ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-502

TITLE PALLAS SHIPPING AGENCY, LTD., Petitioner
v.
JOSEPH DURIS

PLACE Washington, D. C.

DATE April 25, 1983

PAGES 1 - 35

ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

- -x

PALLAS SHIPPING AGENCY, LTD., :

Petitioner :

v. : No. 82-502

JOSEPH DURIS :

- -x

Washington, D.C.

Monday, April 25, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:45 a.m.

APPEARANCES:

WILLIAM D. CARLE, III, ESQ., Cleveland, Ohio;
on behalf of the Petitioner.

THOMAS W. GALLAGHER, ESQ., Toledo, Ohio;
on behalf of the Respondent

- - -

C O N T E N T S

ORAL ARGUMENT OF	PAGE
WILLIAM D. CARLE, III, ESQ. on behalf of Petitioner	3
THOMAS W. GALLAGHER, ESQ. on behalf of Respondent	18
WILLIAM D. CARLE, III, ESQ. on behalf of Petitioner -- Rebuttal	33

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the case of Pallas Shipping Agency, Ltd. against Joseph Duris.

Mr. Carle, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM D. CARLE, III, ESQ.

ON BEHALF OF PETITIONER

MR. CARLE: Thank you. Mr. Chief Justice, and may it please the Court.

The issue in this case is whether the voluntary acceptance of compensation plus the filing and review of certain documents by the Deputy Commissioner is sufficient to trigger the assignment provisions of Section 33(b) of the Longshoremen's and Harborworker's Compensation Act.

Secondarily, whether under the circumstances of this case there is a conflict of interest which, between the employer and the employee, which would preclude an assignment under Section 33(b).

It is the petitioner's position in this case that the Sixth Circuit Decision is erroneous, that it misapplied the law as it relates to Section 33(b) and applied -- relied to a great extent upon conflict of interest principles which this court has held are not

applicable in the classic situation that exists between the longshoreman and his employer.

I would like to discuss just briefly the facts. Mr. Duris was injured in May of 1975. Shortly thereafter the stevedore employer commenced benefits to Mr. Duris which were paid either bi-weekly or weekly for a period of two years through April 28, 1977.

At that time, Mr. Duris had recovered and returned to work and payments were stopped or suspended and a form filed with the Department of Labor. We also know, at this point, in time that during the intervening period, or during that period between '75 and '77, that there was a formal claim filed by Mr. Duris and certain other informal conferences, or a conference held with all of the parties represented.

On April 8, 1980, the lawsuit with which we are here concerned was commenced and on Februay 25, 1983, Duris received a final award. Throughout the entire compensation proceedings and otherwise, Duris has been represented by competent counsel.

I would like, at this point, to give you an overview of what our argument is going to be in this case. It is petitioner's contention, first, that Section 33(b) of the Act contemplates an assignment in each and every case.

Secondly, that the congressional hearings at the time of the amendments indicate that the assignment should take place within a reasonable time after the inception of each claim. Third, that formal compensation orders are not required to constitute an award.

Four, I think it is important that the quid pro quo of the Act be maintained in balance. And five, that Congress, when it amended the Act, certainly did not contemplate eight years between injury and assignment.

The Sixth Circuit's decision in this case, we submit, is erroneous in that it took an unduly restrictive approach to the question at hand. The Sixth Circuit started its opinion and discussion of the legal issues by summarily disposing of two cases from another Circuit which it stated it simply would not follow.

These cases had held that some act of ratification of compensation plus the filing of documents and acceptance of compensation by the longshoreman was sufficient to constitute an award under the Act and specifically 33(b). These same documents were filed of record in the Duris case and the court gave absolutely no consideration to them in considering whether there should have been an award. As a matter of

fact, I don't even find them mentioned in the opinion of the court.

QUESTION: Mr. Carle, would you agree that the statutory term compensation order is a term of art as it's used elsewhere in the Longshoremen's and Harborworker's Act?

MR. CARLE: That troubles me on the term of art. I don't believe it's a term of art, really, because you find as you read the act they use the term compensation order, they use the term order, depending upon what subject they're attempting to approach. And I just hardly think that it's a term of art, at least in the sense that I understand what is meant by a term of art.

QUESTION: I think the Solicitor General's brief indicated support for that concept and I wondered if that were true, why the same meaning wouldn't carry forward in Section 33(b).

MR. CARLE: Well, it's certainly our contention that it don't.

QUESTION: There doesn't seem to be any real reason why the term wouldn't mean the same thing in all sections, including this one. And while I have you interrupted, I -- the respondent and the Solicitor General's position indicate that all the respondent's

employer had to do to ensure receipt of an award in a compensation order was to file a Notice of Controversion and request issuance of an award by the Deputy Commissioner and that it didn't require a full proceeding, but that it is possible to get an award by simply asking for it.

MR. CARLE: That, I don't believe, is quite correct. The government does state in their brief that an award, they would seem to implicate, at any rate, that an award is very easy to obtain from the Department of Labor. The award contemplates agreement between the parties and they simply, the formal award, such as was later entered in this case in February of 1983, simply does not come around quite that easy. As a matter of fact --

QUESTION: Well, this one came as a result of a formal hearing, which is one way to do it. But the position taken by the Solicitor General and the SG is that under the regulations of this Act, you don't have to go to a formal hearing, that the employer can simply ask for the formal award and will receive it.

MR. CARLE: I find no authority for that in the regulations or the Act itself. If the employer contravenes, he can obtain an award and really, when you analyze the Duris opinion, that is what the Duris

opinion has to say, that you must contravene in order to obtain an award and our position is that that certainly is not necessary. Indeed, as I go through the argument, I would intend to submit that it's not even proper. And we'll go on with that, as you'll see, Justice O'Connor.

Just prior to disposing summarily of the two cases which were decided counter to what the Sixth Circuit was going to decide, the Sixth Circuit had this to say. "The Act noted earlier makes purposeful use of the term award. Thus, if benefits are paid without an award, there should be no assignment and no six-month limitation period."

Now I can agree literally with what the court has stated here. But I submit to interpret that and apply it to the Act as the court did in this case, is going to do extreme violence to the scheme of the Act and if the court would view the statistics compiled by the Department of Labor, which were lodged with the court by our amicus in this case, you will see that only in two percent of the cases are formal compensation awards entered. And that's disputed cases, and it's less than that in undisputed cases.

Now, we firmly believe that Congress intended that an award and assignment be issued in every case and we point to the 1972 amendments to the Act in which

Congress extensively revised Section 905(b) with respect to third party liability. And in that revision, Congress stated that the third party liability action is to be brought in "accordance with the provisions of Section 33(b)."

Furthermore, the quid pro quo of the act certainly gives the employer, we contend, the right to review independently all of his cases and determine whether he wants to bring a third party action. It's also clear, we believe, that if the employer is going to lose this right, he has indeed lost a valuable right.

When we look at Section 33 as a whole, because there's the election and then the assignment and then some other sections, but when we look at that as a whole, we'll find that Sections (a) and (b) of Section 33 certainly give the employee and employer both a cause of action, at least by implication, certainly to the employee. And for certain in Section, I believe it's (d), gives the employer a cause of action for recovery under the Act of his compensation loss.

Now, if that is the case, then certainly this statute contemplates an assignment in each and every case. The conditional understanding that employer and employee would have consecutive rights to each third party action is implicit, we believe, in the hearings.

Now, the Sixth Circuit, having said that in the case of voluntary payments there could be no assignment -- no award and no assignment, thus no assignment, or no six month limitation period, realized that they had to come up with something for this poor employer, who is left with his compensation payments. And in the event the employee did not sue a third party, he had no way to recover them.

So, the Sixth Circuit said, all right, we'll give him a Burnside remedy. The Burnside remedy stems from a case decided by this court back in 1969 in which a tort action was permitted to the stevedore in order to permit him to recover other than under Section 33 of the Act.

So, they came up with this Burnside remedy, injected it into the case, and said Mr. Employer, you've got your remedy, while we, on the petitioner's side, question the existence or nonexistence, whether the existence or nonexistence of this nonstatutory cause of action is relevant to these proceedings.

Nevertheless, certainly the viability of Burnside today is extremely questionable in view, again, of the extensive revision to Section 905(b), third party liability Section of the Act with its exclusivity language. Furthermore, I find it extremely hard to

rationalize, in my mind, that any employer today would want a tort-only cause of action for recovery of his compensation loss or other damages in which he would be subjected to the possibility, at least, will he be subjected to the proportional fault recovery in the case, and possibly no recovery.

Next, the Sixth Circuit in Duris hit on the controversion issue, which I was discussing a few moments ago with Justice O'Connor. The court expressed the view, with respect to controversion that by the employer controverting the claim, that it would bring the employee into contact with the statutes which would, in turn, make the employee aware of the assignment provision and then, in view of its previous statement, which I quoted earlier, indicated that the only true way in which an award could be obtained in a 33(b) action would be via contravention.

We suggest that the Sixth's Circuit's reasoning is faulty. Certainly the regulations contemplate the informal administration of this Act and to minimize contravention and/or hearings which would be held as a result thereof.

What, I think, the court neglected to consider is that when you controvert a claim, you controvert the right to receive compensation and under the Act, Section

14 and Section 19, in order -- well, both provide that this will happen early on in the handling of any particular case within 14 days under Section 14 and within 14 days under Section 19. But, in any event, if you controvert, it's going to happen early on in the case.

It will admittedly result in a hearing and award. Now, how controversion is going to make the employee cognizant of his rights under the statutes and, in particular, his rights under the assignment provision, is certainly a mystery to me. The smooth operation of the act, we submit, should not call for contravention by the employer on each and every case in order to obtain this award and, indeed, as I suggested previously, we feel it may be highly improper.

Next, the court considered the conflict of interest question and pointed to the disincentive on the part of the employer to bring suit under the Act. The Sixth Circuit stated "this conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provision of Section 33."

We submit that the underlying reason given by the court, mainly conflict of interest, will not legally justify its conclusion with respect to an expanded

interpretation. This court considered an identical argument, conflict of interest, business relationship, in its recent decision in Rodriguez and rejected it.

We submit that the Sixth Circuit's reasoning in the Duris opinion simply cannot be sustained on sound legal principles.

I'd like, at this point, to discuss, for a short time, the history of the Act.

QUESTION: Before you do that, Mr. Carle, can I ask you just one --

MR. CARLE: Certainly.

QUESTION: -- one specific question? When, in your view, did the six months period start to run, when the form 206 was filed or the form 208? The brief, I think, is a little ambiguous on that.

MR. CARLE: Yes. The -- what we believe is necessary is that you have to have an agreement of the parties along with the filing of the documents. Now, the compensation, Justice Stevens, is going to start even before the filing of the 206.

QUESTION: I understand.

MR. CARLE: And after the 206, of course, it would continue at the same rate. Now, when do we contend that this agreement took place? When the employee accepted, when there was really an agreement

for the employee to accept the compensation and when the 206 was filed with the Department of Labor, reviewed by them and filed. At that point --

QUESTION: You then are not relying on the 208, because your brief says when the 206 and 208 were filed.

MR. CARLE: Yes. That's right. The 208 was filed. We did rely upon the 208.

QUESTION: But you don't today?

MR. CARLE: Pardon?

QUESTION: You don't today.

MR. CARLE: No, we suggested that it could be used as one means of determining when an award might be entered. The 208, as I'm sure you're aware, takes place at the end of the temporary total disability period and it is a form that is used in each and every case and if it were used, it would give the longshoreman a little bit longer period in which to consider his options.

QUESTION: What if he had a permanent disability case?

MR. CARLE: Pardon?

QUESTION: What if you have permanent disability, so that your period of payments extended for a longer period of time?

MR. CARLE: No. That's a problem with the

208, to be very frank.

QUESTION: What I'm really trying to find out is whether you really rely on the 208 form at all or not. I know that would make the case a little less extreme, but we have to figure out what the rule is.

MR. CARLE: It's a form -- it's one of the considerations which we propose that this court might consider and, as I say, I understand it has the advantage of certainty after a temporary disability period.

QUESTION: In a temporary disability case.

MR. CARLE: It has the disadvantage of handing the employer a stale claim.

QUESTION: I suppose the trouble with the form 206 is that it's a little bit contrary to the terms of the statute, because that form, in terms, is compensation without an award. That's what the form says, and we need an award, don't we?

MR. CARLE: Yes, but really, as we pointed out in our brief, all compensation starts without an award. At least, in my view it does, from practical operation.

QUESTION: But the statute talks about an award, that's the problem.

MR. CARLE: Yes. But the award comes at the time that there's an acceptance of that compensation by

the longshoreman, plus the filing of the form with the Deputy Commissioner and then he's got six months to consider his options from that point on.

In examining the history, just briefly, we're all aware that when the Act was enacted in 1927 that the longshoreman had no option. He either took his compensation or he was required to file against a third party.

There was an automatic assignment under the statutes as they existed at that time and the quid pro quo of the Act I think is important at that time, in that the employee gave up a right to sue for sure compensation and, in return, the employer accepted fault on a no-fault basis, basically. And it's also important to note that from 1927 to the present day, that assignment provision has been part of the quid pro quo of the Act.

I'd like to hold five minutes, if I may.

QUESTION: Mr. Carle, it seems to me that the interpretation you ask us to make here would render meaningless the penalty provision in Section 14. Under that Act, if an employer stops, or fails to make payments on time, and there's no award by a compensation order, the penalty's only ten percent.

But if there is an award by compensation

order, the penalty is 20 percent. Now if your interpretation applies, then that Section doesn't mean anything.

MR. CARLE: Well, I would just have to respectably disagree, Justice O'Connor. I feel that there is both the ten percent penalty, prior to an award, and the 20 percent penalty after an award and I certainly --

QUESTION: But it's your position, now, that just starting payments, making payments to the employee, in effect, amounts to an award by a compensation order under Rule -- Section 33. That would mean, thereafter, that any penalty after you start payments is at the 20 percent rate.

MR. CARLE: That's correct. That's correct.

QUESTION: So you don't need Section 14 to say there are two kinds of penalties, the ten percent and the twenty percent because you never use the ten percent. Right?

MR. CARLE: Well, it would depend on how long and when they started the compensation. But the penalties are both there and I think --

QUESTION: But your position is that once you make a payment --

MR. CARLE: I understand. I understand.

QUESTION: -- as an employer, then that's an award equivalent to an award by a compensation order so, thereafter, you have only the 20 percent penalty and you'd never reach the ten percent. You'd never need that, would you?

MR. CARLE: Well, you would certainly need it, for instance, the act provides for contravention immediately or within 14 days. You've got to do it within 14 days under Section 14, so if you contravene and did not pay, and then there did come a subsequent hearing at which they said, pay, you're going to have a ten percent penalty throughout that entire period. I think, I think the ten percent penalty is there and I think it's there for a purpose.

CHIEF JUSTICE BURGER: Mr. Gallagher.

ORAL ARGUMENT OF THOMAS W. GALLAGHER, ESQ.

ON BEHALF OF RESPONDENT

MR. GALLAGHER: Mr. Chief Justice, if it please the Court.

Section 33(b) under the Act, to quote Justice Stevens in writing an opinion for the unanimous Court in the Rodriguez v. Compass Shipping case stated that the wording of Section 933 is both mandatory and unequivocal.

I submit to this court that this Section, this wording of Section 933(b) is no less mandatory and

unequivocal today as it was when you rendered the Rodriguez decision. The statutory language is crystal clear. It's narrowly precise, to quote the terms of the Sixth Circuit. Its intent is clear on its face. You need not even go to legislative intent to receive what the statute holds.

We, as lawyers, have the responsibility to advise our clients in cases when they come to us and ask us what their rights are. We, in this situation, with the case of Joseph Duris, had the direct responsibility to advise him when he came to see us just what his rights were.

In this case, he had received a form after claim was made, and on that form it stated, payment of compensation without award. Indeed, he was paid compensation within 14 days following his injury.

He was provided with notice that he was paid compensation. The notice with which he was paid compensation reflected in boldface letters and the form he received, payment without award.

He then takes that form to his lawyer, seeking to be sure that he is getting everything he's entitled to and what am I going to advise him? I'm going to do what I should do. I'm going to look to the statute, and the statute tells me that there is an abolute,

unequivocal, mandatory condition precedent to the running of the statute of limitations in this case. And I'm going to tell that to my client. And on that advice, we will proceed in our litigation.

In this case, there had not been until February 25, 1983, any award in a compensation order. To touch upon the point brought up by Justice O'Connor, there is no question in our mind. There is no question in the mind of the amicus from the Solicitor General's office, nor in the Longshoremen's Union, nor in ATLA, who submitted amicus briefs to this court, that the language is mandatory and that there is that condition precedent, that that longshoreman need not worry about pursuing his third party remedy until such time as he receives an award in a compensation order which is filed by the Deputy Commissioner. It's purposeful language.

Until that event occurs, he does not have to concern himself with proceeding, other than to try and weigh what can or cannot be done in the future, to see what his injuries are, to see what kind of problems he's facing.

Unfortunately notwithstanding this clear language, there has arisen a conflicts in the Circuits and there's a reason for that. The key case upon which the petitioners rely, particularly in light of the fact

that they're relying on form 206, which is the very form I just mentioned, which has the bold print, without an award, is the Liberty Mutual v. Ameta case.

I submit to you, as I mentioned in our brief, that this case is an aberration of the law. It is not a true statement of what Congress intended. It is not what the law is in this area.

Liberty Mutual is based upon unique facts. It was a situation where literally the longshoremen got together with the ship owner and made a settlement, left out the lien and the rights of the equitable maritime under general maritime law lien of the employer.

The court, in an effort to remedy that law, went about seeking out proper -- the proper thing to do, but unfortunately in the wrong method, and they pursued the case from the standpoint that they wanted to get that payment back to the employer.

Therefore, they came up with the idea that mere acceptance of compensation under an award and certain acts of ratification, that meaning that there were some informal hearings, would constitute what they felt was an award in the compensation order. It is very unfortunate that they felt the need --

QUESTION: Does this happen frequently in this area of the law, where the injured party makes a deal

with the shipowner?

MR. GALLAGHER: Very rare.

QUESTION: Why is that?

MR. GALLAGHER: I think that the situation is such that the longshoremen really follow what the dictations of the law are. They get prompt compensation under the no-fault provisions of the Act and they're satisfied to a certain extent. Then they seek counsel and then pursue their remedies once they're advised just what they are, both by word of mouth and then onward to see an attorney.

But it's very unusual for them to contact the shipowner or his carrier, from the standpoint that he just doesn't have access to them unless there's potentially an insurance adjustor involved who perhaps would contact him directly and that would put up the red flag that he should seek counsel. So I submit to you that it's very rare, Your Honor.

It also brings up another important point, though, from the standpoint that when you have a situation where an individual is injured and if we were to construe the statute to be just what this says it is -- just what the petitioners are desirous of having it say, the longshoreman really only has six months and 14 days within which to bring an action.

I submit to you that's woefully inadequate and Congress recognized it to be just that, woefully inadequate. The problem is, if he were to come to me and if that was the law, I'd have to say to him, we have to file suit right now and I have to attach interrogatories to my complaint to seek out if there's any other individual who may responsible for your injury. By that, I mean a case just like this.

Joseph Duris was injured in May of 1975 while acting in his capacity as a longshoreman, but the shipowner wasn't the primary defendant. The primary defendant was a bare boat charter and I, as trial counsel, would have to advise my client, we've got to get that suit on right now and find out if there is somebody else, if there's a dry boat or bare boat charter whom we really should be suing, or you may find that if we don't file in time and have the right party, then you're totally lost as far as the third party liability aspect of the case.

So that short statute, the construction which the petitioners submit, is a very dangerous proposition for the longshoreman. As I've mentioned, unfortunately, we're, excuse me, dealing with a situation where the Liberty Mutual case started this series of cases indicating that mere compensation was mere sufficient.

And that was even expanded upon, unfortunately, by the Simmons case. And the Simmons case, they went even one step further in setting up their three-pronged test, which is outlined in our brief.

The unfortunate aspect of that three-pronged test is that the very second element of that test is to the effect that when the employer's form LS-206 is filed, that is one of the elements under which the triggering mechanism for the statute becomes applicable.

Again, the same bugaboo, the same problem, the same area of concern. The longshoreman is told that a payment without an award on a form, taking the petitioner's standpoint, is truly payment under an award.

Under such circumstance he'd have to take immediate action. Following an interpretation such as this, you're going to flood the courts with lawsuits, because we've got to get them out in time, we're going to have to move quickly.

Also, going on from the sentence court, the Second Circuit, to a certain extent, got in on the act from the standpoint that they also interpreted somewhat less accurately what the statute actually says.

The Second Circuit maintained that Liberty Mutual was in error, that there's no way that the longshoreman should have the responsibility of picking

up and defining his rights so quickly, as Liberty Mutual required. But they stated that you should have a situation where it arises that the longshoreman has access to all of the information available to him relative to what the award would or would not be, in its total, so that he would have to have an understanding of the totality of the benefits applicable to him before he should make such an award.

Unfortunately, they also, although holding that in that fashion, neglected to truly look at the statute and make the determination that the statutory wording is mandatory and is unequivocal and requires one thing, the condition precedent that there be, in each and every case when the assignment provisions are to become effective, an award in a compensation order filed by the Deputy Commissioner.

The significance of that is that the award in a compensation order is a definable entity. It is mentioned in several parts throughout the statute, Section 914(e) and (f), particularly in point from the standpoint that it sets up specific penalty provisions pending upon which actions the employers take.

Employers, from a practical standpoint, are not, I mean from a day to day standpoint, are not particularly interested, they're in no rush to have that

assignment accrued to them. They've got a benefit by this. And that benefit is, they can sit on the coattails of the employee. They have, under general maritime law, an equitable lien which allows them to obtain back out of the third party suit any monies paid to that employee under the no-fault provisions of the Act.

So they don't have to go offending their potential customers. They don't have to do anything other than wait it out, if he's going to pursue it. And that, indeed, has happened in this case.

For several years now, the unfortunate status of this litigation being in the appellate courts, and at the trial court level, where we haven't reached it on the merits as yet, I still have been receiving and coordinating information with the insurance carrier for the employers. They know that we are protecting their lien.

I submit to you a problem. What if this court should decide to follow Liberty Mutual? What really happens to the employer, actually, his insurance carrier, who by statute is subjugated to his interest? What happens to him is that he's faced with a vigorous defense from these same petitioners and a defense of Laches.

Sure, it's been a long time since this man was injured and since those payments were made. Very often it takes a long time to define what impact on your life a serious injury has occurred. The employer would be subjected to a situation where he is ultimately going to enmeshed in litigation to defend when he has relied on his interpretation of the law, like we have, pursuing the action in this fashion.

The legislative history is also indicative of the intent of Congress that this wording be clear. Since 1938, the courts, I submit to your case of American Stevedores v. Porello, holding that mere compensation is not sufficient to trigger the statute of limitations, is still good, valid and viable law today.

The wording that I'm referring to, the award in a compensation order filed by a Deputy Commissioner, had not been changed by Congress in any of the three times this Act has been amended. Strike that, I mean the two, since it was put into the Act in 1938.

It was thoroughly reviewed in 1959 and at those legislative hearings it was even pointed out that Congress was very interested in the state of the judicial interpretation of this statute.

They liked what they saw. They liked what this court was doing and what the appellate courts and

circuit courts were doing, because they were interpreting the law as it was and as it is today.

So also in 1972 when they amended this Section of the statute again. They didn't touch this wording. This wording provided the condition precedent upon which an employer would take action. And until it was effectuated, there was no need for the employee to take action.

I submit to you that in the reply brief of the petitioners, they saw the infirmities of their arguments relative to the Fourth Circuit and the Second Circuit and they came up with a new theory, that being that Section 919(c) of the Act does not apply to strictly controverted claims, that it applies in all cases.

A careful review of that statute will reflect that that's just not the case. Section 919(c) reflects only, and is applicable only, to those cases where there is a controversion. And the controversion concept's important, too, from the standpoint as mentioned by Mr. Carle earlier.

They maintain that the employer must controvert every claim in order to get his assignment. Number one, he's not that interested in that assignment to begin with, if there's a third party liability claim because he's going to watch the suit of the longshoreman.

Number two, the situation is such that he doesn't need to pursue the matter, because of that action, and at the same time he has his own rights under the Burnside decision of a general maritime action over against the shipowner, should he desire to do that.

That case, which has been attacked by the petitioners, is still valid law. This court in Cindia Steamship Lines v. Delasantos left open the fact that the shipowner still has a duty to a longshoreman and if he breaches that duty, he would have to be subjected to a third party suit, or can be subjected to a third party suit directly from the longshoreman.

So therefore, that Notice of Contravention, the active participation of the longshoreman in contravening is not that necessary from a simple standpoint that if, at any time, he's worried about his compensation benefits, the fact that he's put this money out and hasn't got it back yet, he can, at any time, voluntarily indicate to the Deputy Commissioner that he wants an award. That is 19(c) -- 919(c).

The Code of Federal Regulations also provides for that interpretation and that is, that promulgated by the Secretary of Labor. I submit to you that another review of the Code of Federal Regulations will also reflect the fact that there are procedures which are

applicable to this case and other longshoreman cases like it from the standpoint that these hearings are to be informal in nature.

It's important to consider the whole concept. The Longshoremen Act is a comprehensive scheme to take care of the longshoreman first. He's the primary beneficiary of the Act.

Secondly, the employer, to try and get back the money he spent, if there is a third party who is liable, if there's a third party who's caused the injury. Why harm the longshoreman and why harm the employer, and that's the idea behind the Act.

I submit to you that if you take the narrow construction and ignore the statutory language that the petitioners desire, who benefits? Only one person and that's the shipowner, or the bare boat charter. They get the benefit of the short statute of limitations. They get the benefit of getting out of this picture soon, rapidly.

And also, there's the trap that the longshoreman can make unwitting assignments. If you hit him with a long -- with a very short statute of limitations, you're facing the situation or prospect where he's not going to have the opportunity to decide for himself what needs to be done, if there is, indeed,

the potential for a third party action.

That is an incongruous and harsh result which this court has repeatedly attempted to avoid.

QUESTION: Mr. Gallagher, may I ask you a question? Assume that we agree with you, that we read the statute literally and there's no six months limitation period here. What, if any, limitation period is there on the suit you may bring?

MR. GALLAGHER: I think that you have to go right back to the statute, that there still is a six month statute of limitations, only on those occasions, however, when there is an award.

QUESTION: Under 98 percent of the cases, there's no award.

MR. GALLAGHER: Well, in most situations, it's up to the employer. It's the shipowner who wants you to say that there's not going to be an award, that the figures are reflective of very few awards.

The realities are that if the individuals who the Act is to protect, and in this example, the employer, wants to have the award, wants to have his assignment, he can do so at any time.

QUESTION: Well, but that's really not my question. Assume nothing is done and you have this informal method of proceeding. Is there any period, any

bar at all? Could we sue 20 years from now, for example?

MR. GALLAGHER: Potentially you could.

QUESTION: You think it's -- you think you could.

MR. GALLAGHER: I think you could. I think that that wording was specific in the case law, as indicated, just what -- that it is what it says and that if nothing were to be done, anywhere on down the line, certainly the door would be open. From a practical standpoint with the longshoreman, however, that doesn't happen. I'm not aware of any case that has had any such factual circumstance.

This case is probably unique from the standpoint that only, in looking at the calendar, the injury was 1975 and here we are in 1983. The longshoreman will get his initial benefits and, pursuant to the Act and the intent of Congress, weigh his variables. And generally, within a year or two, just like any other victim of a tort-feasor, will generally file suit.

Joe Duris did in this case. We filed suit for him, the first lawsuit, April 12, 1977. That eight year comment made is strictly one only related to the fact that the injury occurred eight years ago. It has absolutely no bearing on the fact that the lawsuit was

filed in April of 1977, the first lawsuit.

QUESTION: It could have been filed. My point, I just wanted to make --

MR. GALLAGHER: It could have been.

QUESTION: -- it could have been filed in 1990, 19 --

MR. GALLAGHER: My caveat to that, though, is, however, it's highly unlikely. I am aware of no such circumstance.

For the foregoing reasons, we would ask this court affirm the Sixth District.

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

ORAL ARGUMENT OF WILLIAM D. CARLE, III, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. CARLE: Yes. I'd just like to comment. We, as that awful shipowner, don't quite look it as a six month limitation. We look it as an assignment to know who has control of this action.

Supposedly, we're the third party tort-feasor, under Section 905. We have a right to know, we think, who has the right to bring this cause of action in order to prevent multiplicity of litigation, which is what I thought we were trying to avoid, after the 1972 amendments.

Now, there was, in this claim -- in this particular case, a formal claim filed. Unfortunately, it's not in the record of the case. It was only obtainable by us, just as a matter of fact before we wrote our reply brief, when the file was closed with the OWCP. But it is there and Section 19 does apply to it and the notice to the employer is there, so that, really, any way you would look at this case, Mr. Duris is late, a long time late, in bringing his cause of action in 1980.

Now, granted, he did have two previous causes of action, but those causes of action were gone by the time that this cause of action, with which we are here concerned, was run.

I want to say one more thing. Congress, we feel, intended only a reasonable period of time in which to -- in which the employee should be allowed to consider his options. It certainly didn't consider eight years and if that is what we're going to be stuck with, we might just as well write the assignment provision right out of the Act.

I thank you.

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

(Whereupon, at 11:32 a.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

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

Pallas Shipping Agency, Ltd., Petitioner v.
Joseph Duris No. 82-502

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

BY _____
(REPORTER)