ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-131

TITLE JONES & LAUGHLIN STEEL CORPORATION, ETC., Petitioner
v.
HOWARD E. PFEIFER

PLACE Washington, D. C.

DATE February 28, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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JONES & LAUGHLIN STEEL :

CORPORATION, ETC., :

Petitioner :

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HOWARD E. PFEIFER :

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Washington, D.C.

Monday, February 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ROBERT W. MURDOCH, ESQ., Pittsburgh, Pa., on behalf of Petitioner

JEROME M. LIBENSON, ESQ., Pittsburgh, Pa.; on behalf of the Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Murdoch, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT W. MURDOCH, ESQ.,

ON BEHALF OF PETITIONER

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

This case is before you on a writ of certiorari from the Third Circuit Court of Appeals and presents two questions for your consideration. The first question being the interpretation of some of the provisions under Section 905(a), 905(b), and 933 of the Longshoremen's and Harbor Worker's Compensation Act. The second question is a question regarding major damages which was applied by the lower court and affirmed by the Third Circuit in this particular case.

By way of background, the respondent was an employee of Jones & Laughlin Steel Corporation. He had worked for them on the rivers, particularly on the Monongahela River for Jones & Laughlin for many years. He was entitled as having the duties of being a barge helper and barge handler. In doing so, he would go out and he would work with the barges.

So that you are aware of the situation, on the Monongahela River Jones & Laughlin had two landings.

The first landing had an elevator which they would take these barges, and the barges being approximately 175 feet long, 26 feet wide, under the coal elevator. This would then empty the barge as the coal goes into the metal freeze, and persons like Mr. Pfeifer would then be in charge of taking care of the fleet as the empty barges would be moved down to the other fleet.

Mr. Pfeifer was injured on February 13, 1978, at which time he came out to work on the midnight shift. He did not work his normal job at that time, his normal job was a Class 7 job, but as he would do from time to time, he would come out and he worked as a headman, this was a Class 13 as far as the pay is concerned.

In that position Mr. Pfeifer was in charge of two other individuals and these three individuals on that particular shift would then go out and take care of the barges. By taking care of the barges, they would make sure that the lashings were tight. If it was necessary to pump out any barges which were taking on water, this was one of their duties.

Also incumbent upon Mr. Pfeifer and the people he was working with was to make sure that the gunnels, which would be the walkways on the barges, and the deck-ends where the people would walk would be free and

clear of snow.

As I say, Mr. Pfeifer came out to work at midnight on this particular shift, and sometime later, 3:00 a.m., or 4:00 a.m., while going out with two other individuals to pump a barge, he slipped on some ice and snow that had been accumulated on the barge and injured his back. As a result of that incident, then, Mr. Pfeifer did sign the proper forms for getting payments under the Longshoremen's and Harbor Worker's Compensation Act.

I think it is important for you to know as a Court that Jones & Laughlin has been paying Mr. Pfeifer for the compensation benefits as called for under this Act ever since the date of the accident.

At the time of the trial in this particular case in which there was a final verdict rendered against Jones & Laughlin Steel Corporation in the amount of approximately $275,000, there was a set off which was approximately $33,000 for the compensation benefits which had been made to Mr. Pfeifer as of the date of the trial.

I believe it is also important for you to know that even today as I stand here arguing this case before you, we are still making payments under the Compensation Act as called for.

I think this is relatively important because 905(a) of the Longshoremen's and Harbor Worker's Act sets forth what we refer to as the exclusivity provision, which states basically that a person injured under the Longshoremen's and Harbor Worker's Act has exclusive remedies to receive compensation from the employer.

This is why I pointed out that under these circumstances we have been and in fact are still paying because as Jones & Laughlin looks at and reviews the exclusivity provision, we feel that that is the only basis that an employee is to receive benefits from the employer.

QUESTION: That would be traditional in those workmen's compensation type claims. But what do you do with the language of this Court in the Edmonds case which seems to have rejected your position, and in this limited situation would say that the ship owner is still liable both under the underlying tort claim and as under the Act.

MR. MURDOCH: I think, Justice O'Connor --

QUESTION: Do you think that we were in error in Edmonds?

MR. MURDOCH: I believe you are in error, yes. I don't believe that when you review Edmonds,

which in that particular instance concerning the point that I am talking to you about today was strictly dicta, it was not a part of that particular case, although it was part of the discussion.

QUESTION: But it was a pretty clear statement. Is there not legislation pending in Congress now that changed this precise --

MR. MURDOCH: There is in the legislation history as it appears, although the amendments to the Longshoremen's and Harbor Worker's Act are still pending, they have set forth the case of Griffith versus Wheeling-Pittsburgh as being something that was not intended from the 1972 amendments.

I will give you some background. In 1972, there was an amendment by 905(b), which is the section that was discussed in Edmonds and came into play. As I look at the Edmonds decision, as I look at the Griffith/Wheeling-Pittsburgh case, I feel that was done in that particular instance, though, was the failure to look at sections 905(a), 905(b), and section 933, as they are all read together.

Though This Court, even as recently as last Wednesday, set forth in the case of Lockheed versus the United States that 905(a) was the exclusive remedy under the Longshoremen's and Harbor Worker's Benefit Act. As

we look at 905(a), it simply says that this is the only thing that the employee is entitled to.

Getting to 905(b) and looking at the legislative intent of the amendments back in 1972, as we have in most workermen's compensation areas you had the quid pro quo. You had the giving up of any rights that they might have had before the amendments to sue for unseaworthiness or to sue for indemnity in response for largely increased benefits.

These benefits are taken under section 910 and they set forth that as of June 1st of each year the different values are placed on as to what the increase is going to be for the benefits, and then they are implemented in October of that particular year.

So the position that we have here is that because of the 1972 amendments giving such a large increase in benefits to these longshoremen that it did away with what was the dual capacity.

I think it is important that you look at 905(b) as it applies to 905(a) and 933. 905(b) basically starts off by saying that any person injured under this particular Act has the benefits of this Act. I stress that it says "any person" because in looking at the Edmonds case there is a distinction that the Court brought or the Court intended to bring up by saying that

the first sentence only applies to a longshoreman.

I disagree with that because if you go one step further, it says in 905(b) if there is the right, then, to sue the vessel or vessel as a person that the employer cannot be directly or indirectly liable.

So where I have the problem with Edmonds is that it did not go far enough with the language. You have 905(a) which basically says exclusively you get the benefits. The employer is not to suffer any more manner of making payments. Section 905(b) reiterates this, it says that the employer cannot be directly or indirectly liable to the injured employee on behalf of the vessel.

If we look at Edmonds and we try to determine the way it was with Edmonds, then you are saying basically that the injured employee can sue the vessel, but in the same token if the vessel is owned by the employer it is literally the employer that is making the payments.

So it is really a way of getting around the language as far as what 905(a) was, and it is our contention that in 905(b), as the second part of the first sentence, where it says that the employer may not be directly or indirectly liable to the employee for the vessel, then they are in fact reiterating in 905(b) the exclusivity provision that it had in 905(a).

Going one step further in that same sentence in section 905(b) it does make reference that if any action can be filed by the injured employee, it would be in accordance with section 933 of the same Act. Edmonds did not address itself to that particular section.

Section 933 of the Act sets forth that the injured employee, if he determines that the injuries were in fact caused by somebody other than the employer or an employee of the employer, he has the right to a third party action.

So I think you have in 905(a) and 905(b) and 933, you have three distinct places where the intent of Congress was to limit any payments that the injured employee would get from the employer to solely the situation of receiving the compensation benefits.

The trade-offs, as I have indicated, if you look at the legislative intent and the language which I have cited in my brief, sets forth specifically that the intent of the Longshoremen's and Harbor Worker's Act was to place maritime workers in similar situations into the same situation that a land-based employee has under Workmen's Compensation.

I believe the Court is well aware that in the cases where we have a State Workemen's Compensation law that the employee who is injured does in fact have the

right to get the benefits. Under the Compensations Act, he has no other benefits at that time. There is nothing to preclude him, as I feel the intent of 905(b) was, to sue, let's say, the manufacturer of a machine upon which he was injured as long as it was not owned by the employer.

So I think, in looking at the 1972 amendments, when you put them all together without taking them out of context, that you can see that the overall intent was simply to put these longshoremen on the same basis of land-based employees, to get only that type of benefit.

Now, 905(b) does also provide that somebody who is injured, who is not an employee or not, can sue somebody who has caused the injury, but again if there is any liability or any money to be paid by the employer, then they are not going to receive payments.

We had raised this contention in the pleadings. I had raised it as a motion for summary judgment in the lower court, and of course the Third Circuit looked at it, but this is the first time, I believe, that this issue has been before this Court. Although there has been discussion in Edmonds and in other cases, I do feel that what we are looking at is a situation that the intent of Congress was overwhelming to limit the recovery that the longshoremen could get.

I might point out also that if we get this interpretation, and also we are looking at minimizing litigation costs, because I think if you look at the true intent then the employees who are injured will, in fact, be getting their compensation benefits which are quite high under the circumstances of this Act, and there is not going to be these types of actions which are going to take up the time of the trial courts largely.

QUESTION: Mr. Murdoch, just to clarify one point. You never contested the finding of the trial court that the ship owner was negligent?

MR. MURDOCH: That is correct, that was not raised, Justice O'Connor.

QUESTION: All right.

MR. MURDOCH: I would like to point out on that, though, that the finding of negligence, if you want to look at a dual capacity, was not made clear because, although it was a finding of negligence as the owner pro hac vice, it did not make a distinction as to whether or not there was a finding of negligence as an employer or as a vessel. And I think that is the distinction which should have been made.

QUESTION: But for our purposes, we assume that there was negligence as a vessel owner; right?

MR. MURDOCH: No, I don't think we can assume that. I think that because it is unclear as to what the court did, perhaps you have to assume that in order to determine this particular question.

QUESTION: Right. Otherwise we wouldn't have the question --

MR. MURDOCH: That's right.

QUESTION: --that you want to raise.

MR. MURDOCH: Yes.

QUESTION: So I am assuming that we must assume that is the case.

MR. MURDOCH: That's correct, Justice O'Connor.

QUESTION: The issue just isn't here.

MR. MURDOCH: I am sorry, I did not hear.

QUESTION: The just isn't here.

MR. MURDOCH: On the particular 905(b)?

QUESTION: The issue of negligence is not here. It is not before us.

MR. MURDOCH: In what way, I don't understand, I'm sorry, Justice Blackmun.

QUESTION: Your colloquy with Justice O'Connor indicated that the issue is not here.

MR. MURDOCH: I believe the issue is here. I believe, as I stated before talking with Justice

O'Connor, that we had preserved that particular point. There is no question that there is a finding of negligence. It is our position that the law suit should not have been allowed to be filed because of the fact that Mr. Pfeifer was the employee.

QUESTION: But we are not to pass on the issue of negligence.

MR. MURDOCH: That is correct, that was not raised at the time of the argument.

If there are no other questions concerning that question, I will go on to the second question. The second question was the standard of the measure of damages which was decided by the lower court and then affirmed by the Third Circuit.

In 1980, the Pennsylvania Supreme Court decided the case of Kacskowski versus Bolubasc and in that particular case they had adopted what had been known as the Alaska Rule, which is basically the total offset method.

In the total offset method, the lower court assumed that any inflation which may arise in the future would be the equivalent and be offset of any interest rates, so that rather than discounting to the present value, that whatever the value of lost future earnings were going to be or the capacity of future earnings,

that was what the measure was.

In this particular case, as I stated before, the lower court came to the conclusion based on a worklife of 12 years that Mr. Pfeifer would have been making $26,000 for those 12 years. In multiplying this there was a finding that Mr. Pfeifer could do some minimum wage, so that was projected over the worklife expectancy and that was deducted in addition to the workmen's or longshoremen's compensation benefits that we had paid as of the date of the jury -- the non-jury verdict, that was deducted.

It is our position, as we told the lower court and put in our post-findings of fact, that it was going to be necessary -- in the event that there was a verdict in favor of the plaintiff that there was going to have to be a reduction to present work.

This was not done as it was just assumed, as I state, that the inflation was going to offset the interest rates and, therefore, whatever the figure determined at that time was was going to be what the plaintiff would get.

We submit to this honorable Court that this is a decision upon which there is really no basis to make this type of finding. I think when we look at the purpose of determining why we give a lump sum award, it

is because the lump sum award, if it is given directly to the plaintiff at the time of the trial, is going to be worth much more after investing than it would be by the reduction to present value, which is what this Court set the standard to be in 1916 in the case of Chesapeake versus Kelly.

Also as recently as 1980 in the case of LIFECO there was the same reiteration that in order to arrive at a full value, a fair figure for impairment of future earnings or lost wages that there must be a reduction of present worth. That was ignored by the Third Circuit and this is the only circuit which has adopted this measure of damages in a Federal action, and we submit that it should not be done so.

There have been many cases set forth in our brief, and also in the briefs of the Amicus which have filed on our behalf, setting forth the problems that even economists have with making a determination as to how to determine if in fact we are going to have inflation and be able to project inflation at a particular rate over a long time period.

I think with what we have seen in the economy in the last three, four, five years with the spiraling inflation rates, with the governmental steps to come in and try to reduce inflation, with determining whether or

not we are in a recession or a depression, with all the economic factors, the economists cannot even agree from past events what caused those.

It has been held almost uniformly, although there are some circuits which are making a distinction, that inflation is too speculative to have somebody come in and make an argument, give evidence to a fact-finder, to project over a long time period.

What we are suggesting is that the proper measure of damages would be to get back to what we still call the traditional approach. The traditional approach being that there can be evidence of a particular category of individuals in a particular geographical area, and there can be testimony of somebody to come in as an economist to set forth that there would be a likelihood of increased wages, but not to get into the convoluted type of testimony that we have with inflation.

QUESTION: So under your view, you start with the reduction of the award to present value, and then permit it to be augmented by testimony as to increased wages?

MR. MURDOCH: I think we would do it sort of backwards, Justice Rehnquist. We would have the testimony as to merit increases, productivity

increases. The fact for the particular occupation that the plaintiff is involved in that there would be the likelihood of increase of wages.

QUESTION: So what the jury ought to do is to consider that testimony as to future earnings, perhaps higher wage rates or promotions in the future. Then after they get the total award, they go through the mechanics of reducing it to present value.

MR. MURDOCH: That is correct, Justice Rehnquist.

We think this is the most fair because, I think as litigators and being in and out of courts, one of the things we want to do is to try to get the type of testimony which is not going to be convoluted, which is not going to increase the time of trial, the cost of trial, and also put it on the basis that some fact-finders or jurors can then make a decision as to what they should give a person who is injured.

I think this is fair because one of the things that we strive to do in courts is to make it a system that is fair not only for the defendants but for the plaintiffs. The history has shown that any increase in inflation has not kept up with any increase as far as interest rates are concerned.

You have problems if you project, such as in

Kaczkowski, the inflation, basically the inflation, because you are going to assume then that even the increases of salary are going to keep up with rates of inflation. I think that the past history has shown in the cases that we have cited, and that the Amici have cited, that this just is not so.

What I am suggesting, as I said, we want to preclude the introduction of speculation which is basically, as I say, convoluted, reduce it to present worth. You have a built-in factor there that if interest rates are going to increase that the increase, then, from the interest rates can be reinvested and this would also benefit the plaintiff.

So I am not looking at a situation where we are trying to cut down as far as what the plaintiff is going to get, but to make it something that is workable for the court system, fair to both parties, and still something that can cut down on the litigation costs.

QUESTION: The SG has filed a brief in this case on the damages question suggesting, I think, a different approach than you are suggesting if I understand it correctly.

MR. MURDOCH: That is correct.

QUESTION: And one that would propose that perhaps it's all right to consider the inflationary

factors, both as applied to the discount element and as applied to the prospective wage increase. But suggesting that this Court shouldn't finally determine as between some of the approaches now used which is better.

MR. MURDOCH: As far as what they have suggested, they were talking specifically about what would be the Feldman case and the Doca case where they had an adjusted discount rate. I am not so sure that they really did apply inflationary and non-inflationary matters before they applied the discount rate at that time.

One of the problems I have with their approaches is that they do assume, in fact, that the wages of those particular plaintiffs lost, or their earning capacity in the future, would have in fact kept rate, would have increased with inflation. I don't think that they can do that.

What I am suggesting is, I think, a better situation because if you look at the Feldman case, they had 1.5 percent discount rate. Doca had a 2 percent discount rate. But I believe in the Doca case, the Court of Appeals specifically said, we are not suggesting that it be this 2 percent, it might be 3 percent or it might be 4 percent.

There are other approaches set forth in the other briefs which were filed on our behalf. I do think that the discussion does show that the inflation factor should not be part of the testimony. I think that this court should look at the vitality of Kelly and reaffirm it in light of this particular question.

What I would be concerned about is that, as we look at the uniformity provision of one and the same type of standards to look at in all the circuits, that this honorable Court is certainly going to have to make some determination as to what guidelines would be. At most, we would suggest that the Koczkowski case, or the total offset method which was adopted in this case, be overturned because there is no precedent for it, there is no evidence for it. I think it is improper.

If there are no other questions, I would like to reserve --

QUESTION: I have a question, Mr. Murdoch, if I may.

MR. MURDOCH: Yes, sir.

QUESTION: The calculation of the award in this case as set forth in the red brief, on page 17 they explain how they the $275,000. I have two questions that I just didn't understand.

Did they not subtract from, in the

calculation, the future payments of compensation under the Longshoremen's Act?

MR. MURDOCH: No, they didn't.

QUESTION: Why not, I don't understand.

MR. MURDOCH: The $33,000 which is subtracted there was the compensation payments we had made from the date of injury --

QUESTION: Right.

MR. MURDOCH: -- to the date of trial.

QUESTION: Why wouldn't they also -- If they subtracted an amount for the minimum wage, why wouldn't they also subtract -- Was that or maybe that wasn't raised?

MR. MURDOCH: I am sorry. The minimum wage, Justice Stevens, which was deducted was $66,000.

QUESTION: Correct.

MR. MURDOCH: Then the $33,000.

QUESTION: But the minimum wage, this $66,000, as I understand it, is the minimum he would have earned in the future.

MR. MURDOCH: Over the 12 years, yes, sir.

QUESTION: Why wouldn't they also subtract 12 years of future workmen's compensation payments?

MR. MURDOCH: What the Court indicated was going to happen was that if in fact there was going to

be an appeal at the time there was a final decision in this case, that we would then make a determination as to what had been paid at that time.

What happens from a practical standpoint is that if a lump sum award is going to be given to Mr. Pfeifer, no further payments are made at that time.

QUESTION: I see.

MR. MURDOCH: We are given credit for that.

QUESTION: Then my next question is, is there any place in the papers a calculation similar to this of what your expert or what your position in the trial court was as to the proper award?

MR. MURDOCH: No, there was not much evidence on that, Justice Stevens. We did not have an expert witness per se. We had somebody from the payroll office, who is high up in the payroll office, who came and talked about it, but we did not project anything.

QUESTION: If you did not offer evidence that in this case the award would have been lower under your theory, how do you have standing -- I don't understand whether there you have a standing to claim of reversible error on the damages.

MR. MURDOCH: We argued at the time, not only in proposed findings of fact but during the trial, that in order for there to be a proper decision as to any

damages which were going to be awarded that there would have to be the reduction to present worth.

QUESTION: Did you offer evidence showing what that would have produced?

MR. MURDOCH: No, we didn't. We felt that that was the burden of the plaintiff. We felt that if the court would come in and apply what we felt was the proper standard of damages.

QUESTION: It seems to me that it is at least theoretically possible that your approach would have produced a higher damage award and if that is the case --

MR. MURDOCH: I don't believe so because traditionally in Pennsylvania there has been a reduction to 6 percent.

QUESTION: Just looking at the record in this case, can we be sure that you would have been better off under your theory?

MR. MURDOCH: You have nothing in the record before you on that.

I would like to reserve whatever time I have.

CHIEF JUSTICE BURGER: Very well.

Mr. Libenson.

ORAL ARGUMENT OF JEROME M. LIBENSON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. LIBENSON: Mr. Chief Justice, may it

please the Court.

There are two issues in this case. The first is whether a longshoreman may sue his employer for negligence as a vessel owner under 905(b) of the Longshoremen's and Harbor Worker's Compensation Act. I will refer to this as the Act as I go through my argument. The second is whether the lower court properly calculated damages on the record before it. Both these issues were affirmed in the lower court in favor of my client, the Respondent.

The Longshoremen's and Harbor Worker's Compensation Act was passed in 1927, but it was significantly amended in 1972 to add 905(b) for the first time. 905(b) put into staturory form permission to bring an action against a vessel as a third party in negligence instead of unseaworthiness which was the previous method of claim.

As Justice O'Connor pointed out, the Petitioner, J&L's negligence in its ownership capacity is not before this Court. Furthermore, J&L admitted that it was owner pro hac vice of all the barges in the fleet on January 13, 1978, when Howard Pfeifer was injured, when he slipped on an accumulation of snow and ice on a gunnel.

I don't know if the Court is familiar with how

barges are assembled on the Allegheny River. These are coal barges and they are assembled and lashed together in what they call a fleet. The barges are moved in or out of the fleet to unload or load coal to the steel mill.

The point is that of the 35 barges that were there that night or 40 barges, the ownership of those were all J&L's under the pro hac vice theory, whether or not they actually did own them or not. However, J&L would have you treat this case differently if my client fell on an unowned barge in the same fleet, which is contrary to the intent of the Act.

Under 905(b) all longshoremen are to be treated the same, and there should be no difference whether the vessel is employer-owned or third party-owned. The fact is that the employer assumes a dual capacity as all Circuit Courts have found of ownership of the vessel.

They don't have to do this, but when they do it, the Act applies to them as it would apply to any other vessel owner. The incidence of their being an employer of the person who is injured is incidental to the fact of their ownership of the vessel.

I submit to you that the award in this case should not depend on the gratuitous event or

happenstance of how or where a person happens to fall if he is going to be injured.

The 1972 amendments to this Act were brought about because of this Court's finding in Seas Shipping against Sieracki and in the Lyon case. During the period between 1927 and 1972, the practice was for a vessel to ask for an indemnity agreement from any stevedore company, and the effect was that any injury or claim against the vessel under unseaworthiness was paid finally by the stevedore company under the indemnity agreement.

Congress felt that this was improper. In passing the amendments in 1972, it took away the unseaworthiness doctrine, the indemnity provisions, and it expanded the Act by increasing the benefits. But it also in effect ratified Reed against The Yakka and Jackson which this Court had passed, and permitted a suit against the vessel itself under 905(b).

This Court in Edmonds, speaking through Justice White, considered 905(b) and stated: "To permit a third party suit against the vessel providing its own loading and unloading services where negligence and its stevedoring capacity contributes to the injury."

The second sentence means no more than that all longshoremen are to be treated the same, whether

their employer is an independent stevedore or a shipowner stevedore. All stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.

Justice White further cited the congressional hearing reports and stated in footnote 12 in his opinion that "Congress ultimately decided to preserve the longshoremen's tort action against shipowners acting as shipowners."

The legislative goal of passing 905(b) was the safety of the longshoremen, and the committee reports say that "The Committee recognized the progress that has been made in reducing injury in the longshoring industry, but longshoring remains one of the most hazardous types of occupation, and the Committee expects to see further progress in reducing injuries and stands ready to immediately reexamine the third party question."

The point is that Congress felt that by preserving the action against the vessel, it would have a salutary effect on the vessels to ensure their safety.

There are six Circuit Courts that have addressed this question since the 1972 amendments have been in effect, and all of them have arrived at a

finding that is in conformity with Griffith and the results in this case.

I believe that this Court, speaking through Justice Powell in Pfeifer, stated that this was a remedial statute, and the amendments were made out of solicitude for the workers. Justice O'Connor very recently, since the filing of our brief, in Director againt Perrini, cited the committee reports for authority as to what the Act meant. I think if this Court will again refer to the Act and committee reports, they should have no problem with 905(b).

Congress's intent was to treat all longshoremen alike, whether employed by an independent stevedore or shipowner stevedore and to impose liability on shipowner stevedores for negligence in their ownership capacity. This comports with the legislative intent of encouraging safety on vessel and holding an employer/owner to the same standards as any other shipowner when acting in its shipowner capacity.

To deny Pfeifer's recovery due to the mere happenstance of his being injured on an employer-owned or pro hac vice vessel would be grossly unfair and contrary to the legislative intent, and to circuit cases. It would remove any incentive to shipowner/employers to exercise due care in their

ownership capacity in this case.

I would also point out to this Court that there is no double recovery. As Justice Stevens asked and was advised, the award in this case is deducted from the -- the compensation in this case is deducted from the award, so there is no double recovery. The employer is repaid any payments it makes under the compensation.

Jones & Laughlin undertook ownership responsibilities and failed to live up to its responsibilities and it must, therefore, be held liable in negligence for the injuries to my client under 905(b).

The question of damages and the proper method of determining damages is also before this Court.

First of all, I would point to the Court, as Justice Stevens has asked, there is a complete waiver on the part of the petitioner to raise this question.

The local rules of the District Court in which this was tried require any expert testimony to be proffered in the pretrial statement with a report from the expert, and before an expert is permitted to testify. There was no report filed by the petitioner nor any evidence offered on his behalf.

QUESTION: The burden of proof -- Mr. Libenson, isn't the burden of proof as to the amount of

damges he is entitled to recover on someone in Mr. Pfeifer's shoes?

MR. LIBENSON: The initial burden, but if they were going to contest the award, they have to offer their own evidence, Your Honor.

QUESTION: Granted that they can't rely on any testimony other than that already adduced. But supposing your expert takes the stand and due to a slip of communication between you and your expert, testifies favorably to the defendant. The fact that he is your expert doesn't mean that the Defendant can't rely on his testimony.

MR. LIBENSON: I agree. But in our case, we offered in the known wages, and we put in the wages of the men above and below my man in seniority to show what he would have earned over the period of time up to the time of trial.

In addition, we offered into evidence the known union contract which had had certain increases in it, I think through 1982, although the trial, I think, was in 1979 or 1980.

Judge Cohill in the District Court decided, after looking at this case, that there was no Federal common law.

QUESTION: Let's return to your waiver point.

MR. LIBENSON: Okay.

QUESTION: Supposing that after precisely the same testimony as was adduced here, which I take it was your expert on the question of damages --

MR. LIBENSON: We had no expert, Your Honor.

QUESTION: Who was it?

MR. LIBENSON: There was no expert. We just put in the wages, the wage losses, and we were satisfied to proceed with that.

QUESTION: Supposing that Judge Cohill had then said, "I don't care what the law is elsewhere, I think inflation is 20 percent a year. So I am going to figure a factor of 20 percent a year on the basis of this testimony," and made his award accordingly.

MR. LIBENSON: He didn't do that .

QUESTION: I realize that, but do you think that the Defendant would be prevented from urging on appeal that Judge Cohill had applied the wrong measure of damages simply because the Defendant --

MR. LIBENSON: You are presupposing, Justice Rehnquist, that he went outside the record which he did not do, and that is my point.

QUESTION: But the rule, the law of damages doesn't necessarily depend on the record. It is a body of law that you find in cases and not in the record of

this case.

MR. LIBENSON: I would like to -- If I could answer your question by directing your attention or inviting your attention to the Alma case against Manufacturers Hanover Trust in the Ninth Circuit, which stated that in the absence of evidence on the reduction by either side, the Court is not obligated to go ahead sue sponte to do it.

QUESTION: But the Third Circuit did go ahead here and considered various rules of damages.

MR. LIBENSON: I think the Third Circuit did essentially what the Ninth Circuit did in Alma, it addressed the record in front of it and what it did was say that whether or not the Longshoremen's and Harbor Worker's Compensation Act considered inflation and whether or not there was Federal law as precedent at that time. My point is that the Act itself, unlike the Shoremen Act, does not have a treble damage requirement. It has no requirement as to damages.

QUESTION: But the Third Circuit, unless I wholly misread its opinion, affirmatively adopted a rather sweeping change in the law of damages in this kind of case at least for that circuit. Do you dispute that?

MR. LIBENSON: I don't dispute it but I think

the answer is that there was no law of damages in a fixed manner at that time. What the Third Circuit did was evolve, if you will, Federal common law like any other common law that is evolved.

QUESTION: But it certainly wasn't a rule of damages applicable to only these particular facts and only this particular case. It laid down a fairly sweeping rule, whether there was a preceding rule or not.

MR. LIBENSON: I think it was discretionary.

QUESTION: What was discretionary?

MR. LIBENSON: For the Third Circuit to adopt the Kaczkowski case and a total offset.

QUESTION: It may have been discretionary, but they exercised their discretion to adopt it.

MR. LIBENSON: That is true, but I think there was room for it because there was nothing in the Federal law at that time that directed them any other way.

QUESTION: But now it is the law of the Third Circuit. I am not suggesting that they may not have been correct in doing it, but I am suggesting that your argument about waiver really has little bearing in view of what the Third Circuit did.

MR. LIBENSON: My argument -- The waiver goes to the fact that I don't think the petitioner can ask

for a reduction to present worth at this point in time because it is not in the record, that is my point, Your Honor.

QUESTION: If the rule, the yardstick that the Third Circuit applied is not warranted and justified, what about that?

MR. LIBENSON: If they had other evidence before it from which they could argue, but to say that it is not warranted --

QUESTION: Isn't that just a matter of evidence?

MR. LIBENSON: That is right, Your Honor.

QUESTION: Don't you think that they made a new rule?

MR. LIBENSON: I don't think they were entitled to make a new rule under the state of the law as it was before them at the time that this case was presented to them. I think that is one of the reasons they took the case, Your Honor -- Mr. Chief Justice.

QUESTION: The question is whether made the correct rule of law on measuring damages, is it not.

MR. LIBENSON: I am sorry, I didn't hear.

QUESTION: Whether they made the correct rule of law to measure the damages, and that is a question of law and not a question of fact.

MR. LIBENSON: That is true, but a law evolves from facts and I think a court has to have facts in front of it before it can make law.

QUESTION: On what facts do you think the Third Circuit evolved, to use your term, their rule?

MR. LIBENSON: All right. I think they utilized the unique situation in this case that there was no precedent governing Federal law of damages, other than Chesapeake and Ohio.

The case -- the Pfeifer case in the Third Circuit opinion comports with Chesapeake and Ohio against Kelly, a 1916 case, because the set off of inflation against reduction to present worth in effect is a reduction. That is what the Third Circuit said, and the Third Circuit also said that this case, in their opinion, conforms to Chesapeake and Ohio against Kelly.

QUESTION: Does this involve an assumption that inflation is always going to remain in the state that it is on the day or at the time the Court of Appeals is evolving its new rule?

MR. LIBENSON: I think that the history of inflation is recognized by all circuits at this point, but the First. I think that everyone on this bench knows that inflation has been present since at least 1950 and has been increasing. It is a problem that has

to be considered.

QUESTION: Do you think we can take judicial notice that it has been decreasing lately?

MR. LIBENSON: That is one of the problems in the case. I think that you probably will or could.

QUESTION: But it has, has it not?

MR. LIBENSON: Pardon.

QUESTION: Has it not gone down?

MR. LIBENSON: Yes, but it is a variable thing. You see in the newspapers it changes every day. But this case was tried in 1980, and we are in front of you in 1983.

QUESTION: What was it in 1980, about 11 percent or 12 percent?

MR. LIBENSON: It was runaway inflation at that time, that is right. The Defendant was probably getting 18 percent on the verdict here that they have been appealing while the Plaintiff got nothing. The Plaintiff only gets 6 percent if he collects on the verdict anyway.

QUESTION: That is a separate and different matter, isn't?

MR. LIBENSON: It is a different issue, but I think it illustrates the problem, Your Honor.

But also, I think, the Court should consider

that when inflation decreases, interest rates go down, too. So the concept of the total offset method has many good features. It is predictable. It is precise. It is inexpensive, and it saves Court time. Bringing experts in the Court can change an argument, or a trial, rather, to a trial within a trial, and many cases totally confuses the jury.

As a matter of fact, at this point in time, I think between the various circuits that have considered it, you have possibly four different concepts. You have cases, in Doca, in Feldman, or O'Shea, where the various Courts have said that there is a real rate of interest which is anywhere from 1.5 to 2 to 3 percent.

There is a series of cases where the Court just lets it to the jury to consider what inflation is. There is a series of cases that requires expert testimony. Then there is the total offset method. All four wrestle with the same problem as to what is the method, but I think they illustrate that any one method is just not exclusive.

I think that this Court, if it attempted to say that there is one method that is superior to the others, would only run into additional problems on other aspects of damages that would not hold water.

The only question that the Third Circuit

really answered in its opinion was that they held that the District Court did not err in computing damages for future loss of earnings -- this is on 16a of the petition for certiorari -- because it is not necessary to go through the process of discounting lump sum awards at theoretical present values. The discount factor is presumed equal to the offset by the impact of inflation on the future economic value of the award.

I submit that the total offset method is as good as others and better from a theoretical standpoint. It is efficient, predictable, and saves court time.

Justice O'Connor, I would like to point out that in the 1982 Congressional hearings on amending the Longshoremen Act, at page 32, Congress said: "However, apart from these limitations on owner vessel -- limitations, an owner vessel would not be relieved of liability for owner occasioned negligence," and cites Lundy against Litton, Smith against Eastern Seaboard, and Griffith. I submit that Congress has no intention in 1982 of overruling the Griffith case which this case follows.

QUESTION: Mr. Libenson, you intimated a moment ago that you thought the Third Circuit was reviewing the District Court's damage award on kind of

an abuse of discretion theory. Taking the paragraph of the Court of Appeals' opinion beginning at the bottom of page 15a of the petition for certiorari and continuing over that paragraph until you find the Roman five in the middle of the page. Do you think that's really a fair interpretation of the Court of Appeals' rule?

MR. LIBENSON: Your question again, is this a fair interpretation?

QUESTION: Is it a fair interpretation to say that all the Court of Appeals was saying it was not an abuse of discretion for the District Court to have applied this rule, intimating that perhaps if the District Court had applied another rule, it would have affirmed it, too.

MR. LIBENSON: I think so.

But I think that Judge Aldisert in writing this opinion felt that inflation had to be addressed, obviously, from the contents of the opinion, and he felt that this method, if it is going to be addressed, is superior to anything else that has been utilized in the various circuits.

QUESTION: Well, if he felt that it was superior, then is it really fair to say that it is a review on an abuse of discretion basis, and that if Judge Cohill had applied any one of five or six other

rules, you think that would have been affirmed, too?

MR. LIBENSON: I think so.

QUESTION: May I ask you if you know whether this problem of how to compute damages in an inflationary economy has ever been addressed by any legislature?

MR. LIBENSON: I am not aware of any, Justice Stevens.

QUESTION: Were any arguments made to any of the courts along the line that something like a cost of living adjustment could be built into an award?

MR. LIBENSON: Your Honor, in the record in this case, cost of living increases were submitted to the District Court that were known under the various -- under the union contract, however; and that is the reason, on page 21 of my brief, I was able to demonstrate that if you add in the cost of living increases that were known up to the time of the trial and then reduce them by the 2 percent method under the Doca case, you would still come up with about an $80,000 higher verdict than was obtained in this case. Judge Cohill felt that the Kaczkowski case or the Alaska rule of total offset was appropriate and he applied it in this case. I hope that answers your question.

(Pause.)

MR. LIBENSON: I think this Court did address inflation in Leipheld and it said again future inflation are matters of estimate and prediction, but estimate and prediction is not anything precise. The problem is if the court is looking for a precise and totally accurate damage award, I just don't think they exist.

I think the question is, if you are looking for a method that is appropriate for most cases and which should be followed, I commend the total offset method to you because, again, it is comprehensible, efficient, and inexpensive. It will save court time. You will avoid the necessity of expert witnesses. I think any of you Justices, who have tried cases with expert witnesses on both sides, you do not get a consensus or an agreement. It is something for a jury to have to decide who to believe anyway.

QUESTION: May I ask you one other question. The government comes up with two proposals, both of which differ from the total offset method. Am I correct in believing that both of those which do in a sense take inflation into account -- both of those represent a change in the law at least as it was, let's say, ten years ago, a rather dramatic change in the law?

MR. LIBENSON: I think the question of inflation itself represents the change. The question of

how to factor it in is the problem. The method is, we could --

QUESTION: Both of the government suggestions do factor in inflation at least partially.

MR. LIBENSON: Yes. I don't disagree with that. I think all the Circuit Courts, but the First, at this time, consider inflation in awards. But the real question is: What is the most efficient way of doing in the first place.

QUESTION: Yes.

MR. LIBENSON: I might add that the total offset method, if it does favor a Plaintiff in a very small degree, it should because the Plaintiff is not the culpable party, at that point he has already established his liability.

I submit to this Court that Pfeifer's cause of action against the vessel owned or controlled by his employer J&L is valid. The damages were properly calculated in accordance with Federal law. The judgment of the Third Circuit Court of Appeals must be affirmed. Thank you.

CHIEF JUSTICE BURGER: We resume at 1:00 o'clock, counsel, so as not to divide your rebuttal.

(Whereupon, at 11:58 a.m., the Court recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

CHIEF JUSTICE BURGER: Mr. Murdoch, you may carry on.

REBUTTAL ARGUMENT OF ROBERT W. MURDOCH, ESQ.

ON BEHALF OF THE APPELLANT

MR. MURDOCH: Thank you, Chief Justice Burger, and may it please the Court. I would like to cover several points which were raised in Mr. Libenson's argument.

I would respectfully disagree that by having the amendments of 1972 that the Reed versus The Yakka case was overruled. I feel that if in my interpretation, putting 905(a), 905(b), and 933 together, would indicate again, without getting back into my argument, that all actions against a vessel or an employer are completely devoid due to these amendments and, therefore, I feel the negligence actions which are allowed under 905(b) are for a longshoreman or anyone covered under the Act against somebody other than the employer.

As to the payments that come under the workmen's compensation benefits, such as we have in this case, I believe that one of the intents, one of the purposes that we have in the workmen's compensation

statute was to provide regular payments to the individual who was injured.

We have two dangers if this type of action is allowed. First of all, it requires a lump sum payment, which is going to be paid with the stopping of the compensation payments. There is no guarantee that anybody who receives a lump sum payment such as this is going to retain it or have the wise investment opportunities.

So I think that it is something that should be considered, with the purpose to allow the monetary benefits on a regular basis, that these type of actions go against that particular intent.

QUESTION: Are you suggesting that ad hoc evaluations could be appropriately made?

MR. MURDOCH: Yes, I believe they could.

As to the total offset method, I would like to raise something as an example in order to show exactly what we are involved with with the total offset method. If we assume that the finding of the Court would be that the lost earning capacity in the future would be $180,000 for that particular plaintiff, what the total offset method does is provide $180,000 in that individual's pocket at that time. It allows him to invest at the rates, to reinvest at higher rates, so

that assuming that he had ten years of lost productivity, he gets $180,000 plus all the total interest over that time period.

That is not what we are attempting to do when we are determining what amount of money is due to an injured individual. We are determining that if he, in fact, is going to lose $180,000 over his worklife expectancy, that by reducing to the present value that in the ninth and tenth year in my example of his worklife expectancy, he is going to receive exactly what he would have received had he been continuing to work. The total offset method does not do that. It goes completely against the grain to the prejudice of the Defendants.

Also I would like to point out that under section 905(a) and 905(b) that it is almost a strict liability situation as far as the employer is concerned. We are required as employers to make these payments whether there is negligence, non-negligence, or anything like that. I think that this should be taken into consideration. Thank you very much.

CHIEF JUSTICE BURGER: Gentlemen, the case is submitted.

(Whereupon, at 1:02 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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HOWARD E. PFEIFER # 82-131

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BY Pine Hammond

(REPORTER)