ORIGINAL

In the

Supreme Court of the United States

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POTOMAC ELECTRIC POWER COMPANY, PETITIONER,	)	
V.	)	No. 79-816
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., RESPONDENTS.	)	

Washington, D.C.
October 8, 1980

Pages 1 thru 42.

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IN THE SUPREME COURT OF THE UNITED STATES

POTOMAC ELECTRIC POWER COMPANY, Petitioner,	:	
v.	:	No. 70-816
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., Respondents.	:	

Washington, D. C.

Wednesday, October 8, 1980

The above-entitled matter came on for oral argument at 2:07 o'clock p.m.

BEFORE:

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

APPEARANCES:

RICHARD W. TURNER, ESQ., 740 15th Street, N.W., Suite 600, Washington, D. C. 20005; on behalf of the Petitioner.

MRS. ELINOR H. STILLMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Federal Respondent.

LESLIE SCHERR, ESQ., Wadden, Scherr & Krebs, 1730 K Street, N.W., Suite 308, Washington, D.C. 20006; on behalf of Respondent Terry M. Cross, Jr.

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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 Pepco v. the Director of the Office of Workers' Compensation.

Mr. Turner, you may proceed whenever you're ready.

ORAL ARGUMENT BY RICHARD W. TURNER

ON BEHALF OF THE PETITIONER

MR. TURNER: Thank you, Mr. Chief Justice. May it please the Court:

This is a Longshoremen's and Harbor Workers' Act case involving a rather narrow issue but one that is important in that there is a complete division of authority between two circuits on exactly the same narrow issue.

If I may for a moment try to explain the issue in, I think, simple language, the question is, does the language of the statute have its plain meaning or does the language need interpretation? Do the schedules that are promulgated in Sections 8(c)(1) through -(19), are they exhaustive or are they only a minimum schedule? Is a workman who is admittedly injured in the course of employment and having sustained a permanent partial disability according to the schedule, is he limited to what the schedule says? Or if he can prove loss of earnings beyond that point, can he then have more compensation awarded him? I think that is the issue before the Court; that is the point on which the two circuits have completely disagreed.

The 5th Circuit in the case of Williams vs. Donovan in 1966 in a per curiam opinion one paragraph long agreed completely with the district court that the statute meant exactly what it said and that no court, no deputy commissioner, had a right to give any more than the schedules called for.

When we now come to the United States Court of Appeals for the District of Columbia, they decided the opposite of that. They decided that in effect the schedule is meaningless unless the man's injury and damage is less than or equal to the schedule, that if he can show more than that, then this is one of the so-called other cases, 8(c)(21) of the Act. And we submit that this is not an "other" case. The case is clearly one of scheduled injury. We think that the history of the Act, the plain language of the Act, compel a finding that those schedules are exhaustive and not minimal.

QUESTION: Mr. Turner, did the Court of Appeals in this case in your view hold that the schedule provided a minimum that was payable in any event?

MR. TURNER: I think so, sir. They certainly say that any man who can prove more loss of earnings than the schedule calls for is entitled to claim it and it must be paid.

QUESTION: But, in any event, he's -- if he can prove nothing at all except the extent of his permanent partial and that it's covered by the schedule, he gets what the schedule gives?

MR. TURNER: Absolutely, sir. He is entitled to a decision.

QUESTION: And entitled to appeal the decision?

MR. TURNER: He is entitled to the full amount of the schedule.

QUESTION: Not an alternative, it's not an alternative, it's a minimum?

MR. TURNER: Oh, yes.

QUESTION: Because two arguments are made here, as you know, by your opponents.

MR. TURNER: Yes. They say -- one of them says the Government --

QUESTION: One of them says there's a minimum, the other says it's an alternative.

MR. TURNER: That's right, sir. The other one says it's a minimal. We say that it is neither an alternative nor is it a minimal schedule.

QUESTION: But it's exclusive; that's your point.

MR. TURNER: Sir?

QUESTION: Your point is that it's exclusive.

MR. TURNER: Yes, sir.

QUESTION: And the Court of Appeals, you think, said that the schedule provided a minimum?

MR. TURNER: That's correct, sir.

QUESTION: That will go in any event.

MR. TURNER: They say that --

QUESTION: That's what I thought.

MR. TURNER: -- in any event, if the man can prove more, he can obtain more.

QUESTION: But he always gets the scheduled payment?

MR. TURNER: He always must get the scheduled. This statute is 50 years old and there never has been any deviation from that point of view, that, no matter how little the man was injured, he was entitled to the full amount that the schedule called for.

QUESTION: Even though he had no loss of earnings?

MR. TURNER: Even though he had no loss of earnings. Let's say that he completely lost a finger and the doctor bandaged it up and sent him back to work two days later, he still would get the entire amount called for by the schedules. But he could not, under the old administrative procedures which were done by deputy commissioners and finally United States Court of Appeals, which was the system then, he could not get more than that. As a matter of fact, all of these cases of so-called schedule injuries are normally completely disposed of at a very informal level. Such as the case of this one where a man has his operating surgeon say that he had a five percent disability, another examining physician says he has 20 percent disability, but only of the leg; there was no other part of the body involved, there was no other attempt to give

any other rating. Normally, this man would have gone before simply a claims examiner at the informal level. The claims examiner would have looked at it and said, your doctor says five, his doctor says 20, I think you should have 15. And neither side would be completely satisfied but both of them would go away and the case would be done and forever gone.

If this Act, if this case is now affirmed here by this Court, then that will no longer happen, because the claims examiner, he hears it informally, will have no schedule with which to work. He will have to try to find out how much can this man do in the future, what has he done in the past?

QUESTION: You mean the schedule will be the starting point?

MR. TURNER: Yes, sir, only the starting point. Because, obviously, everyone is going to make his claim for as much as he can; no one goes in and says, I want just the minimum, but whatever I can get.

QUESTION: Mr. Turner, it isn't simply that it will be the starting point, because even under the Court of Appeals view would he not have to choose between the schedule and this alternative approach?

MR. TURNER: That's my understanding, sir, that you would not have to choose.

QUESTION: And if it happened and it's the case you supposed earlier, if he lost a finger but he kept the same

job, then he'd use the schedule, wouldn't he?

MR. TURNER: That's correct, sir.

QUESTION: And he wouldn't even try the other approach?

MR. TURNER: Then he wouldn't even try, but to use a more extreme case -- use this one, in which the man has had this minor injury to the leg, a minor operation. Ball players go back to playing football or other athletic events every day in a short time after such an injury. This man decided that he couldn't, or he wouldn't, do all of the work that he had to do in his job. And his job was admittedly a heavy one. He was a cable splicer A and is a cable splicer A for the power company. He does heavy work. He lifts things, he climbs in and out of manholes, he climbs ladders. But he decided that he couldn't do all of this, so for that reason, because he decided that he couldn't do it, then the company could not allow him to be promoted along with the other men who were doing all of their job. They could not allow him to work overtime, which pays time-and-a-half and double time on Saturdays, Sundays, and holidays. They simply couldn't allow that. So because of that fact, the lack of one or two regular promotions that other men got, the lack of working overtime, this man showed an actual loss of earnings, compared to other men similarly situated.

Now, the administrative law judge who heard this case

is bound by decisions of the Benefits Review Board. Consequently he decided that because of this loss of earnings he would decide it, not under the schedule of losses, or 8(c)(2),(19), but under 8(c)(21) which is the other cases provision of the Act. And he decided that this man then should, this case should then be decided under that point, and the man got an award for permanent partial disability based not on his actual wages at the time of injury, as 8(c)(2),(19) says, but under his so-called work -- his loss of earning capacity under 8(c)(21). It's an entirely different thing. It provides for a great deal of speculation and --

QUESTION: What, as a practical matter, is the difference in the amount of the award?

MR. TURNER: Well, the amount to this man, sir, could amount to a hundred and some thousand dollars.

QUESTION: And under the schedule?

MR. TURNER: And under the schedule at the full 20 percent it would be some $12,000-$13,000. There is a great deal of difference.

This case has particular importance, by the way, to the District of Columbia itself, I think. The District of Columbia -- I suppose this Court can take judicial notice that the newspapers are full of its efforts to write its own workmen's compensation act, businesses being squeezed by the onerous burden of the Longshore Act aresimply moving out

of the District of Columbia. It is a terrific burden for business to compete here in the District of Columbia with the suburban districts. At any rate --

QUESTION: Unless the 4th Circuit would --

MR. TURNER: Sir?

QUESTION: Unless the 4th Circuit adopted the same rule as the District --

MR. TURNER: That is correct, sir. They have not. As a matter of fact, I don't believe they have faced the exact question.

QUESTION: Well, there aren't -- in typical state workmen's compensation statutes, schedules of the kind involved here are on their way out, are they not?

MR. TURNER: Well, sir, Professor Larson in his book says that --

QUESTION: Professor Larson says so, anyway.

MR. TURNER: -- there is a trend in that way. But I think that no matter what the trend may be in state cases --

QUESTION: But that has nothing to do with the issue here --

MR. TURNER: It has nothing to do. The issue here is a congresional statute and the state cases.

QUESTION: And you do have a schedule here?

MR. TURNER: Yes, sir.

QUESTION: And the trend in the state cases is

initiative by the legislature abolishing the schedule.

MR. TURNER: I would like to call the Court's attention to the fact that the New York Legislature in 1970 modified their Act to give it just this exact change. The New York court, prior to that time, had followed the schedules very strictly. They had maintained this dichotomy between the scheduled losses and the "other cases." But in 1972 when the New York Legislature felt it was time to make this change, the Legislature did it and not the courts.

And this, of course, is our position here that if there is to be a change in this Act, then the Congress should do it and not the Benefits Review Board, which was constituted in 1972 by an amendment to this Act.

QUESTION: Congress has done this with the Federal Employees Compensation Act?

MR. TURNER: Yes, sir.

QUESTION: But it hasn't done it with the longshoremen?

MR. TURNER: That's correct, sir. The Congress amended the Federal Employees Compensation Act in 1949, I believe, so that when an employee had a serious loss of arm, leg, and so forth, then he could after he had exhausted the schedule come in and show that fact.

QUESTION: But, although that's been on the books a long time --

MR. TURNER: 1949, sir.

QUESTION: The Congress has never done anything to the Longshoremen's Act although the Longshoremen's Act has been modified?

MR. TURNER: That's correct, on other respects. On five different occasions the Longshore Act has been amended. Now, certainly the Congress knew not only that they had amended the Act in 1949 but they again amended it in 19-- -- I forget the exact date, it may be 1970 that the Federal Employees Compensation Act was again amended to more liberalize the alternative position, to go forward with a showing of a greater loss. It was amended twice.

QUESTION: Mr. Turner, how long have private employers in the District been subject to the Longshore Act?

MR. TURNER: 1936, I believe. It's been a long, long time.

QUESTION: It seems a little incongruous.

QUESTION: But it's just a statute?

MR. TURNER: Sir?

QUESTION: It's just a statute?

MR. TURNER: Yes, sir, it was the Congress simply adopted the Longshore Act to be the Workers' Compensation Act for the District of Columbia.

QUESTION: Even though there isn't a longshoreman or a boat handler --

MR. TURNER: That's right, sir. This Act was made for longshoremen and not for piano players or something here in the District of Columbia. But those are all covered now because it is applicable to all employers in the District of Columbia.

The Benefits Review Board when they affirmed the opinion of the administrative law judge in this case pulled themselves up by their own bootstraps by citing two of their own opinions. They first had decided a case of Mason against Old Dominion Stevedoring Corporation, which is found at 1 B.R.B.S. 357. And Mason was a man who injured his hand and could no longer work as a longshoreman. In that case an administrative law judge decided that despite the fact that he had a 25 percent disability of the hand, that he had a 75 percent loss of earning capacity and gave it to him.

The Board in that case approved the opinion and order of the administrative law judge and said that they were not constrained to follow Williams v. Donovan, which provided a maximum recovery where the injury could be shown to extend beyond that period.

Now, to support their decision in the Mason case, the Board cited American Mutual Insurance Company against Jones. Now, that is a District of Columbia case involving, again, an injury to a man's hand. But the man was elderly, he was uneducated, he was untrainable, and it had nothing to

do with the schedules, it was decided under Section 8(a) of the Act, which defines permanent, total disabiity. It had nothing to do with the schedules. But they cited the Jones case as their authority for disapproving of Williams v. Donovan, which was exactly on all fours.

The other case that the Board cited of their own making was Longo v. Universal Terminal and Storing Corporation. Now, that was a hearing loss case in which a longshoreman lost the hearing in one of his ears. But because of that he was unable to go back to longshoring work. Again we were dealing with an uneducated man who could do nothing else and the stevedoring company had not provided him with any other job, nor had it shown that any other job was available. And therefore the administrative law judge decided that he was permanently, totally disabled and properly so. And it has nothing to do with the schedule despite the fact that he had a scheduled loss. He was permanently, totally disabled. He couldn't work; he didn't have a job.

Now, those two cases, as I say, were the authority for the ALJ in my case and the Board itself in my case deciding that the schedule was not applicable but that the man could obtain more compensation than called for by the schedules.

The schedules, of course, called for a definite payment based on the weekly wage being earned at the time of the injury, and for a definite period.

The Longshore Act since its adoption in 1927 has been amended on several occasions, as before mentioned. But the "other case" provision in it has never been changed. There has always been an "other case" provision. And certainly Congress was aware of all of the changes.

Now, if -- no question by anyone has been raised that it is within the power of Congress to promulgate such a statutory scheme for the compensation of workers. That power has not been challenged since the case of Flamm v. Hughes, which is 329 F2d 378, a 2nd Circuit case in 1964.

The recent case of Bloomer against Liberty Mutual decided by this present Court on March 3, 1980, was decided on a different issue, but the Court there held, if I understand it correct, that the Act means what it plainly says. Now, although the Act provides for some elections or options for both worker and employer, nowhere does the Act provide that a person may or may not take under the schedule. There is no option there written nor is there any hint that it would Be. And we submit that the Act in the schedules provides an exhaustive remedy. It is not a minimal remedy, it is not a floor. It is an exhaustive remedy for those enumerated injuries and that the court below was incorrect when it decided that it was not, and we ask that this case be remanded to go to, be admitted back to the administrative law judge for a proper determination of the scheduled loss that this man

has sustained. Thank you.

QUESTION: Mr. Turner, before you sit down, just because I didn't quite follow you, the Longo case, I understand, was that they held a total disability and therefore that really isn't in point?

MR. TURNER: That's correct, sir. The Longo case was --

QUESTION: That's hearing loss.

MR. TURNER: -- a hearing loss case.

QUDSTION: But what about Mason? If Mason in your view was incorrectly decided, is that right?

MR. TURNER: That's correct, sir. It was incorrectly decided because the man had a 25 percent disability of the hand, but the administrative law judge decided that he had 75 percent disability. And the Board, the Appellate Board, decided that that administrative law judge was correct and that they were not constrained to follow Williams v. Donovan, which is of course a case on all fours with ours here before this Court.

QUESTION: And they allowed relief under the all-other-cases language?

QUESTION: All-other-cases language.

MR. TURNER: Well, they didn't say that. They said they relied on the case of American Mutual Insurance Company against Jones, which of course was again a total permanent

disability and had no bearing on the schedule. Thank you, sirs.

MR. CHIEF JUSTICE BURGER: Mrs. Stillman.

ORAL ARGUMENT BY MRS. ELINOR H. STILLMAN

ON BEHALF OF THE FEDERAL RESPONDENT

MRS. STILLMAN: Mr. Chief Justice and may it please the Court:

The essential purpose of the Longshoremen's and Harbor Workers' Compensation Act is to compensate employees for disability, that is to say, loss of wage-earning capacity. Petitioner is contending in this case that this statute should be construed to deny an employee who has suffered a substantial disability -- that is to say, a substantial loss of wage-earning capacity -- deny him the right to recover compensation in proportion to that actual loss.

Construction urged by Petitioner would also lead to a number of totally irrational results, most notably the right of an employee judged to have suffered temporary partial disability to recover more than a employee judged to have suffered permanent partial disability.

Because the construction that Petitioner is urging in this case is thus counter to the essential and central purpose of the Act and would lead to results which cannot readily be imputed to Congress, we say, as this Court said in the case of Baltimore and Philadelphia Steamboat Company v. Norton, nothing less than compelling language would justify

such a construction of the Act, and we don't think that that compelling language is present in this case.

QUESTION: You make a distinction between compelling language and plain language?

MRS. STILLMAN: We don't think, we don't concede that the plain language compels the result that Petitioner is urging.

QUESTION: That isn't what I was asking you. Is there a distinction between compelling language and plain language, or is plain language presumably compelling?

MRS. STILLMAN: I would concede that perhaps the Court equates the two. We would say that neither is present in this case.

QUESTION: Mrs. Stillman, how do you explain away the two words in (21), "other cases"?

MRS. STILLMAN: We would say that other cases mean simply cases not determined under the schedule, and we would say that if Congress had intended to enact a statute with provisions that were contrary to its central purpose of compensating employees for disability, what they would have used was some term such as "cases arising from injuries other than those listed on the schedule," or some statement to the effect that "this shall be exclusive of the schedule." There's nothing there and we just think that this is putting too much pressure on the words, "other cases."

QUESTION: Well, of course, that explanation almost assumes a result, doesn't it? Certainly this individual who qualified under the schedule --

MRS. STILLMAN: He did, Your Honor.

QUESTION: -- and hence one can certainly argue that his is not an "other case."

MRS. STILLMAN: Your Honor, we would concede that there are several permissible readings of the term "other cases" here, and we think in choosing between those permissible reasons you should choose the reading that is consonant with the purposes of the statute and we believe that that's our reading of "other cases."

I think perhaps one thing I should do here at the outset is to explain to the Court that there is not an inconsistency between the approach, the way in which we've briefed this issue, and the way in which Respondent Mr. Cross has briefed it.

QUESTION: Now, before you get to that, Mrs. Stillman, do I understand you to suggest that this case does not fall within the schedule because it holds within other cases? Is that it?

MRS. STILLMAN: Your Honor, we would -- let me explain it this way. We believe that there is an election here, so to speak. But this is the way we understand the Act to operate. The employee who suffers an injury that is listed on

the schedules is permitted if he wishes to simply rest on the schedule. That is, not to seek to prove any loss of wage earnings. He can simply rest on the schedule, show his impairment, and receive a benefit for that as provided on the schedule.

We believe that if an employee understands that he is going to have disability, that is, loss of wage-earning capacity in excess of what is on the schedule, he may then prove that under 8(c)(21).

QUESTION: So there is no inconsistency between your positions?

MRS. STILLMAN: There's no inconsistency, Your Honor.

QUESTION: Now, each of you says that the schedule is a minimum. recoverable in any event without any proof whatsoever of loss of earnings?

MRS. STILLMAN: That's correct, but I want to explain one further thing in the way this would operate because this explains why the result that the Board has reached here is not the same as the result that would be reached under the amendment that was rejected in the 1972 --

QUESTION: Well, forgive me for interrupting again, but then, after what you've just said to my brother Stewart, what you are saying is that this case is one in which, yes, he falls within the schedule --

MRS. STILLMAN: Yes.

QUESTION: -- but he also is permitted the opportunity under other cases to show he has a greater disability?

MRS. STILLMAN: That's correct.

QUESTION: So this case is both a scheduled case and an "other case"?

MRS. STILLMAN: Well, Your Honor, it's an "other case" because --

QUESTION: Isn't that just that? Isn't that a contradiction in terms?

MRS. STILLMAN: No, I don't believe so.

QUESTION: You say he can always get the schedule.

MRS. STILLMAN: He can but he hasn't sought to provide it.

QUESTION: Or, he can elect it. It is a scheduled case, if he elects it to have -- at least that, you'd say, if he elects it as a scheduled case.

MRS. STILLMAN: If he elects it.

QUESTION: The way you put it a minute ago, though, he could always get the minimum.

MRS. STILLMAN: He can if he --

QUESTION: Which means that it's both. You claim it's both. It's a scheduled case and an "other case" too.

MRS. STILLMAN: Let me put it this way: it's potentially double.

QUESTION: Very strange language to describe it.

MRS. STILLMAN: It's potentially both.

QUESTION: Not only potentially, but may he take the schedule and thereafter say, now I'd like some more?

QUESTION: No.

QUESTION: Well, I wanted -- what is your view on that?

MRS. STILLMAN: I should explain what we understand the Board's position to be, and what certainly the position of the Director of the Office Workers' Compensation is.

Let us assume -- I'm going to take a hard case --

QUESTION: Another simple question: yes or no? I could answer it for you.

MRS. STILLMAN: Well, I think I should explain.

QUESTION: All right.

MRS. STILLMAN: Let us assume, taking a hard case for us, that the man has come in, he has a schedule injury, and he has no idea at this point whether he's going to hav some excessive or substantial loss of wage-earning capacity in the future. He comes in and he's awarded a schedule benefit, let's say, 50 percent -- arms, loss of use of arms -- so I think that's half of 312 weeks. He is going to be paid in installments. There's a provision for being paid in lump sum under Section 914(j) of the Act and that's in his favor so he's going to be paid in installments.

The installments are coming along and suddenly he discovers that, let's say, I can't work overtime any more, or

I have to work part-time, or whatever. Under Section 22 of the Act -- this is 33 U.S.C. 922, he could come in for a modification of his award. You can do that anytime prior to one year from the last payment by the employer, or for one year from the rejection of the claim.

He could come in and say, I need my award modified because this is not going to adequately compensate me for wage-earning capacity. If there is a hearing and the claims examiner and the administrative law judge agreed with him, what they could do then would be to vacate the award under the schedule and recalculate the award under Section 8(c)(21). Now, this would not be the same as giving him --

QUESTION: Giving him credit for what he's beem paid?

MRS. STILLMAN: They'd give credit, they would --

QUESTION: But your answer then is no. He can't get both?

MRS. STILLMAN: He can't get both; no.

QUESTION: All right, now, if that's true, and he qualifies for the schedule, what do you do with the word "shall" in Subparagraph (c): It "shall" be paid to the employee as follows. You're saying he has an option, it's may be paid rather than shall be paid?

MRS. STILLMAN: Yes, yes.

QUESTION: What do you do with that one?

MRS. STILLMAN: Well, we think -- we just think it has to be read in context and in terms of the operation of --

QUESTION: And it really should be read as "may"?

MRS. STILLMAN: Yes.

QUESTION: Well, surely, you must concede that those two words "other cases" is the big hurdle in the Government's case.

MRS. STILLMAN: Big hurdle but not an insuperable one, we would say. And again, we would say that ours is a permissible reading which is

QUESTION: How -- for how many years was the Act construed the other way?

MRS. STILLMAN: Your Honor, I should address this. There are several points to be made here.

QUESTION: Isn't there a -- a time --

MRS. STILLMAN: Excuse me?

QUESTION: To Justice White's question, I mean the Act was passed in 1927, amended in '49. He asked you, how many years was it construed the other way?

MRS. STILLMAN: Well, if -- actually, until Williams v. Donovan, we know of no situation in which the case even arose, so it can't be said to have been construed at all before then. And, in Williams v. Donovan, it looks to us, reading the briefs -- and we'd be willing to -- well, I'd submit to the Court if the Court wished -- that the only

question raised to the 5th Circuit was the man was claiming permanent total. Now, the 5th Circuit said in broad language, we approve the reasoning of the District Court, and so the decision in that sense can be read.

But other than that decision, there's simply no other construction, there's no evidence that the case ever arose.

QUESTION: Well, no evidence in the courts. What I'm asking, who decided these cases in the first instance?

MS. STILLMAN: Your Honor, they were decided by deputy commissioners. And unfortunately --

QUESTION: Well, that's what I'm asking you. How did they construe them?

MS. STILLMAN: Well, unfortunately, the Labor Department does not have records, a digest system of those, they were little awards.

QUESTION: So you don't know?

MS. STILLMAN: We don't know.

QUESTION: So you don't think -- you wouldn't suggest that there was never a case where a person suffering a schedule disability couldn't have proved more damages?

MS. STILLMAN: Well, it would have been much rarer before 19-- --

QUESTION: And wouldn't have thought about trying to.

MS. STILLMAN: Well, it would have been much rarer

before 1972 because before 1972 there were total maximums on compensation, so that it would have been rarer that he would have had much to gain from going under -- at all.

QUESTION: That hardly answers my question, does it?

MRS. STILLMAN: Well, Your Honor, we --

QUESTION: So you don't know, you really don't know --

MRS. STILLMAN: We don't know; we don't know that it arose.

QUESTION: You know that the

though.

MRS. STILLMAN: Ah, yes. I would like to address that too, Mr. Justice Stevens.

QUESTION: And it was the New York statute, I think, on which this one was originally patterned, wasn't it?

MRS. STILLMAN: Correct. That was the Sokolowski case.

QUESTION: You started to say, I think, that the proposed legislation that was not enacted would not be the same as your argument today?

MRS. STILLMAN: Correct. That's right.

QUESTION: That provided that a person would take the schedule and then if thereafter he could prove additional --

MRS. STILLMAN: Correct. There wouldn't be a redetermination of the award. Yes.

The Sokolowski case tells us two things. It was decided in 1933, six years after the passage of the Longshoremen's Act. It tells us that in 1933 the New York Court of Appeal interpreted other cases in the way the Petitioner is urging that it be interpreted here. It also tells us that in 1930 the New York Industrial Board, because they were overturning an award of the New York Industrial Board, interpreted it our way. Furthermore, the Sokolowski opinion tells us that the Chairman of the Board at that time was Frances Perkins, who was consulted in the course of the enactment of this statute.

Now, unfortunately, the legislative history of the statute -- we combed it and couldn't find anything that bears directly on this point, so we don't know whether she ever gave them her view or whether her view in 1927 was identical to her view in 1930. But certainly we would think that the Sokolowski case --

QUESTION: She was told, in any event, by the New York Courts that her view was erroneous?

MRS. STILLMAN: Yes, in 1933. But we would say that the evidence of the Sokolowski, to the extent that it bears on the intent of Congress would help us more than it would help Petitioner.

QUESTION: You may recall what Justice Frankfurter once said, that if the language of a statute is clear you don't

need to worry about the legislative history.

MRS. STILLMAN: Yes, and I believe there's a difference --

QUESTION: He put it in the reverse, but that was the idea.

MRS. STILLMAN: Yes, Your Honor. And, again, I wouldn't want to -- we simply don't know what view the deputy commissioners took during these years if they faced precisely this case. But even if they had taken -- I should in all candor admit that there's a footnote in the Government's brief in Williams v. Donovan which suggests -- it's sort of an aside -- that they might have taken Petitioner's position here but that wasn't the issue in the 5th Circuit.

QUESTION: Was that just wrong, or false, or --

MRS. STILLMAN: Well, Your Honor, I would say to that --

QUESTION: It certainly couldn't have been inadvertent, could it?

MRS. STILLMAN: Well, it wasn't, that wasn't the issue in that case, because they were only talking about permanent tolls.

QUESTION: And what was the issue or not? That's what the footnote said.

MRS. STILLMAN: Well, the footnote is inconclusive. It says that the schedule and 8(c)21 are mutually exclusive.

But I would say this, Mr. Justice White, that --

QUESTION: Are mutually exclusive?

MRS. STILLMAN: Yes.

QUESTION: Well, what's ambiguous about that?

MRS. STILLMAN: Excuse me?

QUESTION: What's ambiguous about that?

MRS. STILLMAN: Well, I would say as to that, we don't have any official ruling from the agency that we know of during that time, and even if the agency, what constituted that agency had taken a different view, we would say this, that an agency is not disqualified from changing its mind. And if it does, the Court is reviewing the decision that's before it and it still does not construe the statute de novo, it still construes the statute in the light of the agency's understanding of that statute.

Now, we have consistent rulings of the Benefits Review Board since 1975 that this is the way it should be construed, and they're the ones that have directly faced this situation. And they have good reasons for that. The irrational result that I've mentioned; also, their -- in terms of a policy argument, I'll put here, because I think this is an answer to their contention that this would add to litigation under the Act -- if a man's facing substantial loss of wage-earning capacity with a schedule injury, he is faced with the gross undercompensation that would result in this case.

Mr. Cross faces a loss. Petitioner says that he would be entitled to $130,000 under 8(c)(21) and that under the schedule he would be entitled to either $3,000 if his disability is five percent or $12,000 if it's 20 percent.

If a man is faced with that he's not going to have the incentive to make the effort to continue working as Mr. Cross has done. Mr. Cross wants to work. What he's going to have the incentive to do is to apply for permanent total disability under 8(a). You don't have to be bedridden to collect permanent total disability. It's going to be litigation, which should certainly offset any litigation increase that you might get in permitting this kind of litigation under 8(c)(21).

QUESTION: Mrs. Stillman, is this a two-way street? For instance, if under Subsection (7) or Subsection (6) a person lost a thumb and got this schedule compensation of 75 weeks, could the employer come back in at the end of 40 weeks and say, look, this man is being overcompensated?

MRS. STILLMAN: No. The employer may not do that. There does not have to be any showing of rates or any capacity under the statute. But that's not unfair because the schedule also compensates impairment. The man is going to have a lifelong injury and it's not unfair that he be compensated for that as well as any loss of wage-earning capacity.

He's also being denied any tort suit or negligence

suit he might have against the employer, because this is our first remedy.

QUESTION: Then "in other cases," just in your reading, simply means in any case in which the employee chooses to go outside the schedule?

MRS. STILLMAN: Yes. -- For the reasons that I have stated we think the Benefits Review Board correctly interpreted the Act here and therefore we think that the decision of the, the judgment of the Court of Appeals of the District of Columbia Circuit should be affirmed.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Stillman. Mr. Scherr.

ORAL ARGUMENT OF LESLIE SCHERR

ON BEHALF OF RESPONDENT TERRY M. CROSS, JR.

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

I think that a couple of the comments made by counsel should be addressed specifically.

Firstly, the counsel for Pepco raises the specter of athletes who are operated on in the same manner in which Mr. Cross was operated on and then return to work. That is, playing football. And Mr. Turner goes on to say that this man decided he could not do it.

The facts of the case are clear and a reading of the

transcript will show that it was the doctors who prohibited Mr. Cross from returning to his full duties. As a matter of fact, not his doctors but Pepco's doctors, Pepco's in-house doctors and Pepco's consulting doctors. And it's a point that should not be overlooked.

Mr. Turner also mentions the fact. rather than speculate with respect to the damages that Mr. Cross might have suffered as a result of the injury to his knee, that his exclusive remedy should be under the schedule. Rather than speculate as to the damages, I think a review of Petitioner's brief at page 48a will demonstrate clearly that an in-depth analysis was conducted by the administrative law judge in order to determine what Mr. Cross's actual wage-earning losses were.

What the administrative law judge did was to review Mr. Cross's wages for three full years prior to his injury and for the year following his injury.

QUESTION: Well, that's what a jury is expected to do, I suppose, in a personal injury suit. But this is a Compensation Act where you have a schedule of disabilities.

MR. SCHERR: Your Honor, we never claimed under the schedule. When I say "we," I have represented Mr. Cross since he first came in my office and we filed this claim.

We never claimed that his loss was the removal of the medial meniscus of his left knee, we never claimed that the fact that he limped was his problem. We claimed that he

sustained a loss of over $6,000 per year in wages. That's his loss. Now, Mr. Turner tells us that -- both in his brief and in oral argument -- that Mr. Cross wants over $130,000. That's not speculation. That's true. He wants over $130,000, not because he's greedy or venal, but because his actual loss, not projected, but actual loss based upon what he earned before and what he can earn now, is in excess of $200,000 a year.

QUESTION: But hasn't this been true for a long time under workmen's compensation acts for 50, 75 years, that the schedule awards sometimes are higher and sometimes are lower that what they might get from a jury.

MR. SCHERR: It's for this Court, Your Honor, to decide what the federal statute means. Our position is clear. The federal statute, the purpose of the federal statute is to compensate the injury. The injury is, in this case as in all cases, where there's a loss of earnings, the loss of earnings.

A review of the legislative history shows us at least that H.E. 21 was in the original statute and then it was amended before it was enacted to include the schedule.

Our position is that Congress meant to say that where there is a wage-earning loss, the employee can claim for that wage-earning loss, because that, after all, is his injury. Where there's no wage-earning loss but a corresponding anatomical loss, then the employer get to share in that loss. That is, I as an attorney, if I as an employee of a

corporation and I lost my hand in an industrial accident or while I was on the job, I can continue earning a living despite the fact that I lost my hand. My secretary, however, can't do that. My secretary I liken to Terry Cross because without her hand I could say, okay, from now on you're going to be a receptionist. You need one hand to pick up the phone and to say, "law offices," and then hang up the phone again. You don't have to do anything else. But rather than hand potentially $20,000 a year to a secretary, you limit that to $10,000 a year. Under Pepco's reading of the statute the employee get 100 percent schedule disability for the loss of a hand and nothing to reflect what are actual wage-earning losses.

Another anomaly that comes up under the Pepco's reading of the statute is, take Terry Cross. Exactly the same circumstances, don't change a fact except that rather than the injury to his right knee which caused Pepco's doctors to deny him his work, his injury was to his back, a foot and a half higher up and then a little bit around to the right. Under those circumstances there would be no question that he would be entitled to two-thirds the difference under what Pepco would like to believe is the only reason to have the "other cases" provision in the statute.

That can't be true. It can't be that if Terry Cross loses $6,000 a year because of his knee, he gets a total of $3,000 as Mr. Turner advocated at the administrative hearing

below was that if Terry Cross had the exact same wage-earning loss because of an injury to his back, he gets $130,000 for the rest of his life.

And it should be noted again that the $130,000 that Terry Cross has been awarded, and which award has been affirmed, is not a windfall for Mr. Cross. This is not in addition to what he otherwise would have made. This merely compensates him to the extent of two-thirds the difference of what he would have made had he not been injured.

Further, it is our position that the congressional intent is clear from a reading of the entire Section (8), and that is with respect to permanent total disability, temporary partial disability, and temporary total disability, as well as permanent partial disability, in every case Congress has seen fit to award the employee a percentage of the difference of his actual loss. The only exception is the so-called schedule, Sections 8(c)(1) through -(19).

And as we submit, it is an afterthought of Congress that even if there is no actual wageearning loss, that an employee should receive some compensation for his anatomical losses with whatever suffering is occasioned by that anatomical loss. And it is not meant to be exclusive, it is meant to be a minimum, it is meant to be one arm of an alternative that the employee can take either the schedule loss as a minimum or alternatively he can take under the unscheduled loss, if he can in fact prove as Mr. Cross can and has proven

in this case that his actual earning loss is far greater than what he would receive under the schedule loss provisions.

QUESTION: But if he attempts to prove a case of a leg's loss exceeding the scheduled amount and fails to prove it, he just fails to prove it. He's in any event is going to get his scheduled loss?

MR. SCHERR: That's correct, Your Honor. That is correct.

QUESTION: So you're suggesting that any case like this is at least potentially two kinds of cases. One, it's an anatomical loss, certainly, within the schedule and if there had been wage losses, it's a wage loss case too.

MR. SCHERR: Yes, sir. I think the Court should note that in the eight years since the minimums were removed in 1972, only five cases have been decided by the Benefits Review Board with respect to this issue.

QUESTION: What cases do you mean? In this jurisdiction or all over the country?

MR. SCHERR: Benefits assistance for all jurisdictions, Your Honor. This is a benefits assistance for all federal workmen's compensation cases. Those cases are Mason v. Old Dominion; Collins v. Todd; Brandt v. Avondale Shipyards; Richardson v. Perna and Cantrell; and the Terry Cross case. There are no other cases of the hundreds of perhaps thousands that come before the benefits review Board that has had as an

issue the particular issue in this case.

QUESTION: Well, but this issue arises only under the Longshoremen and Harbor Workers' Act.

MR. SCHERR: Yes, sir, which I'm sure there a million longshoremen and harbor workers, and it also pertains to all employees in the District of Columbia, with certain exceptions. So there are a million and a half, two million employees to which this particular Act pertains. And with all of those claims and all those people, only five cases have arisen in all those years, in eight years.

QUESTION: Well, what about under the -- is this under the Longshoremen's Act generally or not?

MR. SCHERR: Yes, sir. We're only dealing with the Longshoremen and Harbor Workers' Act.

QUESTION: Well, that covera a lot of people besides the people in the District of Columbia.

MR. SCHERR: Yes, sir. It covers longshoremen and highway workers across the country.

QUESTION: All employees in the District of Columbia and all longshoremen everywhere.

MR. SCHERR: Yes, sir; that's correct.

QUESTION: And, you say there have only been five cases in the, in the Review Board?

MR.SCHERR: Yes, sir, five cases, the ones that I named.

QUESTION: We don't know how many thousands of cases there have been decided by whoever those cases are appealed from.

MR. SCHERR: The cases generally go from an informal conference to an administrative law judge in which case there's a record, a transcript. It goes then to the Benefits Review Board --

QUESTION: Well, how many cases like this have been before administrative law judges? You just don't know, I suppose.

MR. SCHERR: There is no record, Your Honor. There is no way for us to find out but we do know --

QUESTION: He replaced the deputy commissioner.

MR.SCHERR: Yes, sir.

QUESTION: You're not suggesting that in this large population of workers there are only five times that the person injured had a schedule loss that wasn't adequate to take care of his economic loss?

QUESTION: I would think it would happen all the time.

MR. SCHERR: I would heartily suggest that would be true, and I agree, Justice White, that it probably happens all the time, but there are, the fear of --

QUESTION: Is it more likely that there are only five lawyers who thought of this argument?

MR. SCHERR: I thank you for the compliment, Your Honor, but I think that the plain reading of the entire statute would make it clear that the purpose of the statute is to compensate employees for actual loss of wages and not for the Benefits Review Board or the administrative law judges to slavishly follow a schedule and say, a knee - $3,000, despite the fact that your actual wage-earning loss which loss occurs because your working for the employer is only five percent of the loss of use of your knee.

I urge the Court to keep in mind that Terry Cross wants to work. He wants to continue to work without being penalized economically for the injury suffered while working for this employer. And I believe that the Longshoremen and Harbor Workers' Act can be construed in terms of all four types of injuries to allow him to continue to work, not have to claim permanent and total disability, have the employer supplement the difference between what he was earning before the injury and after the injury by two-thirds, and be consonant with the intent of Congress and the meaning of the Act.

Thank you.

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

MR. TURNER: If I may, Your Honor, please?

ORAL ARGUMENT BY RICHARD W. TURNER

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. TURNER: Let me first of all call the Court's attention to at least one of the cases mentioned by Mr. Scherr, the case of Collins against Todd Shipyards Corporation, in which the Board itself shows a very divided opinion. The Chief Judge Smith of the Board has written a bitter dissent in that case, so that certainly in my humble judgment no court need bow to the expertise of the administrative law judges in a case such as this, which is a pure question of law.

Now, they couldn't tell you how many cases or how cases were decided prior to this but my own experience tells me that thousands and thousands of cases were decided by deputy commissioners when there was a dispute at the informal conference level; thousands of them were decided and decided under the schedules. There was never any question. When it got to the district, United States District Court, the case was Williams v. Donovan and the United States District Court decided as a matter of law that the schedules were appropriate and were exclusive. They were mutually exclusive, the schedules and the so-called "other" cases department.

The schedules treat all persons the same; no matter who he is or how much he earns the schedules are complete in and of themselves, but it is obvious that they could not take into effect every possible injury that a man might suffer or a woman might suffer. I don't know whether there are women longshoremen or not.

It's not possible. They have heart attack cases, they have brain injury cases. It is just simply impossible. There must be a schedule to allow the employer to have a definite liability and to have the employee obtain prompt and certain compensation.

Thank you. My time has expired.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 3:05 o'clock p.m. the case was submitted in the above-entitled case as described above.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-816

Pepco

v.

Dir., Office of Workers' Compensation Programs

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: James K. McCarthy