommendations. No mention whatsoever made of any maximums for disability or death.

Further, from the beginning of the hearings in this

matter, Senator Eagleton stated in his opening remarks that S. 2318 "would eliminate the maximum payment limitations." And, further, from the beginning, there was no doubt among all the witnesses that testified before that Committee, as to the effect and the intent of S. 2318.

Needless to say, there was much testimony on this proposal. It was discussed by Judge Devaney in his decision and order and also in our brief. The industry side, of course, opposing it, labor side generally thinking it was advisable.

Following that testimony, a revised 2318 was submitted. It was substantially rewritten. Section 6(b)(1) created a new maximum for disability, based on an increasing national average weekly wage, and it had a phase-in of this new maximum.

Section 9 was also rewritten. It was not overlooked and it was not forgotten. Specifically, at Section 9(e), for instance, a new minimum was inserted by the revised 2318, which was tied to the national average weekly wage, a term added to the revised S. 2318.

We think when the original S. 2318's version of Section 9(e) is seen and read and is compared to the revised S.2318 version of 9(e), which was enacted into law, the reader finds a striking similarity. In fact, the sections are almost identical, except for changing the basis for the minimum benefits in death from a dollar figure to the national average weekly wage.

Respondents submit that it is beyond reason to say that Congress somehow suffered some sort of a collective amnesia and forgot what the original S. 2318 meant, forgot what Senator Eagleton said it would accomplish and forgot the tremendous amount of testimony from the witnesses that described the very intent and action of S. 2318.

Rather, it is far more sensible and logical to say that the Congress realized what it was doing and that it consciously and deliberately did not add a maximum in Section 9(e).

Stepping back for a moment in the legislative history, just before revised S. 2318 was written an important event took place. And that was the report of the National Commission on State Workmen's Compensation Laws. It was submitted to the President and to the Congress. This report was a comprehensive study of state workmen's compensation systems, and it made certain recommendations for what it thought provision should be in this field.

As with any other commission, there are many members, many different viewpoints. And this is seen when one looks behind the recommendations to the discussions that led up to the recommendations. For instance, when maximums and minimums were discussed by the Commission, there was found to be only an uneasy case for those. And of the two, the Commission found maximums to be the more troublesome.

QUESTION: Did the Commission distinguish between

maximums and minimums for disability and maximums and minimums for death benefits?

MR. OSTMANN: When they discussed maximums and minimums at the beginning of the report, there was no distinction made. That portion of discussing the advisability of maximums and minimums, the report, I believe, had application to both death and disability.

QUESTION: Did they later make any distinction?

MR. OSTMANN: We believe they did. We believe that there were some comments made that I am going to get to in a moment, where the report discusses death in a manner different from disability.

For instance, in the opening paragraph on death benefits, the Commission makes an interesting comment. It says that death is the ultimate work related tragedy and deserves full compensation. Now later, of course, they reach the conclusion that the same maximum, in their estimation, should apply. But that statement was their opening statement with respect to death benefits.

No similar statement was made with respect to disability. Later, in discussing the proportion of the wage that should be replaced in death cases, the Commission discussed the advisability that, perhaps, a higher percentage of the average wage of the deceased should be replaced in death cases, basing it on the incentive argument. The incentive argument being

that when a worker is disabled it is good for him and it is good for society, and it is good for the industry, if this individual is encouraged to get back to work and be productive again. Because of that, that is one reason why benefits are limited in Workmen's Compensation to a percentage of that wage.

Now, the Commission did end up, as I said, recommending the same percentage. But we believe that this discussion is important because this discussion was part of the legislative history. It was something that the Congress read and must have considered when it revised 2318. And it also establishes some discussion, some reason for having benefits higher in a death benefit case then in a disability case. The rationale is there.

Further, as Judge Devaney pointed out, the recommendations of the National Commission with respect to death and disability were minimum recommendations only. Prior to each percentage that they recommended that are cited in the briefs, the Commission said the benefits should be at least this much.

QUESTION: Is it true that a death benefit could be lost by a widow's remarriage in a fairly short period of time, whereas, a disability benefit could continue for a rather indefinite period of time?

MR. OSTMANN: That's correct. If a widow remarries, she receives a lump sum payment and after that she gets no further death benefits. And the disability, of course, could continue as long as the disability exists, permanent total

disability.

There is a final important point about the National Commission's report. It has been argued here that with respect to death benefits the Congress intended to follow rather precisely the recommendations of the National Commission. They cited something from the legislative history, saying that the new act, the '72 Amendments, were fully consistent with the National Commission's recommendations, implicitly then that the Congress did not intend to go beyond the National Commission recommendations. However, there is another section in the Act, as amended, that disproves this argument. It was mentioned by Mr. Sennett.

In Section 9 the first sentence says, "If the injury causes death or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit."

It is our submission that that is a radical and even revolutionary concept in Workmen's Compensation. To say that the survivors of a permanently totally disabled worker will get death benefits, though that worker dies of a cause totally unrelated to his injury, is a drastic departure. And yet it is in this Act.

QUESTION: I am not sure what you want us to draw from that, Counsel.

MR. OSTMANN: I think what's important about that is that that concept was not recommended by the National Commission, was not even discussed by the National Commission. The National Commission defined death benefits as payments to survivors of a worker who dies "as a result of a work-related injury or disease."

QUESTION: Mr. Ostmann, on that point, if a person dies while he is receiving permanent disability benefits, under the statute section you just read, would that disability benefit be converted into a death benefit?

MR. OSTMANN: I wouldn't say it is exactly converted. They are two separate benefits. At the point of his death, he would no longer receive permanent total disability benefits and if he had survivors, a wife or children, or both, they would receive death benefits under the Act.

QUESTION: If he was in a high enough weekly wage the benefit would rise.

MR. OSTMANN: That's correct.

Respondents submit that this language I just mentioned from Section 9, which is another example of the Congress here treating death benefits in a more expansive way than they had been treated before, conclusively establishes that the Congress did not intend to be bound by the recommendations of the National Commission, but rather intended to go beyond those recommendations and to establish what Senator Williams called "the first serious

step towards reform of our society's Workmen's Compensation laws in the past fifty years."

Turning to Section 6(d), this section has received a tremendous amount of attention in this litigation. Respondents would submit that attention is misplaced. Section 6(d), when it is read, contains no maximum. That much is clear. However, we believe that Section 6(d) does have a purpose and our feeling about that purpose is different from Petitioners'.

We believe that Section 6(d) is designed to say that only two classes of beneficiaries will receive the benefit of an increasing national average weekly wage, under this legislation. We believe that, in effect, it states its point conversely, namely, that the lesser classes of disability do not get the benefits of an increasing national average weekly wage. We believe that this point can be best illustrated by using the example of a high income, temporary, total disability individual. If he is injured today, his benefits are easy to calculate. There is a national average weekly wage in effect, benefits are limited to 200% of that national average weekly wage. It is a mathematical calculation.

Now, if a person has the same injury, a temporary, total disability recipient, next year, during the next period, and he is high income, again, there is no problem figuring his benefits. It is the same function. The only difference would be that because the national average weekly wage has been going

up because of our inflationary society, his benefits will be higher.

The question becomes what happens to the first example? If his temporary disability extends to the next period, does he get an increase in benefits or do his benefits stay frozen at the level when they are awarded?

Section 6(b) does not really explain that. Section 6(b) recites 200% of national average weekly wage is the maximum.

We believe it could be read either way, that yes everyone goes up if their benefits are based on a national average weekly wage. Or it could be read that they are frozen. It is an unclear point.

Section 10(f), mentioned by the Government, does not apply because it only concerns by its very nature permanent total disability and death benefits. It is designed to clarify -- its a mathematical section -- stating just how those two classes of beneficiaries will have their benefits enhanced.

We believe that Section 6(d) is in there to clarify that the temporary total disability recipient will not get any increases. There is no doubt that the section is obscure, it doesn't state its point precisely. We believe that that reading gives the section meaning. We believe it clarifies a point that is not clarified otherwise.

QUESTION: But, Mr. Ostmann, if the exclusion of

temporary disability beneficiaries from the language of 6(d) is intended to exclude them, why wouldn't the same rationale apply to Section 10 as well? If that refers only to permanent and death and fails to mention temporary, why do you need the (d)?

MR. OSTMANN: We believe that 10(f) is in there to show that all recipients of permanent total disability and death benefits will get the benefit of an increase because, without that section, the only individuals that would get an increase would be those whose benefits are figured on the national average weekly wage. In other words, the middle range recipients --

QUESTION: I understand that, but wouldn't 10(f) of its own force exclude temporary disability recipients from any increase?

MR. OSTMANN: It would, perhaps, exclude the entire range of them, but we would say, without 6(d), the question would still be open in minimum and maximum situations. Where the benefits are figured in disability on the national average weekly wage, we don't think the point is clear from 10(f). We believe in those instances there might be a question open as to whether or not an increase should be granted, and we believe that is why 6(d) is in the statute.

QUESTION: Mr. Ostmann, if there is a redundancy between the two sections, do you think that your case is demolished? Or can you live with redundancy?

MR. OSTMANN: Well, I could live with redundancy, Your Honor.

QUESTION: It's a question whether we can.

MR. OSTMANN: Yes, that's certainly the question.

We don't believe that there is redundancy though. We have tried to find a reason for 6(d). It hasn't been easy, but we believe that this is the purpose of the section. We don't believe that 6(d) and 10(f) are identical.

QUESTION: There is one strange thing about 6(d). It refers to determinations under this subsection. What subsection do you understand that to refer to?

MR. OSTMANN: I believe, as everyone in the case has agreed, that that was an oversight, that should refer to Section 6, because in the bill it was a subsection.

QUESTION: I suppose, Counsel, you have read some of published articles of members of the Congress which would hardly support your suggestion that really members of the Congress knew what was in this statute and how the statutory scheme would work. These experienced members of Congress who have written published articles say they simply haven't the time to look at it.

MR. OSTMANN: Yes, Your Honor, that is true. However, we believe that when the entire legislative history is read here the choice is to go, what the Government called, "the tortuous route"of finding through a myriad of provisions a death

benefit maximum, or to declare that the Congress eliminated it.

QUESTION: They couple that argument, as I get it, either expressly or by implication -- that this tortured route takes them to what is the sensible and reasonable solution, and that any other route does not produce a sensible and reasonable solution in light of the total purposes of the Act.

MR. OSTMANN: We would not agree with that, Your Honor. We think it is important to realize that at the beginning S. 2318 intended to remove all maximums. True, when revised, we believe that there was a compromise, that a new maximum was inserted in disability, but that the Congress decided in death cases, because it is a different class of benefits, because there is no incentive argument, which is one of the reasons for a lower level of benefits, that with respect to those the families of workers they shouldn't be fettered with an arbitrary ceiling. The family of a high-income worker should be able to live in the method that they have been accustomed to. And that's more beneficent and more humane than treating them in any other way.

QUESTION: Mr. Ostmann, at the hearings, before the revised 2381 or 2318, whichever was proposed, how much testimony was there in support of the view that there should be no maximums at all? Was there a significant amount of testimony?

MR. OSTMANN: There was substantial testimony to that effect, Your Honor. The labor side, for instance, was supportive

of that proposal.

QUESTION: Cutting through all the language, your basic position is that, even though it doesn't appear in the legislative reports directly, that there must have been a compromise between the two facts, and they said, "Okay, we will keep the ceiling on disability and take it off on death."

MR. OSTMANN: Yes. We believe that, for instance, the National Commission's discussions of death, in a different light, indicates that. The citation of the enhanced definition of death benefits was something else that was added now. That wasn't discussed in the National Commission, nor to my knowledge was it proposed by anyone before the Congress in testimony. Yet it was added and it's definitely a clear provision.

QUESTION: What if we were to conclude that the statutory language is absolutely clear, that disabilities do have maximums and death benefits do not. But we were also to conclude that we can't think of any conceivable reason why Congress would do that. Should we affirm or reverse?

MR. OSTMANN: I would say affirm, Your Honor, because I believe the function of the Judiciary is to determine what the statute says and what the Congress intended.

We believe that if this Court is going to find for Petitioners it will have to, in effect, rewrite this section, because there is no death benefit maximum set out anywhere in the statute. This language would effectively be inserted.

QUESTION: Having no reason wouldn't be as bad as having an unreasonable reason, would it?

MR. OSTMANN: Well, either one, Your Honor.

QUESTION: Either way, you win.

MR. OSTMANN: In any event, in our estimation, 6(d) is designed to establish that the lower classes of disability are frozen at the level when they are awarded.

The statutory construction of this statute has always been beneficent of purpose liberally construed in favor of the worker.

QUESTION: Was this part of the '72 amendments, where there were some trade-offs on both sides?

MR. OSTMANN: Yes.

QUESTION: Well, then, why do you talk about this being beneficently construed and liberally construed toward the worker? It was a give and take thing with the unions on one side and management on the other. There is no reason why this Court should favor one over the other, is there?

MR. OSTMANN: I think, historically, the development of workmen's compensation has been to benefit the worker.

QUESTION: That may be true, historically, but, as I understand your response to my question, there was just some pretty hard-nosed bargaining in 1972 and management was on one side and labor was on the other.

MR. OSTMANN: That's correct, Your Honor, but the

benefits were enhanced. For instance, the unseaworthiness doctrine was removed as an alternative remedy. That was one of the trade-offs, and there were others.

QUESTION: How should we construe the removal of the unseaworthiness doctrine, beneficently, remedially?

MR. OSTMANN: We believe that when the statute is to be construed by the courts it is to be construed in favor of the worker and his family, because that has been the historical purpose of workmen's comp, to create a liability without fault against the employer.

QUESTION: How about the elimination of the unseaworthiness remedy? How should that be construed?

MR. OSTMANN: I think that's a very clear elimination, Your Honor. I don't think there has to be any construction at that part of the statute. That's not at issue and I don't think there is any question,but the unseaworthiness was eliminated by this Act.

QUESTION: Because it just didn't make sense.

MR. OSTMANN: In a sense, it created dual remedies for the workers, that is correct.

It has been said that to remove death benefit maximums is too radical, too drastic to not have been intended. We believe, though, as I just mentioned, that the statute had been radical from the beginning, that there are other radical changes in this Act designed to enhance benefits for workers. Further,

such questions are questions of degree and questions of policy which we believe are more properly presented to the Congress rather than to this Court.

In conclusion, when reviewing the entire record surrounding the '72 Amendments, we believe that it becomes clear that Congress intended to truly modernize this statute and to truly bring benefits and benefit levels up to a reasonable state, and that as a part of this reasonable and beneficent amendment of this Act, the Congress consciously and purposely eliminated any artificial limits on the payments to the families of deceased workers.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sennett.

REBUTTAL ORAL ARGUMENT OF ALBERT H. SENNETT, ESQ.,

ON BEHALF OF PETITIONERS IN NO. 77-1491

MR. SENNETT: By way of brief rebuttal, I find myself largely in agreement with the former speaker that the Act has beneficent purpose. The intent of Congress is clearly indicated in the Act and that is to increase benefits substantially.

However, I've heard no presentation to this Court, and I have seen none in the briefs presented and I've seen none in the history we've studied which can offer some rational analysis or logical distinction as to why there should be a differential between disability benefits and death benefits.

QUESTION: Mr. Sennett, can I interrupt you there.

Supposing -- It would have been logical -- Some Senators, Senator Eagleton and others, thought it would have been logical to take the ceilings off entirely, if there is a case for that position.

MR. SENNETT: There certainly is, Your Honor.

QUESTION: Well, why is it totally irrational for a couple of Senators on opposite sides of the argument to say, "Well, we'll split the difference and we will take it off one and not the other"?

MR. SENNETT: Because in the light of the compensation system which is meant to replace the loss of wages to a family the logic would be, as indicated previously in the opening remarks, to increase disability benefits, because of the impact of the loss of wages of a man --

QUESTION: But maybe in the negotiation between the two they thought there are less dollars riding on death benefits than there are on disability benefits and "Let's just make this our trade-off."

MR. SENNETT: It might be well to speculate about that, but along those lines keep in mind that the Longshore Act, by extension, applies to employees in the District of Columbia, Outer Continental Shelf employees, to a vast variety of employees, many of whom enjoy very substantial salaries, greatly in excess of what had been contemplated for longshoremen.

I think the best way I can rebut this is to illustrate

what would happen if the position advanced by Mr. Ostmann were correct. In other words, if Mr. Rasmussen had suffered a total and permanent disability instantly upon his injury in a form that was irreversible and left him entirely at the mercy of vagaries of time and his family. He would be enjoying $167 a week, plus the additional increments that we have discussed. So at the present time, if he were still alive and still with us, he would be receiving $398 a week.

According to the proposition advanced by Mr. Ostmann, immediately upon his demise, his family would enjoy $532 a week.

We submit to this Court there is no logic to that.

QUESTION: Out of that $167 they would have to provide all the care for him?

MR. SENNETT: That $167 would last -- And that is the reason for it. The reason for the increases on a yearly basis provided by the Congress. That is exactly what Congress had in mind, Mr. Justice. And that is that because of that concern that that kind of money would not reflect the needs of the family there were increases up to 200%, so that at the present time that family would enjoy $398 a week.

QUESTION: Is this where we get this concept of a premium on death?

MR. SENNETT: Yes, Your Honor, I think that this, perhaps, is an illustration of --

QUESTION: In other words, the family with one fewer person to support and no medical bills, gets almost three times as much as the family which still has the totally disabled father, head of the household.

MR. SENNETT: It sounds like somewhat of a cynical remark, but in the light of the fact that this is a compensation system and not a damage system, I think that is the proper characterization of the implications of what is being advanced to the Court.

QUESTION: It is on that basis that you and the Solicitor General argue that that reading of the statute just doesn't make any sense and Congress should not be considered to have intended that?

MR. SENNETT: We believe that Congress has given the signal to the Court. Now, the signal is perhaps a bit murky, but the signal is there and when one examines the intent of the system I think the answer is relatively straightforward and self-evident.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:04 o'clock, p.m., the case in the above-entitled matter was submitted.)