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IN THE SUPREME COURT OF THE UNITED STATES

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U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.,

Petitioners

v. : No. 80-518

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

Washington, D.C.

Tuesday, October 6, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 o'clock a.m.

APPEARANCES:

RICHAD W. GALIHER, Jr., ESQ., 1215 Nineteenth Street, N.W., Washington, D.C. 20036; on behalf of the Petitioners.

JAMES F. GREEN, ESQ., 2000 L Street, N.W., Washington, D.C. 20036; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC,

400 VIRGINIA AVE., S.W., WASHINGTON, D.C. 20024 (202) 554-2345

C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in U.S. Industries against the Director of the Office of Workers' Compensation Programs. Mr. Galiher, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD W. GALIHER, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. GALIHER: Mr. Chief Justice, may it please the Court, the issue before you today in this case involves the proper interpretation and application of Sections 2, 3 and 20 of the Logshoremen and Harbor Workers Act as extended by the D.C. Workers Compensation Act.

Specifically, the petitioners herein contend that it was error of law for the lower court to use the Section 20 statutory presumption to presume an accidental injury arising out of and in the course of employment on November 20th to the respondent Riley when he awoke in pain at home with pain in his chest and arms.

By so doing, the lower court finding makes every illness of any type encountered by an individual covered by Workers Compensation whether on or off the job.

QUESTION: Are you saying that all a worker need do is to file a claim and then from that point on it is up to the employer to rebut it?

MR. GALIHER: Justice, I believe that that is what

the presumption has been interpreted to be by the Riley decision; precisely. The language of the presumption talks about the term "claim;" that the claim be presumed within the coverage of the Act. And that is what the Riley interpretation broadly interpreted can mean. And this is why we have contested it to this Court.

QUESTION: How could one more narrowly interpret it?

MR. GALIHER: Well, the circuit courts of appeals presently have taken the position that the presumption should be applied only when there has been an accident which occurred in the course of employment; in the course of employment being in a space and time relative to the employment relationship.

In this particular instance, the court has simply taken a finding, made a finding that the term "injury" means pain, and then gone on to say that the presumption can be applied because a worker has pain, to relate that pain to something in the employment activity.

It is our position that this case is governed by Section 903 of the statute quoted on page 3 of the brief, and it states as follows: Compensation shall be payable under this chapter in respect of disability or death of an employee; but only if the disability or death results from an injury.

Under this statute, injury is specifically defined in Section 2, Subsection (2) of the Act as an accidental injury or death arising out of and in the course of employment. The terms "arising out of", "accidental injury", "in the course of employment" have been construed by court decisions. It is our position that the burden of proof of the respondent Riley in this claim starts with the Section 903 language that he must be an employee in order to achieve the status for making the claim in the first place, and secondly, that his claim must arise out of in the course of employment.

"Arising out of" has been determined under this Act to mean that there is a causal relationship between the employment or the work that the employee was doing and his injury. The language "in the course of" has been determined to mean that the injury must occur at a time and place relative to employment activities being performed.

QUESTION: When you say "has been determined" do you mean by this Court?

MR. GALIHER: No. No. This Court in its decisions, as I have read them, has never come to a determination of some of the issues which are raised in this case. This Court has never separately defined the meaning of "arising out of" and "in the course of employment" in the context of a worker's compensation statute, under the

Longshoremen and Harbor Workers Act cases.

In this particular instance, when we have the language of the definition of injury providing a base for compensation, it is our contention that the statutory presumption cannot be used as it was in this case. I would point out to this Court that the lower court found that despite the administrative law judge who tried the case and who heard the evidence and who found that there was no injury suffered by the employee at work on November 19, 1975 when he alleged an injury at work at 2:30 or 3:00 o'clock in the afternoon, this court in reviewing these facts did not disturb the finding made by the administrative law judge, did not say that that was not supported by substantial evidence.

What the court, in fact, did, however, was find a new injury. The new injury -- and they used the term "injury" in a statutory meaning which we contend is incorrect -- was found at 2:30 in the morning when Mr. Riley awoke in pain and was rushed to the hospital. That is the injury that the lower court found.

Having made such a finding of injury in that case, then the lower court went on, bearing in mind you have these elements; accidental injury, arising out of, and in the course of, the court went on to then go to the "arising out of" part of the statute. The court went and took a look at

the presumption and said we have never failed to apply the presumption to any case in this circuit. So we are going to apply the presumption here, and the effect of that presumption is to change the burden of proof in this case. We are going to put the burden of proof over on the employer, and we are going to let the employer explain how this man or why this man turned up with an injury at 2:30 in the morning.

QUESTION: Well why, under the reasoning of the court of appeals, would you even need an injury, if they apply the presumption that the claim comes within the provision of this chapter? Wouldn't that presumption be all-encompassing under their reasoning? And the simple filing of the claim bring with it the presumption that the claim comes within the provision of the chapter?

MR. GALIHER: Broadly interpreted, as the D.C. Circuit did in this case, that is a correct statement of what they say the law should be. We contend that that is not what the law is; that that is not what the legislative history -- little of it thought it may be under this Act pertaining to this question -- we contend that that is not what the intention of the drafters of this statute had in mind when they used this language in the statute to define injury. And even despite the language in the statute dealing with the statutory presumption.

The statutory presumption is taken word for word from the New York Act. When the legislative history and congressional testimony was taken in this case, there was discussion initially concerning whether or not there should be an accidental injury or merely an injury; then there was discussion as to whether it should be arising out or in the course of employment or arising out of and in the course of employment.

We have pointed out to this Court in our brief that the term "arising out of and in the course of employment" appears in the state statutes of 42 states. The term "accidental injury, arising out of and in the course of employment" appears in the state statutes of 30 states. But when we come to the presumption, the presumption only appears in a total of four states, one of which is New York, one of which being New York this Act embodied the New York Act. The language of Section 21 of the New York Act is, in fact, our statutory presumption in Section 20 of the Act. And the "arising out of and in the course of employment" as a result of the conference committee was construed to be the proper definition of injury under this Act.

New York decisional law, construing this Act, indicated that the language of the presumption could not be applied the way the D.C. Circuit has done here. The language of the presumption in the New York cases prior to

the enactment of this Act cited in our brief and cited in the amicus brief make it clear that you must show some facts, you must show some incident arising in the course of employment in order for the statutory presumption to be considered.

QUESTION: Mr. Galiher, could I interrupt you for a second? On this case we have sort of two different theories on which the claimant might have recovered; one, that he had an accident the night before where he hurt himself; or alternatively, that he had an arthritic condition that was aggravated by long employment with this company, which is the theory I guess the court of appeals considers acceptable.

Is it your view that he had originally filed a claim in which he said, I woke up at 2:30 a.m. with a very bad back, which I now claim was aggravated by -- I had arthritis for years and it's an aggravated situation, and that claim is compensable under the statute. Though he could still not recover.

MR. GALIHER: No. My position in that regard is that the burden of proof is that he must --

QUESTION: Would it be then called a statutory presumption -- that's the question, I guess.

MR. GALIHER: Well, this relates to statutory presumption, Justice. It is my position that the employee,

under that set of circumstances, is not foreclosed from proving an injury, from proving these elements, proving accidental injury arising out of and in the course of.

QUESTION: Well, what does he have to prove? You say he proves that he had arthritis a long time and he woke up in the morning with a very bad -- with these pains.

MR. GALIHER: Well, it is our contention that he would have to come in with medical opinion indicating that there is a cause and effect relationship between his work duties --

QUESTION: Then what function does the statutory presumption play?

MR. GALIHER: We look at the statutory presumption in terms of the broad general purpose of this Act. It's a remedial act for employees within the scope of their employment who suffer injuries. The purpose of this presumption is to assist the claimant in making his case if he cannot prove it otherwise.

However, the presumption, in our view, does not apply until the employee shows himself within the initial elements of injury, and that particularly with reference to "in the scope of employment." If he wakes up at --

QUESTION: But you just said it wouldn't apply in the example I gave you to show causal connection. It seems to me you're saying he must prove a prima facie case before

he gets the benefit of the statutory presumption.

MR. GALIHER: I am saying that. I am saying that because that is the way I interpret the definition of injury under the statute, and that is the way I believe the New York cases, which would embody -- be embodied in the legislative history of this Act have also indicated the fact to be.

QUESTION: So really, the law would be the same if that section were not in the statute, because every plaintiff has the burden of proving a prima facie case, I suppose.

MR. GALIHER: Well, that's correct, but the case law also indicates a little bit more in this instance. First of all, the case law indicates that the Act is to be liberally construed in favor of workers. Secondly, there is a mandate from court decisions that indicates in the case of doubt that the employee is to be given the benefit of the doubt with respect to his proof on any claim.

What I'm talking about with reference to the statutory presumption is simply that you have to start with the working relationship; you have to start within employment, and that you cannot make a claim or prove a claim solely by the use of this presumption. That precisely is what the court did below; the court having found that November 20 rather than November 19th was the crucial date.

Then the court below went on to say that it was the employer's burden.

QUESTION: Mr. Galiher, do you think that the presumption is, in itself, evidence that the administrative law judge says, I flatly disbelieve this claimant in his statement that he's suffered an injury; that nonetheless, the presumption could be used in favor of the claimant, so that you would have a conflict of evidence?

MR. GALIHER: That is not my interpretation and I do not believe that that was the interpretation of this court when it considered in Del Vecchio the way the presumption worked and how it could be rebutted.

QUESTION: Let me ask you this hypothetical question. Suppose the allegation were that the man was a steamfitter and that on a given day he was assigned to thread a pipe, a four-inch pipe, which he alleges normally is the work of two men. But because they were shorthanded, he was directed to do it alone and he undertook to do it alone. That he threaded the pipe with the usual equipment, felt faint shortly after that, had to go and lie down, and the next day was found to be suffering from some kind of a cardiac condition.

Would you think that would be enough to give rise to this presumption?

MR. GALIHER: I think under many of the circuit

opinions cited by the solicitor in the brief in response to my petition, I think that that would be enough to trigger the presumption. Clearly, he would --

QUESTION: It clearly would have in this circuit, but --

MR. GALIHER: His onset was within the scope of his employment, and with that onset having occurred -- occurring within the scope of the employment, the majority of circuits below take the position that there is a presumption that arises to assist the claimant in proving the causal relationship.

With respect to Justice Rehnquist's question, though, there's a case called Kwaisur in the Third Circuit which I cited in my brief, and in that case there was very clear language indicating that even if an injury occurred in the course of employment, in the scope of employment on the job, that the administrative law judge, upon hearing this testimony, was not bound by the presumption. He could still make the credibility finding and reject the claim.

What I am asserting here is that there must be evidence. You start with evidence, not simply the filing of a claim, a piece of paper, and then come in on the presumption. Because the logical ending of this type of a decision is that the common cold will be covered if an employee goes home and is in good health and the next

morning wakes up with a cold. Under this decision because he went to the doctor and was treated he can file a claim, and as pointed out by the amicus in their brief, he can put the employer to the test and say that this statutory presumption compels a finding prima facie that there was a relationship between my employment activities the preceding day and my cold the next day.

This is where the decision of the lower court does not make sense. The decision of the lower court makes a finding, a presumed finding, that whatever happened to cause the pain, wherever the pain arose, was, in fact, from the employment relationship. And this is a finding that we contend is not supported by any of the cases, except those cases where you have the initial pain or complaint within the time and framework of the employment.

We are contending that the employee can prove this. He can come in -- we contend it's their burden for the employee to come in and prove that there's a relationship between the pain off the job and something in the employment relationship. And under those circuit decisions that hold that the presumption exists because that pain occurred in the course of employment, we hold that this would indulge the operation of the presumption.

The problem with the lower circuit case here is that this makes the employer an insuror of the safety of the

employee at all times, because that presumption is going to come in and operate to relate that harm or pain to the employment relationship.

In short, --

QUESTION: Mr. Galiher, let me ask just one other question. Supposing in this case he gets on the -- he makes his claim, he gets on the stand and says I woke up in the morning with these pains and I worked there for X number of years, and this is the nature of my work. I life things and I do all this. And he gets a doctor to get on the stand who says, given that set of facts, it's my opinion that this pain in the morning could have been the result of aggravation of his arthritic condition. Now, the burden would then shift to the employer, wouldn't it, to disprove that, or would you say that's still not enough?

MR. GALIHER: Well, if he woke up and his first pain was in the morning?

QUESTION: Two-thirty a.m., just as you have here.

MR. GALIHER: Not on the job. I would say that the burden is on the employee in that instance, in the first instance.

QUESTION: The employee.

MR. GALIHER: Yes.

QUESTION: But say he gets on the stand, he says I work there -- you know, he just says the facts that are

right obvious on the surface of the case. And he has a doctor say that given those facts, it's my opinion that it's possible that the pain in the morning was the result of aggravation of his arthritis. Has he made out a case that shifts the burden?

MR. GALIHER: I think he does at that point, yes.

QUESTION: Then what are we -- isn't that all that's going to happen here?

MR. GALIHER: No.

QUESTION: I mean, we're going to have a trial now and then somebody is going to decide whether that's right or wrong.

MR. GALIHER: What's going to happen here on remand is this case is going to go back with the employee being told that he doesn't have to come in with any additional evidence.

QUESTION: Yes, but you know he's going to put a doctor on the stand. I don't think there's much doubt about that, is there?

MR. GALIHER: Well, reading the Riley decision from the D.C. Circuit, he doesn't have to do anything.

QUESTION: All right, but if you put a doctor on the stand who says this couldn't have happened, then you're going to win.

MR. GALIHER: That's correct. If we put the

doctor on the stand and if the presumption were compelled to apply in that situation, Del Vecchio would say that the burden comes back to the employee, and then he's going to have to show something else.

What we're talking about here is where the burden starts and the D.C. Circuit says that the burden starts with the employer, not the employee.

QUESTION: The question really is who has to put the first doctor on the stand.

MR. GALIHER: That's correct.

We see this case as a case involving a further erosion by the circuit courts of what started out with the New York decisions to be the use of the statutory presumption to favor the claimant only when he had put on his initial burden of proof. The circuit courts of appeals now have taken the position that if you have an injury in the course of employment, that this presumption automatically arises, to give the employee the edge up.

Now, the employer still has a right in those circumstances to bring in evidence to try to rebut the presumption. But what the lower court decision says here is that the presumption starts the whole thing. Before the employee puts on any proof, the presumption is there for the employee to rely on because he filed his claim.

We would point out that the statutory presumption

uses the term "claim"; it doesn't say "accidental injury", it doesn't say "arising out of", it doesn't even say "jurisdiction", although this Court in its previous decisions has used the presumption without making a specific finding; has affirmed findings of deputy commissioners who have found jurisdiction and have mentioned this statutory presumption along the way.

In the Caputo case that was cited in one of the briefs, the lower court mentioned specifically that there was no presumption of jurisdiction. When this court made its finding in that case, there was no mention of the statutory presumption. This court made its finding based upon the evidence to determine what did the evidence show with regard to the status and situs of the employees under the Act for coverage purposes.

What we are asserting here is that a similar finding should be made by this Court that evidence must be produced; that the presumption cannot be used to supply the injury, which is what this court did.

QUESTION: Well, what happens without the presumption and the complaining party says I woke up with this pain and that was because I worked too hard on my job, and he doesn't put on anything? Wouldn't he lose?

MR. GALIHER: He probably would lose, but let me say this, Justice Marshall --

QUESTION: Well, let's add this. The company puts on 18 doctors. Would he lose then? Would he lose then?

MR. GALIHER: Yes, he would.

QUESTION: So in this case, what's wrong with it going back with or without the presumption?

MR. GALIHER: Well, when this case goes back with the presumption here --

QUESTION: Well, if it goes back without the presumption, wouldn't he still have to put on testimony?

MR. GALIHER: He would have to put on testimony, yes, but with the presumption.

QUESTION: And doesn't he have to put on testimony with the presumption? Doesn't he have to put on some testimony?

MR. GALIHER: Not the way the D.C. Circuit interprets it.

QUESTION: Can you imagine him winning without a doctor?

MR. GALIHER: Yes, I can. I have tried many of these cases and the law says that --

QUESTION: You just have no faith in the jury system.

MR. GALIHER: Well, it's not a jury, Justice, it is an administrative law judge who tries this case. The judge can make a finding, as we've cited in some of the

court decisions in the briefs. The judge is free to reject or accept the opinion --

QUESTION: Well, there's no way we can control the administrative judge. If he wants to do the things you're talking about.

MR. GALIHER: Well, the administrative law judge, under the decisions, is free to accept or reject the testimony of any physician, as well as the claimant under this. If he finds that he wants to believe the employee that he had an injury on the job, then having heard that testimony, he can make a finding in favor of the employee.

QUESTION: So you just don't want to go before the administrative judge.

MR. GALIHER: I don't want to go back before the administrative law judge with this presumption as it has been interpreted by the lower court to give the employee 24-hour a day coverage. I don't want to go back under those circumstances.

Now, we've indicated here that the interpretation placed upon this statute by the lower court, we contend, was never meant to be. It cannot be justified on the basis of the legislative history of this Act, or on the basis of prior judicial interpretation. Riley is the first case to come down, and using the definition of injury, accidental injury arising out of and in the course of employment, to

come and say that "in the course of employment" will be presumed. Not only do you have decisions now that say that accidental injury shall be presumed; you have decisions that say "arising out of" will be presumed. This makes a presumption of coverage for everybody, whether they're an employee or not. The crucial thing under this decision, all the employee has to do is file his claim, and then the burden shifts to the employer.

So it's our contention that the administrative law judge, under the Cardillo case which we cited in the appendix to our brief, had the right to make a choice in this case, and that his choice based upon the evidence, considering this broad statutory terms, should not be disturbed; that there is a narrow scope of review to which the employee is entitled to.

In this case, contrary to most of the cases you will read cited, the employer won. Most of those cases were cases -- the other cases cited were cases where the employee lost and then the burden was placed upon the employer to come in and show that there was not substantial evidence. In this case we contend that there was substantial evidence. We contend that Riley should not be presumed to -- used to presume the relationship between a condition of health and employment.

CHIEF JUSTICE BURGER: You're using your rebuttal

time now.

MR. GALIHER: Thank you, Mr. Chief Justice, I'll stand down.

CHIEF JUSTICE BURGER: Mr. Green?

ORAL ARGUMENT OF JAMES F. GREEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GREEN: Mr. Chief Justice and may it please the Court, the question before this Court today is not whether Ralph Riley is entitled to workers' compensation, but whether his claim shall be afforded the scrutiny which Congress intended and which the court below would require.

If the proof of a job-related injury entails the proof of a specific accident, then virtually no occupational disease would be compensable, nor could any gradual aggravation of an ailment by a person's work be compensable.

The court below has once again held that the potential work-relatedness of injuries must be explored.

QUESTION: Mr. Green, on page 15a of the petition, which is the court of appeals' opinion at the bottom paragraph the court says, "From these facts, the administrative law judge inferred that the story of an accident was not constructed until claimant's release from the hospital on November 25th, 1975, and that claimant's differing account of the act 'renders unbelievable his testimony as to the happenings of any accident.'

Accordingly, the administrative law judge denied the claim."

The court of appeals went on and reversed that decision. Now, what is going to happen when this case goes back to the administrative law judge?

MR. GREEN: When this case goes back, as we hope it would, to the administrative law judge with a Section 28 presumption intact, the judge will be required, as the court of appeals demanded of him and of the administrative body, to review this injury with regard to whether or not not just a specific accident did or did not occur, but whether or not the man's work in any way contributed to his present infirmity, which the judge found as an uncontested fact that he was so disabled as a result of an event, but not the injury that he testified to.

That's -- all the presumption would do in this instance, as I would see it, Justice Rehnquist, is to require the administrative body to review the definition of injury under its own act and to see whether or not this history in any way comes within the ambit of Section 2(2).

QUESTION: Would it require the administrative hearing examiner to believe what he has already found was unbelievable?

MR. GREEN: Not at all, Mr. Chief Justice, that's precisely the point. All it demands of him is that he answer the entire question before him, not just part of the

question. The whole question being is there an injury within Section 2(2). Not to get into what he found. It does not require him to disbelieve any facts he found; that is undisturbed by the court of appeals' opinion.

QUESTION: Well, the only claim before the administrative law judge with respect to an injury was an injury on the job, wasn't it?

MR. GREEN: It was, Justice White, yes.

QUESTION: And the court of appeals said well, we won't disturb the finding that such an injury didn't take place, but we say there was nevertheless an injury which occurred in the middle of the night.

MR. GREEN: The court of appeals observed that the judge, the administrative law judge, had found an injury in the course of the evening.

QUESTION: But it wasn't the injury that the claimant had put forward.

MR. GREEN: It was not the accident at work that the claimant put forward, but it may very well still be an injury within Section 2(2).

QUESTION: That may be so. I'm just wondering if you think the court of appeals quite properly seized on a different injury than had been claimed before the administrative law judge.

MR. GREEN: I think the court of appeals was

frustrated based on the record that it had in front of it. It knew that the administrative --

QUESTION: Well, that isn't my question. My question is is there anything improper about the court of appeals substituting another -- in imposing an injury other than what the claimant had put forth before the administrative law judge.

MR. GREEN: Justice White, I don't believe that there was anything improper with the court of appeals making the observation that the judge had found such an event and was frustrated in its ability to deal with that fact in the record that the same administrative law judge found. Because the administrative law judge, having found the fact, never addressed it.

Therefore, the court of appeals, in our opinion and we would urge was correct.

QUESTION: Well, it had never been claimed as an injury.

MR. GREEN: That's correct, sir.

QUESTION: Well, do you think they should fault the administative law judge for that -- practice law for the claimant?

MR. GREEN: No, I don't think that they should practice law for the claimant, but I think they're required to examine the administrative record and the administrative

requirements for review, consistent with the court's interpretation of the Section 28 presumption. Having done that, I think they were required to remand the case.

QUESTION: Well given the language of the 28 presumption and its breadth, which simply says that the filing of any claim under this act entails a presumption that it is covered, is it enough for a workman to simply file a claim saying that he was injured while in the employe of X company, and then say okay, X company, come on in and show that what I'm saying in my claim isn't true?

MR. GREEN: As I understand the requirements of the Section 20 presumption, that is correct. Once the claim is asserted, the presumption does not have the force, as this Court has held in Del Vecchio, Justice Roberts for the Court, does not have the force of affirmative evidence, but does nevertheless require the rebuttal of its existence through some substantial evidence, as the Court defines substantial evidence in that particular decision dealing with Section 20(d), sub (d) of the presumptive Section 20.

QUESTION: So even if the claimant files against employer X, employer X may have to come in and show by FICA records or something like that the claimant has never worked for this particular employer.

MR. GREEN: Certainly, the employer -- if a claim is filed, it would require the acceptance of the claim by

the employer or its rebuttal by the employer once initiated. The law does require that. And in this instance, I believe this decision is consistent with that requirement. Section 20 does not give affirmative evidence to the claimant; simply requiring that the claim comes within the provisions of the act. The employer is then free, through substantial evidence which can be general negative evidence, to rebut that claim.

If a claimant comes forward with no evidence, I am confident that the claim is going to be rebutted.

QUESTION: But it doesn't have to be.

MR. GREEN: No, the employer can prove nothing. The employer can not submit any evidence, can not challenge the claim, can choose not to voluntarily accept it and let the administrative body rule on the claim as made.

QUESTION: And in that case, the administrative body must accept the claim.

MR. GREEN: It would be my understanding that the administrative body would accept the claim in the absence of any rebuttal, assuming that -- in the absence of any rebuttal or any evidence from the employer, the administrative body is presented with a prima facie case. There is nothing they can but accept the claim.

QUESTION: The presumption says it's presumed to be within the act.

MR. GREEN: In any proceeding.

QUESTION: Mr. Green, I'm afraid we're not allowing you to argue your case, but it would help me if you would consider this hypothetical.

MR. GREEN: Yes, sir.

QUESTION: Let's assume that the claimant in this case had been a clerical worker, and over a weekend he suffered a heart attack, and all he introduced in evidence before the administrative law judge was that he had a heart attack over the weekend, didn't say where, when or how. He put a doctor on the stand who testified that he did, indeed, have a heart attack and if he were asked if he knew anything about when, where or why, he would say no, indeed; I just know he had a serious heart attack.

As I read the language of CADC, that's all he would have to prove. The burden would then be on the employer to determine what indeed did happen over the weekend. What would you respond to that?

MR. GREEN: Justice Powell, as I understand your hypothetical, my response would be that if a prima facie case was made by the claimant in the view of the administrative body from the assertion that you have given us in the hypothetical, then the employer could rebut.

QUESTION: But you've assumed the answer when you say if.

MR. GREEN: Yes.

QUESTION: If a prima facie case had been made.

MR. GREEN: Yes, sir. I have, and the answer is that I would say that a prima facie case had been made.

QUESTION: In other words, if he'd been skiing in the Alps over the weekend, came back with a heart attack, the employer would have to prove that it wasn't job-related.

MR. GREEN: Not just job-related, but whether or not there was coverage in the Alps. The employer is going to do a number of things with such a claim.

Justice Powell, I think the employer would be quite competent to rebut such an assertion by a claim.

QUESTION: Did you say he would have to -- otherwise, his heart attack or his broken leg --

MR. GREEN: As I understand the decision in Del Vecchio, yes. As long as the Section 20 presumption proceeds in any claim, any proceeding under this law and covers any provision of a claim, then it can be rebutted by the most negative evidence, the most minute evidence, but it must be rebutted. And if the employer does nothing, then the presumption carries. Such has been the announcement of this Court in Del Vecchio.

QUESTION: If a legislative body enacted a provision relating to negligence actions or any other type of actions and created the presumption that you assert here,

do you think that might give rise to some due process questions?

MR. GREEN: It may very well, Mr. Chief Justice, in a negligence action; something outside the statutory framework and constraint of what --

QUESTION: Why is it different in your view from an ordinary negligence case, in this situation?

MR. GREEN: It is different here, Mr. Chief Justice, because Congress has given us, as this Court said in Del Vecchio -- we are constrained to work within the statutory framework; we cannot consider the common law questions that arise in such a fact setting. And that's why I would suggest, sir, that it would be different.

QUESTION: In other words, a legislative body, you are saying, could not superimpose this kind of a presumption on the common law claims of any kind.

MR. GREEN: I believe that Congress may very well have the authority to remove from a citizen certain common law rights, and as a matter of fact has done so in workmen's compensation statutes. But --

QUESTION: Then why doesn't the due process issue enter this case? Where it would carry us I don't know.

MR. GREEN: I'm sure that due process would enter the case, Mr. Chief Justice, but not as how I understood your first question, which would be that the presumptive

statutory requirements dictate the finding of the court and the court cannot impose common law concepts on --

QUESTION: May I ask a question. I take it that a proceeding for compensation is initiated by some form of claim, is that right?

MR. GREEN: Yes, sir.

QUESTION: And if that form of claim on its face alleges a compensable claim under the statute, is it your position that under the decision of the court of appeals, automatically then it falls to the employer to rebut the claim?

MR. GREEN: My position, Justice Brennan, would be that it does fall to the employer --

QUESTION: I just want to get this clear. Then I gather all that the employee has to do is to write out on the form a claim that falls within the statute, and then he has no further burden to prove anything. Is that right? He has the benefit of the presumption and he has to prove nothing else; everything then falls before the administrative law judge upon the employer to rebut. Is that it?

MR. GREEN: Yes, it does.

QUESTION: Mr. Green, would Congress require an employer to be an insuror?

MR. GREEN: Congress required the employer to

either be --

QUESTION: I said could they, could Congress --

MR. GREEN: Yes, I suspect Congress could.

QUESTION: You have no due process problem with that at all.

MR. GREEN: I do, but I suspect that Congress might pass such a law.

QUESTION: Well, would it be constitutional?

MR. GREEN: I would have problems with it, Justice Marshall.

QUESTION: Mr. Green, may I go back to the statute for a moment. Section 20 says that in any proceeding for the enforcement of a claim for compensation and so forth, that the presumption is that the claim comes within the provisions of the chapter. On page 80 of the appendix, which is claimant's exhibit 2, which I take it is the claim in this case, wherein which you gave notice to the company of the basis of your claim. The claim was that you were injured on November 19th -- your client was injured on November 19th while working at Walter Reed Hospital.

So the presumption applied to that claim. Was there ever a claim made that's consistent with the theory of the court of appeals to which the presumption would apply?

MR. GREEN: The distinction is that once a claim is asserted under Section 2(2), all of the definition of

injury is encompassed within the nature of the claim. In this specific case, the administrative law judge focused on the occurrence of incident; from disputed evidence disbelieved that, but observed that an accident --

QUESTION: Right. He focused on the claim made on page 80 of the appendix.

MR. GREEN: Yes. But observed that an accident had occurred. What I am suggesting, Justice Stevens, is that the filing of this form and the statements made thereon in no way limits, we would urge, in no way limits the definition of injury under statute.

QUESTION: It may not definition of injury, but the presumption doesn't apply to injuries; it applies to claims, it applies to one claim in the statute. And the only claim I'm aware of in the record is one that he had a whole trial on and found was unsupportable. He had the benefit of the presumption at the trial on whether or not there was an injury of the kind that your client testified to.

MR. GREEN: No, sir, we did not have the benefit of the presumption. The administrative law judge indicated in his decision that Section 28 does not attach to the nature of injury, in his opinion, but attached to whether or not the law presumes a humanitarian purpose.

It is our position that the administrative law

judge misunderstood the definition of the Section 28 presumption --

QUESTION: You're not asking for a retrial on the question of whether he was really injured on November 19th, are you?

MR. GREEN: No, sir. I'm asking for the entire matter of injury to be reconsidered by the judge within Section 28 presumption that he do it.

QUESTION: It seems to me you're asking for a trial of a different claim than the one you asserted before the hearing.

MR. GREEN: No, sir. We asserted a claim that Rile was hurt in the course of his employment. We alleged a specific --

QUESTION: Specifically at Walter Reed Hospital.

MR. GREEN: Yes, sir. We alleged a specific occurrence at Walter Reed Hospital. From disputed evidence, the administrative law judge chose not to believe the occurrence of that incident. He also notes, Justice Stevens, that there was in fact an injury to Riley and finds uncontested in the record that there was such injury, reviews the entire hospitalization for myocardial infarction, the discharge for cervical osteo-arthritis and then doesn't comment on it.

What the court of appeals is asking him to do, not

anticipating what he's going to find; he may very well find no injury -- just answer that question within Section 2(2). Give us an entire administrative record so that we will know what you are saying.

QUESTION: It seems to me that that means that in any hearing if facts develop that show that an employee was injured in some way outside the claim, just show that he had a sore foot or something that nobody mentioned, then they have to go ahead and make a finding as to whether that was employment related.

MR. GREEN: In the specific instances of this action, any work-related employment-bred injury or occurrence that is found should be addressed by the administrative judge. He found it, he makes note of it in his findings, but never addresses it.

QUESTION: Well, let me see, Mr. Green, what he said in the claim -- the accident occured when I was lifting ductwork weighing approximately 500 pounds and felt sharp pain in the neck. And the administrative law judge did not believe the testimony in that respect.

MR. GREEN: That's correct.

QUESTION: Therefore, that element of the claim -- and that's the only accident that's alleged in the claim, is it not?

MR. GREEN: That is the incident that is alleged.

The definition --

QUESTION: Now then, are you say but nevertheless, there was evidence to indicate that there was another injury, not one related to lifting ductwork weighing approximately 500 pounds?

MR. GREEN: Justice Brennan, I am saying that, and I'm saying that the administrative law judge found that to be true, found that to be uncontested and never addressed it. And all this court was doing --

QUESTION: You mean never addressed it, never determined whether in fact that was an injury? Is that it?

MR. GREEN: Yes, sir.

QUESTION: So you say the claim ought to be conformed to the proof. Is that essentially what you're saying? Because surely, there's never been a claim filed with respect to the injury that is now that the court of appeals found.

MR. GREEN: Justice White, we are suggesting that the claim provision of the law encompasses that finding by the administrative law judge. The distinction is that he concentrates on the incident and not the injury, and because he confuses those definitions of no incident, he does not then address what else he finds, which is the fact of injury which he finds.

QUESTION: What is a claim in the technical sense

of the word?

MR. GREEN: As I would understand it, Justice Rehnquist, a claim is an assertion that an injury comes within the coverage of the Longshoremen's Act, that it is an injury arising in and out of the course of employment, and that such injury is occasioned by such employment relatedness.

QUESTION: Did it specify what kind of injury it was?

MR. GREEN: No, sir. The claim does not, sir.

QUESTION: Well, your letter, which is Exhibit A, I gather, signed by you, Mr. Green, addressed the office of the Workmen's Compensation Programs, identified what you were filing as original and two copies of "our claim form, to be filed on behalf of our client Riley", and your claim form, I gather, was Exhibit 2, isn't that right?

MR. GREEN: That's correct, Justice Brennan.

QUESTION: And there's no reference anywhere to anything except this accident lifting ductwork weighing approximately 500 pounds.

MR. GREEN: That's correct, Justice Brennan, there is no such reference because that is the theory upon which we proceeded. That an incident --

QUESTION: Well, who put in all this other evidence about other causation for the injury?

MR. GREEN: It was a matter of the testimony in the case, and the judge so found that there was such injury at home from cervical osteo-arthritis found in this matter of fact. And then he never addressed whether or not that was related to the employment situation.

QUESTION: Are you telling us then that the court of appeals treated the claim that was filed, not just that which is Exhibit 2, but really to find out what the claimed filed was, looked at the complete record before the administrative law judge?

MR. GREEN: It did, Justice Brennan, and put that record in juxtaposition to the administrative proceeding.

QUESTION: Has there ever been any other claim filed up until this moment?

MR. GREEN: No, sir, there is none because under the requirements of the statute you do not file another claim or amend the claim under Section 922 until there is a final proceeding or a finding by a court.

QUESTION: So you did not.

MR. GREEN: No, sir, nor can we.

QUESTION: Well, I'm still troubled as to how we can uphold that claim.

MR. GREEN: You do not. Nor did the court of appeals. They did not uphold that claim. They agreed --

QUESTION: Well, if your claim is not upheld, do

you or do you not lose?

MR. GREEN: If our claim is not upheld, we do not win, Justice Marshall. However, our claim in this --

QUESTION: Well then how do you win?

MR. GREEN: Our claim in this instance is more than the incident at work. And all we are suggesting is what the court of appeals did; that by finding -- and they did not disturb the finding -- that there was no incident at work. What they said is you've also found evidence of injury, you find it uncontradicted in the record, and you don't tell us whether or not that is employment bred, and you are required to do that by the Section 28 presumption. When they read the judge's decision, they find that he did not even apply the Section 28 presumption to the facts that he found.

QUESTION: How do you frame the claim that was upheld?

MR. GREEN: There was no claim --

QUESTION: In words, how do you frame it?

MR. GREEN: Justice Marshall, there has been no claim.

QUESTION: I have great difficulty in affirming something that I don't know what I'm affirming. That's why you have the pleadings in common law, and you have pleadings here, don't you? You had to file a claim.

MR. GREEN: Not in the sense of common law --

QUESTION: Well, why did you file a claim?

MR. GREEN: Because the man asserted an injury at work.

QUESTION: To get a case started. Because you couldn't move without that claim, could you?

MR. GREEN: That's correct, sir.

QUESTION: And I would be unfair in saying you couldn't win without that claim. That would be wrong, wouldn't it?

MR. GREEN: No, sir, I think I need a claim to win. But all we are suggesting here is that the claim is more than the incident at work. The statute requires more than that, and required the administrative law judge to answer everything he found. He finds two problems, the fact of injury and an incident of injury; finding both only addresses the incident of injury and not the fact of injury in the course of employment.

QUESTION: It may be, Mr. Green, that it might help you to note that no question like this was put in the petition for certiorari. But the court of appeals' judgment was not attacked on this ground. Of course, we can notice clean air coming from that federal court, I suppose.

MR. GREEN: Justice White, I understand exactly what you're saying. I'm suggesting that the court of

appeals does not, in any way, suggest what the finding of the administrative law judge should be; it only requires the administrative judge to answer the question, which may very well be in the negative. But it does not anticipate his finding.

QUESTION: It is a new claim. Otherwise, you wouldn't have to have a new trial. This certainly is a different claim than you filed before.

MR. GREEN: It is not a different claim, Justice White, in the sense of claim under the act.

QUESTION: No one at the trial said well, this man has arthritis; is it work related. There wasn't a question at all.

MR. GREEN: But the judge found and --

QUESTION: That he had arthritis.

MR. GREEN: Yes.

QUESTION: All right. But no one addressed whether it was work related.

QUESTION: I gather that was a happy accident, then, wasn't it, Mr. Green, for your client that the administrative law judge should have taken this evidence on not as to the weightlifing but all this other stuff and spread it on the record. That, you're suggesting, required the court of appeals then to say well, the presumption applies to that record made before the administrative law

judge, and the administrative law judge didn't complete his job, so send it back to do it.

MR. GREEN: Yes, Justice Brennan, that's correct.

QUESTION: And yet, if none of that had gotten on in the record before the administrative law judge, nothing except the evidence as to the lifting of the weights, you wouldn't be here, would you?

MR. GREEN: That's correct, sir. I would have to be back with a Section 922 request for modification of the original hearing as opposed to going forward through the courts of appeals to have this issue resolved. It could have been done administratively under Section 922.

QUESTION: Incidentally, has the court of appeals addressed this issue before this case?

MR. GREEN: The court of appeals? Yes. All courts of appeals, in contra-distinction to my brother, have addressed this issue, and I would hold again, in contra-distinction to my brother, that all courts of appeals have answered the question in the affirmative, as the District of Columbia Court of Appeals has done so.

QUESTION: Is that on the ground that the statutes deliberately construed in favor of --

MR. GREEN: Among others, yes, Justice Brennan. And I would suggest that there is a unanimity among the circuits, as opposed to other assertions in this record. I

believe the case law, of course, will speak for itself as to their positions on Section 928 presumption.

All we are asking for is the administrative law judge to answer the question under 920. If he answers the question either affirmatively or negatively, the case has come to rest. That is the request that we have made. As we said at the opening, the question before this Court today is not whether Ralph Riley is entitled to workmen's compensation, but whether or not his claim shall be afforded the scrutiny that's required.

QUESTION: If you hadn't expanded the record as it was expanded, and therefore on the finding against you on the weightlifting you'd have had no claim, could you have filed a new claim later?

MR. GREEN: Yes, sir, we could have.

QUESTION: Setting up this second ground.

MR. GREEN: We could have filed both a new claim and also a request for modification under Section 922. The law contemplates the filing of modification of awards and claims, both for the benefit of employer and insuror, should situations change, and also for the claimant. It does not have the same finality as the common law.

QUESTION: Does it have the same sweep as the -- as you would have in a common law place to move to amend the pleadings to conform with the proof?

MR. GREEN: It certainly is analogous to that, Justice Burger, it most certainly is analogous to that. But again, I am hampered from saying that it does because of what this Court has announced in Del Vecchio; that we can't speak to the analogy of the common law; we must speak to what the statute requires, we must follow that statute. And as Justice Roberts said, this is what we must do.

I would urge this Court to do the same. I would respectfully suggest that there has been no swamping of claims by the D.C. Circuit or any other circuit since the filing of this. The so-called effect of the Riley decision has not been seen anywhere. Indeed, there are no additional claims for the common cold that we could find, nor have any been appended to this record.

We would urge the Supreme Court to consider that the Section 28 presumption has not been applied to the benefit of the claimant, or more importantly, the benefit of the administrative proceeding, so that this record would have answered all questions before it when they were raised and found by that administrative law judge.

Respectfully, we would suggest and we would urge that the court of appeals should be affirmed.

CHIEF JUSTICE BURGER: You may have two minutes for rebuttal.

ORAL ARGUMENT OF RICHARD W. GALIHER, JR., ESQ.

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. GALIHER: Thank you, Mr. Chief Justice. First of all, there was a question from one of the Justices about an occupational disease claim. I have pointed out in my brief that there was no claim for occupational disease made here, and the statute separately defines occupational disease.

Secondly, with respect to the due process question of Mr. Chief Justice, we do feel that there is a due process question here with the operation of the presumption, because we do feel that this is taking property based upon a legal presumption, and the legal presumption that the D.C. Circuit made was that there could be another claim encompassed within this injury; another claim which we had no opportunity to defend and no opportunity to rebut.

QUESTION: Mr. Galiher, on that precise point, your opponent says, if I understand him correctly, that instead of appealing after they lost on their first theory, they could have, in effect, filed a second alternative claim saying well, it really was an aggravation of arthritis rather than an accident at the hospital.

What is your view of the law on their right to do something of that nature?

MR. GALIHER: I think that's incorrect. In this

act there is a provision that you must file a claim within one year of the date of injury. The only loophole to that is that the employer must file a report of injury, but within one year after the employer has filed the report required by the statute, then the claim is barred by limitations.

In this particular instance, the employer's report is part of the record; we did file it, so that Mr. Green could not come back, except within this very proceeding, to file a new claim.

Now, on the question of Section 22 of the act, it specifically talks about that there must be a mistake of fact or a change of conditions. This issue was not previously raised to this court. However, we contend that the administrative law judge made no mistake of fact here; he decided the case as presented to him, and that the D.C. Circuit changed it around.

I have nothing else.

QUESTION: But you didn't put that question in your petition, did you?

MR. GALIHER: The question --

QUESTION: Whether or not the court of appeals properly looked for and found another injury, other than what had been tried out before the administrative law judge.

MR. GALIHER: I do feel, Mr. Justice, that it was

placed in there. The implications of the decision were fully argued, and this implication was one of them.

QUESTION: I don't see that question in your Petition for Certiorari, though.

MR. GALIHER: Well, the question is by reference to the definition of injury. The statutory definition of injury as to whether or not this is in the course of employment.

CHIEF JUSTICE BURGER: Very well, thank you, gentlemen, the case is submitted.

(Whereupon, at 11:00 o'clock a.m., the argument in the above-entitled matter was concluded.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., et al., vs. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, et al.

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

BY Suzanne Young