

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1891

TITLE MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL.,
Petitioners v. DIRECTOR, OFFICE OF WORKERS'
COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,
ET AL.
PLACE Washington, D. C.

DATE March 21, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

MORRISON-KNUDSEN CONSTRUCTION
COMPANY, ET AL.,

Petitioners

v.

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

No. 81-1891

Washington, D.C.

Monday, March 21, 1983

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

ARTHUR LARSON, ESQ., Durham, North Carolina; on behalf of the
Petitioners.

ALAN I. HOROWITZ, ESQ., Office of the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
Respondent Director supporting Petitioners.

GEORGE STEPHEN LEONARD, Alexandria, Virginia; on behalf of the
Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Larson, I think you may proceed whenever you are ready now.

ORAL ARGUMENT OF ARTHUR LARSON, ESQ.

ON BEHALF OF THE PETITIONERS

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

The question in this case is under the Longshoremen's Compensation Act should employer contributions into union trust funds for health and welfare, pensions and training for the first time in history be included in the concept of the individual's average weekly wage for purposes of calculating his benefits, adding on the average of 30% to 40% to those benefits which now stand at 88% of take-home pay? The legal issue, of course, is the intent of Congress. Unfortunately, all the three major indicators of that intent, the clear language of the statute, the legislative history of the Act and of its amendments, and above all, the fact that Congress could not possibly have intended an interpretation of the Act that would severely damage the functioning of the Act and its ability to carry out its purposes.

First, I would like to say just a word about why this case came as such a bombshell to the compensation community. Workers' compensation has been with us for 70 years and the Longshoremen's Act for 55. During that time literally tens of millions of cases have been disposed of on the understanding that

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1 wages meant wages along with traditional non-cash wage sub-
2 stitutes such as board and lodging. Now, suddenly we are being
3 told that all those thousands of judges and administrators and
4 lawyers and employers and employees and unions were wrong all
5 along in what they thought wage included and overnight we are
6 supposed to accept a new meaning of wage which, believe it or
7 not, will raise benefits above pre-injury take-home pay and all
8 this by judicial, not legislative action.

9 QUESTION: Mr. Larson, would you tell us what
10 happened to the legislation that had been introduced in the
11 Congress, I guess, to overrule the decision below?

12 MR. LARSON: Yes. There is a bill pending in Congress
13 right now -- There was a bill last year which passed the Senate.
14 The bill pending in Congress now has a small clause in there
15 which in effect would undo the effect of this for the future.

16 QUESTION: Did the House take any action on the bill?

17 MR. LARSON: So far this year I don't think anything
18 has happened.

19 QUESTION: And last year the House took no action?

20 MR. LARSON: No, they took no action last year.

21 Now, of course, there are two reasons at least why
22 this doesn't really affect this decision very much. The first
23 is, as we all know, it is a long distance between introducing
24 a bill, especially on workers' compensation, and getting it
25 passed.

1 But, the other is that even if it were passed,
2 enormous damage would be done just in cases now pending. A
3 lot of them are hanging fire right at the moment. But, even
4 more seriously, under the very permissive reopening provisions
5 of the Longshoremen's Act, tens of thousands of cases would be
6 reopened on the theory that there was a mistake of fact in the
7 determination of the benefits. So, most of the damaging
8 consequences, as we have outlined in our brief, would happen.

9 QUESTION: Assuming you are correct, what happens to
10 things like medical insurance premiums that might be paid to
11 a fund by the employer in the future?

12 MR. LARSON: There are, of course, all kinds of
13 benefits under this plan and the various others that occur
14 and under some plans the medical payments go on during dis-
15 ability and others they don't. Of course, in the case of
16 death cases, they would not go on.

17 But, what we keep coming back to in this case is,
18 of course, the intent of Congress and the intent of Congress
19 is very well expressed in this case in the short but very
20 specific definition we have been provided which is that wages
21 means the money rate at which the service rendered is recom-
22 pensed under the contract of hire in force at the time of
23 injury, including the reasonable value of board, room, housing,
24 lodging, or similar advantage received from the employer and
25 gratuities received in the course of employment from others

1 than the employer.

2 Now, the simplest way for the Court to dispose of
3 this --

4 QUESTION: Of course, that is the problem. So, if
5 you are right, how do we distinguish in the future between
6 payments such as rent and board and, on the other hand, medical
7 insurance? I mean, what is the line?

8 MR. LARSON: The principal distinction -- This is the
9 one that has always controlled these cases of so-called similar
10 advantage. There are two things: Similar advantage means, if
11 it means anything, having a clear and present cash value now
12 and also being paid directly by the employer to the employee.
13 Those are the distinctions under which -- For example, vacation
14 pay is included and overtime and under certain circumstances
15 transportation.

16 Well, obviously, the fund payments aren't the money
17 rate. That, in the common term, is the cents per hours paid
18 to the employee. It certainly isn't board, it isn't lodging,
19 it isn't housing, and, as I have just indicated, it isn't
20 similar advantage.

21 Now, there is another way this Court --

22 QUESTION: Mr. Larson, I suppose that some payments
23 by an employer of board or lodging might not be paid directly
24 to the employee at all.

25 MR. LARSON: Well, I think in almost every case it

1 is either furnished directly or the money is furnished directly,
2 but it has a present cash value and this is a traditional thing
3 and it is written, of course, -- It is written right into the
4 statute so it can't be controversial.

5 QUESTION: Would certain medical benefits have a
6 present cash value then?

7 MR. LARSON: They might, yes, but they are not paid
8 by the employer to the employee. That is one of the difficulties.
9 And, they are not written into the statute as part of the
10 definition which makes a crucial distinction.

11 I think another -- A simply way the Court could dispose
12 of this case would be by direct application of the rationale
13 of Potomac Electric Power Company against the Director decided
14 by this Court just two terms ago. There this Court held that
15 since the Longshoremen's Act was copied verbatim from the New
16 York one and since it employed terms which had accepted meaning
17 in 1927 when the Longshoremen's Act was passed, Congress should
18 be deemed to have intended the meaning that prevailed at that
19 time.

20 Now, to carry out over to the present situation, it
21 is only necessary to observe that when the Longshoremen's Act
22 was first passed the meaning of wages that we are talking
23 about was not only dominant, which is the word in Pepco, it
24 was absolutely universal.

25 But, now I think we can carry this down to the

1 present more cogently by applying the Pepco principle to the
2 1972 amendments which were in effect, the re-enactment -- they
3 were such massive amendments -- particularly because the central
4 concern of the 1972 amendments was exactly what we are talking
5 about here, the benefit level.

6 The remedy chosen by Congress to deal with that bene-
7 fit level problem was to make the ceiling flexible and, indeed,
8 the benefits went from \$70 a week to \$500.

9 Now, as you recall, the heart of the 1972 amendments
10 was a sort of trade off between the longshoreman giving up
11 his rights of unseaworthiness against a ship in exchange for a
12 dramatic increase in compensation benefits.

13 Now, the point, for present purposes, is that in
14 striking this balance everybody had to start from a common
15 understanding of what wages included. If it had ever occurred
16 to anybody that a new meaning of wage was going to come along
17 that would in itself raise the benefits 30% to 40%, can anybody
18 suppose that this same balance would have been struck.

19 This was not an oversight. By 1972, these fund
20 contributions into union plans were a very conspicuous feature
21 of the labor sea and Congress had just a few years before had
22 to deal with it in connection with the Davis-Bacon Act which
23 has a sort of parallel history to the Longshoremen's Act and
24 it dealt with it by simply writing a detailed provision into
25 the Davis-Bacon Act spelling out that union fund contributions

1 are included in the concept of wage.

2 Now, in '72, Congress, in connection with the
3 Longshoremen's Act, theoretically could have done the same
4 thing.

5 QUESTION: Mr. Larson?

6 MR. LARSON: Yes.

7 QUESTION: When was the Davis-Bacon Act amended to
8 include --

9 MR. LARSON: '64.

10 QUESTION: '64?

11 MR. LARSON: Yes.

12 Congress could have theoretically done this, but in
13 the thousand pages of testimony, no one even thought of sug-
14 gesting it, not because they weren't aware of it, but it just
15 didn't occur to anybody as being even remotely practical and there
16 were a lot of reasons for that, but I think the most obvious
17 is that while the Davis-Bacon Act is a collective figure for
18 a whole area, under the Longshoremen's Act you have to determine
19 an individualized figure for every single employee and that
20 would have been administratively absolutely impossible.

21 Now, as to the third and final part of the congres-
22 sional intent, I am going to take again as my text a passage
23 from Pepco in which this Court said it is not to be lightly
24 assumed that Congress intended the Act to produce incongruous
25 results. Well, the decision below would produce results that

1 are not only incongruous but severely damaging to the entire
2 functioning of the system.

3 The first most serious damage that I would briefly
4 mention and that is that benefits would actually go above pre-
5 injury take-home pay. Now, this is the ultimate nightmare of
6 workers' compensation or any social insurance system.

7 A couple of quick ways to demonstrate this --

8 QUESTION: May I ask you a question, Mr. Larson?
9 When you are making that argument, would the benefits go above --
10 you say above take-home pay.

11 MR. LARSON: Take-home pay.

12 QUESTION: But not above gross pay?

13 MR. LARSON: Well, they would even do that in some
14 cases, but I am making the mildest --

15 QUESTION: And clearly they wouldn't go above gross
16 pay if you included the fringe benefits as part of gross pay?

17 MR. LARSON: In many cases they would go above gross
18 pay. In high salary brackets, they definitely would.

19 QUESTION: Even if you include in gross pay the
20 payments to the pension funds and the like?

21 MR. LARSON: Yes. They would definitely -- There
22 are elaborate calculations in some of our briefs, full
23 tables of what would happen. And, since the disparity as to
24 take-home pay obviously has a lot to do with taxes, the higher
25 you go in salary brackets, the --

1 QUESTION: If that is true, if it is higher than gross
2 pay even including fringe benefits, I suppose it is possible,
3 even under your view, that benefits may --If you define wages
4 the way you argue, benefits may in some cases exceed wages.

5 MR. LARSON: They do now, yes.

6 QUESTION: They do now?

7 MR. LARSON: They do now, yes.

8 QUESTION: So there would be no difference under --

9 MR. LARSON: There would be a great difference in
10 the amount by which they exceeded.

11 QUESTION: But, the mere fact that they exceed is not
12 a critical difference.

13 MR. LARSON: Well, the Comptroller General pointed
14 this out in his report a couple of years ago and I am simply
15 quoting him when he says that in some cases it is at least
16 theoretically possible to show that the present thing could go
17 above.

18 But, what would happen under this decision below
19 is practically all of the benefits, and certainly on the
20 average, would go above prior take-home pay.

21 Take the Atlantic and Gulf contract for example.
22 Under the Atlantic and Gulf contract, which is typical of the
23 longshoremen's contracts, the take home pay for a year averages
24 \$20,200. The compensation benefit payable on that is \$24,100
25 a year.

1 QUESTION: Under the decision of the Court of Appeals?

2 MR. LARSON: Under the decision of the court below.

3 Now, needless to say, the impact --

4 QUESTION: Well, in that example, \$20,200 is the take-
5 home pay and --

6 MR. LARSON: Twenty thousand two hundred is the take-
7 home pay.

8 QUESTION: What would the comparable figure be if
9 you included the amounts paid to the pension funds on behalf
10 of that employee?

11 MR. LARSON: That -- I can give you the exact figures.
12 The amount paid into the pension fund, the contributions, on a
13 wage of \$12.80 was \$4.59.

14 QUESTION: Well, what is the figure comparable to
15 the \$20,200 figure? Is it more than \$4,000? I think it is.
16 So, you actually have an example that doesn't support your case.

17 MR. LARSON: Well, the --

18 QUESTION: You are really comparing oranges with
19 apples when you include the payments for one purpose but not
20 for the other.

21 MR. LARSON: I am including them all, of course.

22 QUESTION: The \$20,200 figures, does that include
23 the amounts paid into the pension fund?

24 MR. LARSON: No, no, it doesn't.

25 QUESTION: Whereas the \$24,000 does?

1 MR. LARSON: But, you see, what we are concerned with
2 is in the last amounts of this incentive to the worker and what
3 he sees obviously is if he works he gets \$20,200 and if he
4 doesn't work he gets \$24,100 and no amount of talk about the
5 employee's value of what goes into the fund will make much
6 difference to him, because, you see, there is not a direct pipe-
7 line of that fund contribution from the employer into the pockets
8 of the employee. It goes into a trust fund and he may or may
9 not some day profit by it.

10 QUESTION: You could have made a similar argument in
11 1927 if the employee had a very low take-home pay, but got
12 free room and board and a lot of tips.

13 MR. LARSON: Well, they wrote this into the Act
14 definitely because room and board -- And, of course, they had
15 to write tips in.

16 QUESTION: Of course, the employee in 1927 saw a
17 right with his monthly paycheck the benefit of a rent payment
18 or a food payment. And, an employee today doesn't see on a
19 monthly basis the pension payment.

20 MR. LARSON: He doesn't see it as in many cases he
21 never will see it. There is a very indirect relation between
22 what goes into these funds and what comes out.

23 For example, in Mr. Hilyer's case, he didn't work
24 long enough to get anything. Some of the people who were
25 working side by side with him got credit for years and years.

1 No contributions were ever paid. That is the nature of the
2 plan.

3 QUESTION: Of course, it is hard to compare, Professor
4 Larson, this man because he will not be working any more, he is
5 dead, he is killed.

6 MR. LARSON: That is right. That is right.

7 Probably the most damaging --

8 QUESTION: You speak of massive -- I think that was
9 the word you used -- on the one side, but imposed death is
10 also rather massive.

11 MR. LARSON: I didn't hear that.

12 QUESTION: I say imposed death, being killed on the
13 job is also massive.

14 MR. LARSON: I want to say with all my heart that
15 nothing in the world can compensate people for the loss of a
16 husband and the Compensation Act never has pretended to do
17 anything like that. It doesn't even pay for pain and
18 suffering. It doesn't pay for loss of consortium. It doesn't
19 even pay all your wages back that you lose. It is a very
20 arbitrary and rough and ready scheme mainly designed so that
21 it will be virtually automatic and self-executing.

22 Less than a month ago this Court in the Lockheed case
23 put its finger right on it. It said the purpose of workers'
24 compensation is to pay benefits that are fixed and immediate
25 and without litigation.

1 Well, as for being fixed, they won't be fixed at all
2 because there is going to have to be an individual, tailor-made
3 calculation for each employee in relation to each employer as
4 to each fund, and some employers have ten of them, against the
5 backdrop of controversy about what kinds of benefits should go
6 in. We just have a small sample here. There are many, many
7 others. And, the worst controversy of all is how do you
8 evaluate all these assorted plans? Some are on a per-hour basis,
9 some are on a per-tonnage basis, some of them are on an arbitrary
10 actuarial basis in which the employee simply pays in whatever
11 is necessary.

12 So, far from being immediate, the benefits would be
13 delayed by years, and as for being without litigation, of course,
14 litigation will be enormously increased.

15 There is another very direct way in which the worker
16 is going to get hurt. Let me just say here I think everybody
17 realizes that this whole system of compensation is all about
18 the worker. It is not about insurance companies, it is not
19 about employers, it is about the worker. And, if the system
20 gets undermined, the worker and his dependents are going to be
21 the ones that ultimately lose and this is one of the ways
22 they are going to lose, by the delay in their payments for
23 years, whereas now, at least so far as this item is concerned,
24 they are virtually automatic.

25 But, there is another way that could even be more

1 seriously damaging to particular employees. In New York Harbor,
2 for example, the compensation premium is \$84 to \$87 per hundred
3 of payroll. In some Canadian ports that are competitive, it is
4 \$3.00. Three to four thousand jobs have already been lost from
5 New York Harbor to Canadian points.

6 Now, that may partially explain the fact that neither
7 the International Longshoremen's Association nor any other
8 union of longshoremen has joined in this litigation.

9 In the District of Columbia, about 15,000 jobs were
10 lost in six years largely for the same reasons which may explain
11 the fact while the AFL-CIO District Council filed a brief in
12 a petition for certiorari, they have not filed a brief on the
13 matter.

14 CHIEF JUSTICE BURGER: Your time has expired now,
15 Mr. Larson.

16 MR. LARSON: Thank you.

17 CHIEF JUSTICE BURGER: Mr. Horowitz?

18 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

19 ON BEHALF OF RESPONDENT DIRECTOR SUPPORTING PETITIONERS

20 MR. HOROWITZ: Thank you, Mr. Chief Justice, and may
21 it please the Court:

22 I would like to discuss what I believe is the under-
23 lying premise of the Respondent's contention in this case and
24 that is looking at wages contemporaneously any common sense
25 notion of wages must include the contributions and, therefore,

1 whatever the intent of Congress was in 1927, the statute today
2 must be construed to cover them.

3 This premise is false. In fact, common sense does
4 not dictate that these contributions must be covered and that
5 is particularly true in the workers' compensation context.
6 Such contributions are generally not treated as wages in other
7 contexts and they have never been so treated under the Long-
8 shoremen's Act. This is so, because the contributions, even
9 as viewed in the abstract, are quite different from ordinary
10 wages. They are paid to union administered funds and they
11 benefit particular employees only in an uncertain and indirect
12 way.

13 Moreover and more important, in the specific workers'
14 compensation context, they are unlike wages in that they
15 generally do not represent income loss to the employees'
16 beneficiaries by reason of his disability or death and, there-
17 fore, income that must be made up by the longshoremen's benefit
18 in order to pay expenses that the widow will have to pay later.

19 I would like to speak first to Justice O'Connor's
20 question earlier about whether there is really value to some
21 of these things that must be replaced. One thing that is
22 important to note is that the Court of Appeals itself never
23 attempted to value these benefits. It is true that something
24 like medical insurance does have a value to the worker and to
25 his family, but the Court of Appeals never made any effort to

1 assess that value. It just arbitrarily picked these contri-
2 butions that are made by the employer to these funds. These
3 contribtuions are not made to the benefit of a particular
4 employee. They are just made to the funds in general.

5 Now, the fund invests those contributions in a way
6 that does rebound to the benefits, to the benefit of employees
7 as a whole but not in a way that rebounds the benefit of a
8 particular employee.

9 I think that can be seen by looking at the pension
10 plan involved here. Employees make contributions or -- Excuse
11 me, the employer makes contributions for every hour worked by
12 and employee, but an employee does not necessarily receive
13 pension credit for each of those hours. There is a certain
14 minimum level he must reach before any pension credits are
15 accrued. He may receive the same pension credit for different
16 levels of hours that he works and unless he vests, which in
17 this case, I believe, requires ten years of service, something
18 Mr. Hilyer never had, he does not ultimately receive any
19 pension.

20 Now, as far as -- in the specific longshoremen's
21 context, whether it makes sense to consider these contributions
22 within the wage base, I think it is important to look at the
23 question of whether there is going to be a double recovery
24 by including these benefits in the wage base. The fact that
25 they may have value to the employee at the time he is working

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17 ~~he vests~~, which in this case, I believe, requires ten years
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21 context whether it makes sense to consider these contributions
22 within the wage base, I think it is important to look at the
23 question of whether there is going to be a double recovery
24 by including these benefits in the wage base. The fact that
25 they may have value to the employee at the time he is working

1 for the employer does not necessarily mean that his beneficiaries
2 need money to cover those expenses once he has become disabled
3 or died.

4 I think it would be instructive to look at each of
5 the benefits on their own in assessing this. Life insurance
6 is the most obvious example. It is true that Mr. Hilyer received
7 a benefit when the union-administered funds were used to purchase
8 a life insurance policy on his life. But, now that he has
9 passed away, there is certainly no need for his beneficiary here
10 to receive a benefit to cover the expenses of purchasing such
11 a policy on her own. There is no need to have a policy on Mr.
12 Hilyer's life. In fact, she has already received the benefits
13 of that policy which was paid out when he died.

14 The same is true of other types of benefits that
15 are purchased by these employer contributions through the union-
16 administered funds. Disability insurance, unemployment insurance,
17 there is certainly no need for Mrs. Hilyer to go out and
18 purchase on her own. The training fund that is specifically
19 referred to in the Court of Appeals' opinion is certainly not
20 for the benefit of Mrs. Hilyer. Indeed, it seems to be not for the
21 benefit of particular employees at all.

22 The same is true of pensions. And, I would like to
23 focus on pensions to some extent, because the Court of Appeals
24 specifically mentioned pensions as something that Mrs. Hilyer
25 would have to go out and purchase on her own later.

1 The purpose of a pension fund is to provide for the
2 replacement of income upon retirement. Now, the need to receive
3 these pension payments is triggered by a specific event,
4 retirement or the ending of a person's employment. That has
5 already happened in this case. Mr. Hilyer is not going to
6 retire in the future and the death benefit that he received
7 under the Longshoremen's Act begins upon his death and will
8 continue up through the period that he would have been working
9 and beyond the period when he would have retired. So, in that
10 sense, the death benefit itself is its own pension. So, there
11 is no reason for Mrs. Hilyer to go out now and invest in an
12 annuity or something like that to provide a pension. The
13 Longshoremen's Act has already provided that pension for her.

14 So, for her to receive an additional benefit by
15 including the pension contributions in her wage base is nothing
16 more than a double recovery.

17 QUESTION: Mr. Horowitz, the Director has switched
18 sides in this case, hasn't he?

19 MR. HOROWITZ: Well, the Director --

20 QUESTION: Do you have any comment on that?

21 MR. HOROWITZ: The Director -- Well, we mention that
22 in our brief. The Director took a different litigating position
23 in the Court of Appeals. I think I should say though that the
24 administrative practice under this Act has always been con-
25 sistent. It dates back to well before 1968 when this

1 memorandum was written. These contributions have never been
2 included in the wage base by employers, by claimants, or by
3 the agency.

4 QUESTION: He just got out of line?

5 MR. HOROWITZ: Pardon me?

6 QUESTION: He just got out of line in the Court of
7 Appeals?

8 MR. HOROWITZ: Well, the decision was made to take
9 this position in the Court of Appeals. Probably there wasn't
10 adequate consultation at the time, but since it has been
11 rethought --

12 QUESTION: Who represented him in the Court of
13 Appeals?

14 MR. HOROWITZ: Who represented the Director?

15 QUESTION: Yes.

16 MR. HOROWITZ: The Department of Labor, I believe.

17 I would like to speak to Justice O'Connor's question
18 about whether rent payments, which are specifically authorized
19 by the statute should perhaps, under the theory propounded
20 by Petitioner, really ought not be considered in the wage base
21 either if they are paid, say, directly to the apartment building
22 rather than the employee. I think there is a big difference
23 between that situation, where there is essentially a shortcut
24 taken in the payment, rather than paying the money to the
25 employee who then passes it on to the apartment building, the

1 money is paid directly to the apartment building. That is
2 nothing more than a shortcut, but what we have here is a detour
3 and a very long and uncertain detour. The money is not paid
4 directly to the employee. It is paid to these funds. But, as
5 we explained in our brief, the funds are not simply a channel
6 like the Court of Appeals said, for the money to be passed on
7 to the employees.

8 QUESTION: How about the medical benefits for the
9 family?

10 MR. HOROWITZ: Well, in a case like this where the
11 employee has died and if the union had given him an insurance
12 policy to cover the medical benefits for his entire family,
13 that probably is an expense that the beneficiaries would have
14 to pick up afterwards. In a disability case I am not sure
15 that would be so because these insurance policies often
16 continue for disabled employees.

17 I think my answer to that question has to be that
18 you have to look at the Act as a whole and at these benefits
19 as a whole. There is no way under the statutory definition
20 really to distinguish between life insurance, medical insurance,
21 training funds, et cetera, et cetera.

22 QUESTION: I guess the question is whether it is a
23 similar advantage. Now, how would you treat that to the extent
24 that it would go to the family for their medical care?

25 MR. HOROWITZ: Well, I don't think it is a similar

1 advantage for many of the reasons specified. The money is not
2 paid directly, the benefits received by the employee are very
3 uncertain.

4 What I would say is that it does make some economic
5 sense for medical insurance benefits to be included in the wage
6 base as I think it does not make economic sense for pension
7 and life insurance benefits.

8 QUESTION: How should we treat it then?

9 MR. HOROWITZ: Well, I think there has to be a general
10 rule for the totality of cases. And, if the question is whether
11 there is a slight under-recovery by the claimant because in
12 some cases there may be medical insurance that she perhaps
13 should get credit for or whether there is going to be a very
14 significant under-recovery because a lot of fringe benefits
15 are going to be lumped in that make no economic sense. I think
16 the Court has to follow, I think, what is the best reading of
17 the statutory definition and not include these benefits.

18 Now, the fact that there is some need to pay for
19 medical insurance may be something that Congress took into
20 account in setting the percentages of wages that the employees
21 are actually going to receive for benefits.

22 I would also like to note that in numerous other
23 contexts --

24 CHIEF JUSTICE BURGER: Your time has expired now.

25 Mr. Leonard?

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1 ORAL ARGUMENT OF GEORGE STEPHEN LEONARD, ESQ.

2 ON BEHALF OF THE RESPONDENT

3 MR. LEONARD: Mr. Chief Justice, and may it please
4 the Court:

5 The case we have before us has hardly been described
6 to you. We are talking about a death benefit case. We are
7 not talking about a compensation case. You have heard great
8 things about the Atlantic and Gulf contract which, of course,
9 has no place in the record. You have heard about tens of
10 millions of cases without one being named. You have heard of
11 tens of thousands of reopened cases which are about to happen
12 which aren't going to happen as far as we know, because, after
13 all, very few people have died.

14 Vacation pay and overtime was described to you as
15 coming within the field of similar advantage when, in fact, they
16 are perfectly ordinary pay. They are the money rates at which
17 the contract in effect at the time of the death takes place.

18 We have Exhibit Three in this case in the record. It
19 is a contract between the union that Hilyer belonged to and
20 the employers including this employer. It is, in fact, three
21 multi-employer trust plans. That is what we are talking about.
22 We are not talking about some indefinite cloud called fringe
23 benefits. We are not talking about compensation for disability,
24 and as I believe one of the gentlemen before me argued, we don't
25 want to encourage them not to come back to work. But, Hilyer

1 isn't about to come to work. He is in an entirely different
2 category. If this Court recalls the Rasmussen opinion, the
3 history of the '72 amendments was gone into in great detail to
4 show that the death benefit and compensation were two entirely
5 different things in the mind of Congress at the time they
6 passed --

7 QUESTION: Mr. Leonard, I didn't read the Court of
8 Appeals' opinion to suggest that it would treat the computations
9 differently in the case of death benefits than in the case of --

10 MR. LEONARD: No, they don't make the distinction in
11 the Court of Appeals, but as far as the record is concerned,
12 there is such a distinction; namely, it is a death benefit
13 under Section 9 of the Act.

14 QUESTION: The principle is exactly the same. I mean,
15 if we were to affirm, you would have exactly the same calcul-
16 lation for benefits for those who were injured.

17 MR. LEONARD: Well, let me put it this way. In one
18 case the employee gets it and in the other case the beneficiaries
19 or relics get it. That, to me, seems to be a significant legal
20 difference and that is what the statute provides. It may be
21 that the fact they are calculated in much the same way is the
22 overruling factor but we must remember, as in the Potomac case
23 which was cited to you, Congress has specifically provided for
24 the length of time that any disability may continue and that
25 isn't the case a death benefit.

1 QUESTION: But, I suppose the question under the
2 statute -- you are dealing with a statute -- is whether these
3 contributions to the funds constitute a "similar advantage"
4 under the statutory language.

5 MR. LEONARD: No. May I -- There is every effort on
6 the Petitioners' side to make it appear that it comes under
7 the similar advantage language. Actually what the statute
8 says in plain terms is that it is the money rates at which the
9 employment is compensation, is recompensed, I believe, is the
10 actual word used by the statute. It is every form of recompense.
11 There is nothing about the employee having to receive it. He
12 has to receive a similar advantage from the employer, but he
13 doesn't have to receive the money rates.

14 QUESTION: Mr. Leonard, what if the contract in this
15 case had provided, in addition to the things it does provide
16 for, that the employer would contribute five cents an hour
17 for each worker to a fund to build a gymnasium for the workers
18 on his property? Would you say that would be --

19 MR. LEONARD: The answer is, yes, they could because,
20 number one, in the case that you decided in January of this
21 year, the Bowen case, you held that a negotiated contract such
22 as this one was considerably superior to the old employment
23 contract. In effect, what you were saying there was that this
24 is part of modern labor practice and it is.

25 QUESTION: What case was that?

1 MR. LEONARD: That is the Bowen case which you decided
2 on January 11, I believe.

3 QUESTION: Who is the other party?

4 MR. LEONARD: Well, I can look --

5 QUESTION: No, don't bother.

6 MR. LEONARD: The point was -- You pointed out at that
7 time --

8 QUESTION: That was a case involving whether or not
9 a union was liable for damages resulting from failure to
10 properly represent. That had nothing to do with workmen's
11 compensation.

12 MR. LEONARD: In Alessi and one other case you have
13 already held that the union has an absolute right as a trustee
14 to come into court and see to it that the employer does pay into
15 the fund as he is required to do by the contract.

16 QUESTION: But, that to me does not stand for the
17 proposition that an employee who has a contract with the --
18 a collective bargaining contract with the employer is necessarily
19 on the same footing as the union would be. The union is a
20 direct recipient of --

21 MR. LEONARD: No, I don't think the employer is, but
22 the employee is because that is what Congress said.

23 QUESTION: Do you think the employee could come into
24 court --

25 MR. LEONARD: The employee can come --

1 QUESTION: Would you wait and let me finish my
2 question, please?

3 MR. LEONARD: I am sorry.

4 QUESTION: Do you think that the employee would have
5 the same standing to come into court in a situation such as that
6 raised in the Alessi case?

7 MR. LEONARD: Yes, I do. Under the Labor Management
8 Relations Act, the employee has a right to go into court to
9 ascertained that the money is being put into the trust in his
10 name, the amount of it, that is the value of it, and if it is
11 not being, to take such steps as he needs to to see to it that
12 the employer contributes.

13 QUESTION: Mr. Leonard?

14 MR. LEONARD: This comes back to a fact --

15 QUESTION: Mr. Leonard, Justice Powell is addressing
16 you.

17 MR. LEONARD: I am sorry.

18 QUESTION: Have you finished responding to Justice
19 Rehnquist?

20 MR. LEONARD: Mr. Justice.

21 QUESTION: I wanted to ask whether or not the benefits
22 are fully vested.

23 MR. LEONARD: No, Your Honor, and never will be.

24 QUESTION: Is there any other benefit received --

25 MR. LEONARD: Well, he didn't have the life -- I am

1 sorry. Are there any other benefits did you say?

2 QUESTION: Are there any other benefits to which
3 the term "wages" applies that are not vested?

4 MR. LEONARD: I would not be surprised if the time he
5 took off for coffee breaks constituted part of his wages, but
6 we have not sued for it.

7 QUESTION: What is the answer to my question?

8 MR. LEONARD: The answer, I think, is probably so.
9 There are certain what are known in one legislative history as
10 bona fide fringe benefits which would be part of wages even if
11 not in the particular union contract.

12 QUESTION: If this employee had left the employment
13 to take an entirely different job, a non-union job, would he
14 have any interest whatever in the funds?

15 MR. LEONARD: That would depend on the terms of ERISA.

16 QUESTION: Terms of what?

17 MR. LEONARD: The Employee Retirement --

18 QUESTION: Well, under the terms, whatever are
19 applicable, would this employee, had he walked away rather than
20 died --

21 MR. LEONARD: No. I believe these funds are handled
22 on an insurance basis. They pay off the people for whom they
23 are vested.

24 QUESTION: Are they only insurance benefits?

25 MR. LEONARD: Well, the insurance benefits, of course,

1 are applicable immediately. In other words, every employee is
2 covered by the insurance benefit. He is covered at all times
3 by the training benefit. The pension, of course, he does not
4 vest until a certain amount of time. And, the question, of
5 course -- That is the question in this case. How do you value
6 the future of a person who has been killed? I don't know. To
7 be perfectly frank with you, I can't find any cases that are
8 specifically on it. I can find a section of the tax statute
9 that refers to it, but it is the only one I can find and that
10 is highly indefinite and we will get to that in a moment.

11 Now, what I wanted to say is that the compensation
12 community, I believe it was described by Dr. Larson, some 800
13 insurance companies, 65 employers and the United States now are
14 opposed to me. And, I represent only the Claimant in this case.
15 I don't represent any other Respondent. But, it seems to me
16 that the entire case being made here is a case of extraordinary,
17 literally extraordinary exaggeration if the record is, in fact,
18 the basis upon which this case is to be determined.

19 I have already said there is no Atlantic and Gulf
20 contract. In fact, there are no maritime workers in this case
21 at all. This is a District of Columbia adoption of the case,
22 not necessarily something else which I don't know.

23 Justice Stevens, I believe your question was directed
24 right to it; namely, they put it in when it comes to a question
25 of compensation and they take it out when it comes to a question

1 of fact and thereby achieve a result. What is the actual fact
2 on the record? This man gets 68 cents an hour in these three
3 benefits. That is a total of \$27 a week.

4 QUESTION: You say he gets them. He doesn't really
5 get them, does he?

6 MR. LEONARD: That is, of course, this case. I agree.

7 If this case were decided for the Plaintiff --

8 QUESTION: His widow.

9 MR. LEONARD: The widow and her two sons as the Court
10 of Appeals put it, he would get a total addition of \$27 a week,
11 68 cents and hour, constituting approximately 9% increase,
12 9-1/2% increase in his wages.

13 I simply don't know on the basis of this record where
14 the \$22,000 a year, where the \$24,000 a year, the tens of
15 millions of cases, the tens of thousands of reopened cases,
16 the nightmare of compensation run wild, I don't know where these
17 come from. They are certainly not in this record.

18 Let me be perfectly frank about it because I have. I
19 myself now am going outside the record. I want to be clear
20 about this. I don't know that these facts are true. But,
21 according to the Department of Labor, the Bureau of Labor
22 Statistics, in their Bulletin 2140 of 1981, they point out that
23 two-fifths of all employers at the present time are funding such
24 benefits as we are talking about. They identified 11 employer-
25 paid benefits, two-fifths of which are being paid for by the

1 employers. They identified 17 employee-paid benefits which I
2 presume the employees are paying for. That is stock sharing.
3 And, if this Court will recall, it had in the Ford case, the
4 Ford decision, the interesting question of access to the company
5 cafeteria which you held to be an actual benefit and part of a
6 man's wages.

7 Now, I have to rescind that. You didn't say it was
8 part of his wages, but you said it was part of his recompense.
9 It was something he was entitled to get.

10 QUESTION: With these men, Mr. Leonard, when they
11 calculate the social security, what is included for --

12 MR. LEONARD: Social security is offset by the benefits
13 you receive from workermen's compensation.

14 QUESTION: When they send every month or every three
15 months, at some period the employer must send something in and
16 the employee has a deduction, does he not? What is the base
17 on which that is calculated?

18 MR. LEONARD: That I do not know. I do know that
19 in the Alessi decision of this Court you held that pension
20 trust benefits could be offset from social security and the same
21 under the National Labor Relations Act, the benefits were
22 described as being terms and conditions of employment which had
23 to be negotiated. And, if you will -- By the way, the citation
24 on that case I referred to about the cafeteria prices is the
25 Ford Motor Company against the National Labor Relations Board

1 in which you pointed out that access to the company cafeteria
2 was a very definite benefit and it is, of course. Whether it
3 is part of wages is an entirely different story.

4 QUESTION: Mr. Leonard, there really isn't any dispute
5 about the fact that the fringe benefits are benefits. Everybody
6 agrees with that.

7 Let me ask you this question if I may. Is it not
8 correct that if you are right in your reading of the word "wages,"
9 that that would also apply to disability cases as well as death
10 cases. I am talking about the word in the statute.

11 MR. LEONARD: If these are recompense, and I believe
12 they are, what we are talking about today is an entirely
13 different labor picture than we had more than half a century ago
14 when this case -- when this was first passed.

15 QUESTION: I wonder if you heard my question.

16 MR. LEONARD: I heard your question and your question
17 is does it apply to disability and I said, yes.

18 And, what is the thing here is very interesting. You
19 see, an employee now can deduct, defer is the right word, the
20 income from these benefits until he retires, until he actually
21 receives them. In fact, he never pays any tax on the medical
22 insurance at all. He never pays any tax on the training if he
23 doesn't take it.

24 But, I found three cases which have rather odd benefits
25 which are not part of the contract and, therefore, were taxable.

1 Number one, where the employee's children are paid educational
2 benefits out of the plan. It was held to be income to the
3 employee. Where the employee received strike benefits from
4 the union to keep them from going back to work. That was held
5 to be income on which he had to pay.

6 Now, the Title 26 is very clear about this. Title 26
7 in effect says that everything a person receives directly or
8 as a third-party beneficiary, which is this case, is income on
9 which he must pay taxes.

10 Then Congress passed the Multi-Employer Pension Plan
11 Amendments Act which added Sections 401 to 422 to the Title 26
12 and in 401 it is provided that these payments by the employer
13 into pension plan trusts are not to be taxed to the employer
14 until he receives them, then they are to be taxed to the
15 employee. Meanwhile, the employer, however, is totally entitled
16 to deduct as payroll expense all of these payments.

17 QUESTION: Mr. Leonard, is that true of the training
18 fund too? If an employee --

19 MR. LEONARD: No. I have trouble with the training
20 fund.

21 QUESTION: I would think if an employee gets retraining
22 he doesn't then realize income, does he?

23 MR. LEONARD: This happens to be one case in which
24 I going to join with the Petitioners. They take everything
25 from Mrs. Hilyer's point of view, whereas, in fact, the statute

1 has everything from Mr. Hilyer's point of view. Nevertheless,
2 from her point of view, she can't go back to work without some
3 kind of retraining. So, in the sense that he had it to improve
4 his job which brought money home to her, you see, the equivalent
5 is her ability to go out and earn money to bring home.

6 So, I have to say with the Petitioners that in this
7 case we should look to Mrs. Hilyer instead of Mr. Hilyer, because
8 his possibility of getting that training is gone forever. Her
9 necessity is still in existence.

10 QUESTION: So, you don't think the training fund payment
11 should be included in the wage?

12 MR. LEONARD: Yes, I think it definitely should be
13 included in wages, because the question we have here on wages
14 is really a very simply one. As long as employees can defer
15 taxability and employers can get it immediately, there is going
16 to be a strong union push to put more and more benefits into a
17 wage package, into a contract. And, as a matter of fact, I
18 have already told you that the Department of Labor has identified
19 some 28 benefits of which 11 are employer paid. I can go further
20 than that. I found a Conference Board Report which specializes
21 in employee benefits and they say that dental benefits,
22 prescription drugs, optical, hearing aid -- and I will come
23 to the last one in a moment -- are all new types of benefits
24 which most unions today are seeking to obtain. Eight-four
25 percent of employers today are paying for these benefits.

1 Now, I don't think this is any indication that the
2 employer wants to pay, that this is out of the goodness of his
3 heart, that this is what has loosely been called a contribution.
4 It isn't a contribution at all. It isn't a fringe benefit. It
5 isn't anything but part of what the employer is paying in order
6 to get this man on his payroll.

7 QUESTION: You say these are more attractive to the
8 employer than straight wage raises because the employer doesn't
9 have to pay tax? Does he have to pay taxes on money that he
10 puts into a pension fund or medical fund or training fund,
11 the employer?

12 MR. LEONARD: I believe we -- We come -- Let me put
13 that -- Let me answer that this way if I may. The new benefit
14 which has currently only been adopted by 20 employers with 87
15 more now considering it is called the cafeteria benefit and it
16 has nothing to do with the Ford case which was the access to
17 the company cafeteria. A cafeteria benefit is where the
18 employer says I will pay \$10 an hour for this man. I will pay
19 him \$7 in salary and \$3 and you can split that up into any kind
20 of benefit you want. Now, that is called a cafeteria benefit.

21 QUESTION: Why is that more attractive to the
22 employer than paying \$10 in wages?

23 MR. LEONARD: Because the union asked them to. And,
24 he can -- Since the employee can defer it and it doesn't cost
25 him any money one way or the other, it is exactly what he wants

1 to do.

2 QUESTION: It is a matter of no consequence --

3 MR. LEONARD: It is a matter of no consequence to
4 the union. It is a matter of no consequence to the employer.

5 QUESTION: Well, if it is of no consequence to the
6 union, why do they ask for it? Why do they prefer that?

7 MR. LEONARD: Well, I suppose that the answer is that
8 they probably read the decisions of this Court to the effect
9 that unions are supposed to represent their workers.

10 QUESTION: You are suggesting that the workers want
11 it?

12 MR. LEONARD: What?

13 QUESTION: You are suggesting that really the workers
14 prefer the 7-3 cafeteria --

15 MR. LEONARD: The workers get tax deferment for all
16 of the benefits that apply to the wages.

17 QUESTION: And the employer deducts it?

18 MR. LEONARD: What?

19 QUESTION: And the employer deducts it?

20 MR. LEONARD: The employer deducts it immediately as
21 part of his payroll. That is -- This is the thing that we
22 are going to see, more and more of these benefits. The take-
23 home pay with the various deductions is going to be down to a
24 minimum and the tax deferral scheme, if we continue the way we
25 are going, is obviously going to take over the labor market

1 sooner or later. These benefits are going to get larger and
2 larger.

3 QUESTION: Of course, Congress recognized that in
4 the case of the Davis-Bacon Act and amended the statute
5 accordingly.

6 MR. LEONARD: Davis-Bacon, Federal Employees, Miller
7 Act, National Labor Relations Act, the Social Security Act,
8 ERISA, the LMRA and the tax -- Internal Revenue.

9 QUESTION: Well, why do you recite all those seriatim?

10 MR. LEONARD: Because I can take each one as being
11 tied in to workmen's compensation directly.

12 Let's take the Davis-Bacon Act. It wasn't cited to
13 you. It wasn't quoted to you. But, what it says that on public
14 buildings labor's wages are to include the employer payments
15 to the unions and that is to be counted when adjusting the
16 compensation of the worker. That is what it says in the Davis-
17 Bacon Act.

18 QUESTION: Does it say that in this Act?

19 MR. LEONARD: I don't have quotations marks around
20 it so I cannot say that is so.

21 QUESTION: But, isn't it true that that is for a
22 rather different purpose to be sure that the total compensation
23 package meets the local area standard for --

24 MR. LEONARD: I know that -- I am sorry, I --

25 QUESTION: Isn't the purpose of the Davis-Bacon Act

1 quite different? It is to be sure that the compensation paid
2 by the government contractors is as high as the local prevailing
3 wage standard and they include in that computation --

4 MR. LEONARD: Are you suggesting that they would pay
5 a higher compensation on the basis of -- for a laborer on a public
6 building than one on another building? I don't believe that
7 was ever Congress's intent.

8 QUESTION: The statute requires that they pay at
9 least as high, wages at least as high as the prevailing --

10 MR. LEONARD: Well, at least as high then would include
11 the fringe benefits.

12 QUESTION: Correct, for that purpose.

13 MR. LEONARD: Correct.

14 QUESTION: Yes.

15 MR. LEONARD: Now, I am clear that the employer pay-
16 ments to unions is part of the statutory language. I am clear
17 that these are to be counted in and I quote, "adjusting
18 compensation for injuries" from the statute. That is 40 USC
19 276(a).

20 Let's take the Federal Employees Compensation Act
21 because this is a rather remarkable parallel. Assuming that
22 Congress doesn't particularly want to distinguish between the
23 two, which it might well do, we take Section 8171 of the Federal
24 Employees Compensation Act -- that is Title 5, 81 -- starting
25 at 8114 -- and that applies to non-appropriated fund activities.

1 Now, remember, these are civilian people and they are brought
2 under this Act we are now talking about, the Longshoremen's
3 and Harbor Workers' Act. In other words, Congress is saying
4 in the Federal Employees Compensation Act this covers non-
5 appropriated fund activities and their personnel come under
6 workers' compensation.

7 Let's take the Miller Act. This I can't go very far
8 because of your statement before, Mr. Justice Stevens, because
9 these are sums justly due the employees, because that is exactly
10 what you said and there is no point in going into it.

11 QUESTION: Was that in a dissenting opinion if I
12 remember correctly?

13 MR. LEONARD: What?

14 QUESTION: Are you talking about the Miller Act case?

15 MR. LEONARD: That was the Miller Act case.

16 QUESTION: And, wasn't I in dissent in that case?

17 MR. LEONARD: It was what?

18 QUESTION: Wasn't I -- Was I not in dissent in that
19 case?

20 MR. LEONARD: I am not sure.

21 QUESTION: I think I was.

22 MR. LEONARD: Let me go back for a moment to Davis-
23 Bacon as a matter of fact. As part of the general exaggeration
24 of these facts, we have a very curious happening in Davis-Bacon.
25 Remember, you were told that the amendment to this Act went back

1 to 1964 and that it had a parallel history to the Workmen's
2 Compensation Act? It was never amended. It was supplemented
3 but never amended. You see, there never was a definition that
4 kept out fringe benefits in the Davis-Bacon Act. Congress
5 was intent on seeing that they were, in fact, put in to the
6 Act and, therefore, supplemented it in 1964, almost 20 years ago
7 which shows that Congress is really not behind the times.

8 Let me take the National Labor Relations Act. I have
9 already mentioned the fact that the benefits are negotiable and
10 that leads, of course, to the Labor Management Relations Act
11 which created employee trusts. Apparently Congress distrusted
12 the unions on these funds to the extent that it created the
13 trust form of handling, gave the right to the union and to the
14 individual to make sure that the contributions were put into it.
15 And, in Section 17 of the Longshoremen's and Harbor Workers'
16 Compensation Act it is provided that whatever you have received
17 from one of the union benefit plans you may have to return if
18 you get workmen's compensation. You may have to put it back
19 into the trust.

20 Now, nothing, I think, could be clearer than to show
21 that what is paid into these trusts, if paid out without
22 compensation, must be put back if you get compensation. The
23 interrelationship of the two is fascinating.

24 By the way, there is a typo in the Hilyer brief. It
25 says it is Section 7 when in fact it is Section 17, but it has

1 been identified two or three other places as 17. That is on
2 page 24.

3 Let's come down to the Social Security Act. As I have
4 already mentioned, you have to offset both disability and
5 compensation and pension trust benefits from what you receive
6 under Medicare and under ERISA.

7 You have in tax -- I have already talked about the
8 fact. I take it that this Court is fully familiar with Section
9 501(c) of the Title 26 which in Section 5 exempts all labor
10 organizations from tax, which in Section 17 exempts benefit
11 plan trusts such as these three from tax. In Section 22 also
12 exempts government retirement funds from tax. And, Congress
13 passed a law, as you probably know, in the Economic Recovery
14 Tax Act that forbids the Internal Revenue Service from issuing
15 any regulations on how to tax these benefits and this runs
16 through the end of 1983 and probably -- And, since this is
17 the third extension, I am sure it will be extended again or it
18 is reasonable.

19 Thank you very much.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
21 case is submitted.

22 We will resume arguments at 1:00.

23 (Whereupon, at 11:57 a.m., the case in the above-
24 entitled matter was submitted.)

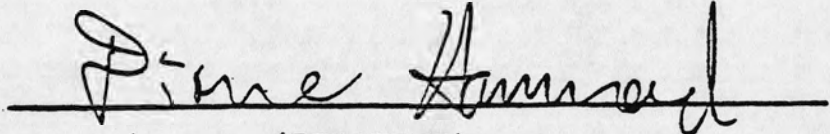
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

MORRISON-KNUDSEN CONSTRUCTION COMPANY, ET AL., Petitioners v.
~~DIRECTOR, OFFICE OF WORKERS' COMPENSATION, UNITED STATES DEPARTMENT~~
OF LABOR, ET AL. #81-1891

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

BY

A handwritten signature in cursive script, appearing to read "Pine Hammond", is written over a horizontal line.

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