

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-747

TITLE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Petitioner  
v. PAUL D. JOHNSON, ET AL.

PLACE Washington, D. C.

DATE April 24, 1984

PAGES 1 thru 54



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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

WASHINGTON METROPOLITAN AREA :

TRANSIT AUTHORITY, :

Petitioner, :

v. : No. 83-747

PAUL D. JOHNSON, ET AL. :

- - - - -x

Washington, D.C.

Tuesday, April 24, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:49 o'clock p.m.

APPEARANCES:

E. BARRETT PRETTYMAN, JR., ESQ., Washington, D.C.; on  
behalf of the petitioner.

WILLIAM F. MULRONEY, ESQ., Washington, D.C.; on behalf  
of the respondents.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C C N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
E. BARRETT PRETTYMAN, JR., ESQ.,	
on behalf of the petitioner	3
WILLIAM F. MULRONEY, ESQ.,	
on behalf of the respondents	27
E. BARRETT PRETTYMAN, JR., ESQ.,	
on behalf of the petitioner - rebuttal	51

1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Washington Metropolitan Area Transit Authority  
4 against Johnson.

5                    Mr. Prettyman, I think you may proceed  
6 whenever you are ready.

7                    ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,  
8                                    ON BEHALF OF THE PETITIONER

9                    MR. PRETTYMAN: Mr. Chief Justice, and may it  
10 please the Court. This case involves an interpretation  
11 of three sentences in the Longshoremen's Act which at  
12 the time of the injuries in this case was the governing  
13 law in the District of Columbia for workers  
14 compensation. These three sentences appear in Sections  
15 904(a) and 905(a) of the Act.

16                    WMATA is and has been for many years in  
17 overall charge of building the Metro system in the  
18 Washington metropolitan area. It has been doing so  
19 pursuant to an interstate compact between the  
20 jurisdictions of the District of Columbia, Maryland, and  
21 Virginia. The compact directs WMATA, the Washington  
22 Metropolitan Area Transit Authority, to construct the  
23 system, and WMATA as the general contractor subcontracts  
24 the construction out to hundreds of subcontractors and  
25 thousands of sub-subcontractors at various tiers.



1           Prior to 1979, each sub at whatever tier  
2 purchased its own workers compensation, and this simply  
3 proved to be unworkable. The small and minority  
4 contracts have trouble getting insurance and competing  
5 for the bids. WMATA was never really certain whether  
6 they had secured or not, or whether they were  
7 maintaining their insurance, and since the purpose of  
8 the Act is to make certain that all employees are  
9 covered at all times, WMATA in 1971 introduced the CIP,  
10 the coordinated insurance program, or what we call  
11 wrap-up.

12           And this is a single policy for comp, for  
13 general liability, for workers' liability, covering  
14 every employee at every tier in the entire system.  
15 WMATA did this by being named itself in the policy, and  
16 then in order to make sure that all employees are  
17 covered, because you obviously couldn't name every  
18 employee, by naming every sub as the sub came on board  
19 on the policy, and WMATA thereby secured under the Act,  
20 and respondents, incidentally, do not deny that we  
21 secured.

22           These suits were brought by seven injured  
23 employees. Compensation was promptly paid to them under  
24 the wrap-up, and then the employees brought these tort  
25 suits.

1                   QUESTION: Mr. Prettyman, does the same  
2 situation exist outside the Metropolitan Transit  
3 Authority in other construction contracts in areas  
4 covered by the Longshoremen and Harbor Workers' Act?

5                   MR. PRETTYMAN: Let me answer that in two  
6 ways. The wrap-up itself is being used extensively  
7 throughout the United States in every large project. As  
8 it affects the longshoremen, Your Honor, it is rather  
9 limited, in the sense that there are other statutes that  
10 incorporate the Longshoremen's Act, the Defense Base  
11 Act, and other statutes, but it does not apply, and  
12 also, of course --

13                  QUESTION: But this question would have  
14 application beyond the boundaries of the Washington  
15 Metropolitan Transit Authority, I assume, in other  
16 construction contracts under the Longshoremen and Harbor  
17 Workers' Act?

18                  MR. PRETTYMAN: Correct, Your Honor, and it  
19 also, of course, would apply in a limited sense in the  
20 maritime situation. It would not apply in your  
21 traditional vessel owner, stevedoring, longshoremen  
22 situation, but it would where different things such as  
23 crane operations and so forth were subcontracted out.

24                  QUESTION: You don't have too many  
25 subcontracts in the maritime business.

1 MR. PRETTYMAN: No. That is absolutely true,  
2 Your Honor. All five district --

3 QUESTION: Does the use of the wrap-up  
4 insurance result in lower premiums overall and lower  
5 administrative costs?

6 MR. PRETTYMAN: It results in lower  
7 administrative costs, but the premiums, of course, are  
8 quite high. We paid out \$177 million in this project in  
9 workers comp premiums.

10 QUESTION: Is that substantially less than it  
11 would have been if the individual subcontractors were  
12 all buying it separately?

13 MR. PRETTYMAN: I think it is substantially  
14 less. Certainly cost is a factor here, but I have got  
15 to emphasize that the real force behind wrap-up is  
16 several things. First of all, to impose your safety  
17 program on the entire project from the top, and  
18 secondly, to make absolutely certain that you are  
19 carrying out your duty to have this comp secured at all  
20 times, because when you have got subcontractors coming  
21 aboard, leaving, some of them may or may not have  
22 insurance. They have it. Maybe it lapses, and so  
23 forth. Monitoring that situation becomes impossible as  
24 a practical matter. Wrap-up, we have found since '71 is  
25 simply the only practical way of doing this.

1 All five District Court judges in these seven  
2 cases held that WMATA was a general contractor, that  
3 since the subs had not secured, that WMATA fulfilled its  
4 statutory duty in securing with this policy, that all of  
5 the employees had received compensation under the  
6 policy, and therefore WMATA was entitled to immunity  
7 from tort suit under Section 905(a).

8 QUESTION: As an employer, Mr. Prettyman?

9 MR. PRETTYMAN: I am sorry, Your Honor?

10 QUESTION: As an employer, or what?

11 MR. PRETTYMAN: No, as a contractor.

12 QUESTION: Yes, as a contractor.

13 MR. PRETTYMAN: And I will get to that  
14 specific language, but of course, as you know, the  
15 statute --

16 QUESTION: But only because somebody else has  
17 not -- did not have their own insurance?

18 MR. PRETTYMAN: Well, let me make it clear.  
19 It gets the immunity as a statutory employer, and it  
20 gets it because it had a duty as a contractor to go cut  
21 and secure, in view of the fact under Section 905(a)  
22 that the employer was a -- the direct employer was a  
23 subcontractor. Then --

24 QUESTION: Well, suppose the subs never  
25 changed. There was a group of subs, and they all sat



1 down with the general contractor, and they all said,  
2 well, how should we go about getting our insurance, and  
3 the general said, well, why don't I just buy it for all  
4 of you, it will be cheaper in the long run, and the sub  
5 says, well, if that's the way you want it, but we will  
6 get our own if you want. And so you buy the insurance  
7 because there has been a mutual decision that the subs  
8 won't. Wouldn't you be making the same argument here?

9 MR. PRETTYMAN: Well, Your Honor, first of  
10 all, the subs can do that --

11 QUESTION: Can you answer that yes or no?

12 MR. PRETTYMAN: Oh, well, I would be making  
13 the same argument here unless the Court were to hold --  
14 it would be rather unusual under the circumstances here  
15 -- if the Court were to hold that we were merely acting  
16 as an agent for the subs and that they really secured  
17 and we didn't.

18 QUESTION: No, the general buys it, and  
19 everybody agrees they are going to buy it, and you will  
20 be -- you are the one who will pay the -- you will pay  
21 the employees.

22 MR. PRETTYMAN: Then I think we are fulfilling  
23 our duty under the statute to secure. There is no  
24 question about it. Look at how this statute is  
25 arranged, Your Honor. This is --

1 QUESTION: But then what if the subs -- what  
2 if the employee of the sub is hurt, and turns to you for  
3 compensation and you pay him.

4 MR. PRETTYMAN: Yes.

5 QUESTION: Can the sub then -- can the  
6 employee then -- and suppose the sub was negligent.

7 MR. PRETTYMAN: Right.

8 QUESTION: And was responsible for the  
9 accident. Normally couldn't the employee sue the sub as  
10 a third party?

11 MR. PRETTYMAN: Well, it depends on who you  
12 mean by the sub. If you are talking about his immediate  
13 -- his immediate employer?

14 QUESTION: I am talking about the sub who was  
15 negligent. No, I -- Yes, the immediate employer.

16 MR. PRETTYMAN: Yes, the immediate employer.  
17 We say that perhaps he can sue the sub for tort, Your  
18 Honor. Now, you get into there Professor Larson  
19 pointing out that the modern trend is to allow immunity  
20 all up the line, so you may say that everybody is  
21 immune.

22 QUESTION: Do you object to the dismissal of  
23 Bechtel here?

24 MR. PRETTYMAN: No, of course not.

25 QUESTION: Why?

1 MR. PRETTYMAN: Because Bechtel was our agent  
2 under Section 80 of the compact.

3 QUESTION: I know, but they were the -- they  
4 were sued as a third party, weren't they?

5 MR. PRETTYMAN: Yes, but they are not the  
6 employer, Your Honor. They are not the immediate  
7 employer. The immediate employer were various subs down  
8 the line, and instead of suing --

9 QUESTION: So could they sue -- you suggest  
10 that perhaps the subs who were possibly negligent could  
11 be sued.

12 MR. PRETTYMAN: Unless you adopt the modern  
13 theory that everybody gets immunity. That is the modern  
14 trend, as pointed out by Professor Larsen in his  
15 treatise. But if you don't do that, then what we say is  
16 this. You look to who has the duty. As soon as you get  
17 into the second sentence of Section 904, and you have a  
18 -- let me just read that to you, because I think it is  
19 quite important.

20 "In the case of an employer who is a  
21 subcontractor," and that is what we have here, "the  
22 contractor shall be liable for," not the sub any longer,  
23 but "the contractor shall be liable for and shall secure  
24 the payment of such compensation." And that is what we  
25 did. That is our situation.

1           Now, when we do that, then it may be that you  
2 will eventually hold in the next case, not this one,  
3 that the sub may nevertheless have immunity because it  
4 was contingently liable in the event that we failed to  
5 secure, but the important point is that we get immunity  
6 under Section 905(a) because we fulfilled the duty that  
7 we had at that point. "The contractor shall be liable  
8 for and shall secure." That is us. That is WMATA. And  
9 that is what we did. And that is what we got when we  
10 got this --

11           QUESTION: But, Mr. Prettyman, you didn't read  
12 the rest of the sentence.

13           MR. PRETTYMAN: Yes.

14           QUESTION: It says, "unless the subcontractor  
15 has secured such payment." Now, is it part of your  
16 argument that the subcontractor has not secured the  
17 payment?

18           MR. PRETTYMAN: Absolutely, Your Honor.

19           QUESTION: And therefore it is your position  
20 that the subcontractor is liable?

21           MR. PRETTYMAN: Well, as I say, it may be in  
22 the next case that they are liable, but I would point  
23 out to you that the modern trend in this is to say that  
24 as soon as somebody secures at any tier, at any point,  
25 as soon as somebody secures, everyone up the line should



1 be immune from tort suit thereafter because they are  
2 potentially liable in the even of the circumstance --

3 QUESTION: Well, that may be the modern trend  
4 in legislation or something, but it doesn't hardly  
5 square with the Longshoremen's Act, does it?

6 MR. PRETTYMAN: Well, I respectfully submit  
7 that that issue has not been decided --

8 QUESTION: Well, it may not.

9 MR. PRETTYMAN: -- and it doesn't have to be  
10 decided in this case. All you have to decide in this  
11 case is, did we have a duty, and did we fulfill it and  
12 thereby do we get the immunity --

13 QUESTION: Well, if you have a duty and you  
14 have fulfilled it, the sub, the actual employer, didn't  
15 have a duty, and didn't fulfill it, and why should he  
16 have immunity under the Longshoremen's Act?

17 MR. PRETTYMAN: Well, because he was  
18 potentially liable in the case that something happens to  
19 our insurance. There is a concomitant duty here, Your  
20 Honor. The employer --

21 QUESTION: Nothing happened to your  
22 insurance.

23 MR. PRETTYMAN: Pardon me?

24 QUESTION: Nothing happened to your  
25 insurance.

1 MR. PRETTYMAN: No, absolutely not. And in  
2 this case it is just clear as can be that we did what we  
3 were supposed to do, and that we should therefore get  
4 the immunity for doing it. That is the quid pro --

5 QUESTION: Well, Mr. Prettyman, what if the  
6 subcontractor got the insurance, and the general  
7 contractor didn't? Do you think the general contractor  
8 should have immunity in that circumstance?

9 MR. PRETTYMAN: Again, that is the next case  
10 where you may eventually hold --

11 QUESTION: Well, but what do you think?

12 MR. PRETTYMAN: I think myself unless you  
13 adopt the modern view that we should be liable,  
14 absolutely, they should be able to sue us in tort if you  
15 do not adopt the modern view in the next case.

16 QUESTION: Are we free to, as you say, adopt  
17 the modern view?

18 MR. PRETTYMAN: Yes, it is wide open, Your  
19 Honor, --

20 QUESTION: Why? Why is it?

21 MR. PRETTYMAN: -- because this hasn't been  
22 interpreted before.

23 QUESTION: Well, it isn't if the statute  
24 doesn't permit it.

25 MR. PRETTYMAN: But I think the statute does

1 permit it. The statute says that under Section 905(a),  
2 and let me turn to that, because I think quite clearly  
3 here the real issue comes down to whether we are a  
4 statutory employer protected by Section 905(a), and as  
5 you know, Section 905(a) says the liability of an  
6 employer prescribed in Section 904(a) of this Act shall  
7 be exclusive.

8 Now, does that apply to us? That is the  
9 issue. And I would submit to you that it doesn't make  
10 any sense under this statute and this statute that you  
11 are interpreting, it doesn't make any sense for us not  
12 to be a statutory employer, and let me tell you why.

13 If we are not a statutory employer, it means  
14 that we do not even have to pay out what we have  
15 secured, because under Sections 907 to 9 and 914, paying  
16 out, that only relates to an employer. It means that we  
17 wouldn't have to notify the Labor Department when we  
18 made our first payment under this comp policy because it  
19 says only the employer does that. It would mean that  
20 the contractor couldn't be sued for comp by the  
21 employee. So we have got this policy out there and they  
22 couldn't even sue us, because the statute says that only  
23 an employer can be used by the employee.

24 QUESTION: Well, you are just a gratuitous  
25 interloper.

1 MR. PRETTYMAN: Pardon me?

2 QUESTION: You are just a gratuitous  
3 interloper.

4 MR. PRETTYMAN: That's right, a volunteer, as  
5 the Court of Appeals said, Your Honor. And of course we  
6 are not. We had a duty and we fulfilled it here.

7 QUESTION: Well, I suppose regardless of whose  
8 name is on the policy, the cost of the premium in one  
9 way or another is being shared by both the general  
10 contractor and the sub, either in the form of a lower  
11 bid by the sub if the general contractor gets it or vice  
12 versa.

13 MR. PRETTYMAN: Your Honor, the lower price  
14 that is submitted in the bids by the subs is applicable  
15 to everybody, everybody who comes along. They don't get  
16 a better position vis-a-vis each other. They have to  
17 outbid each other without counting the cost of the  
18 insurance in the bid, but they can, and as a matter of  
19 fact this happened about a month ago.

20 QUESTION: The point is just that I think you  
21 might find that the cost of the premium is economically  
22 being shared by both the subcontractor and the general  
23 contractor.

24 MR. PRETTYMAN: Well, to be very honest, Your  
25 Honor, I think the cost of this premium is being paid by



1 the public, because what happens is, while the bids are  
2 lower, the general contractor, WMATA, is paying these  
3 tremendous \$177 million out in premiums, and that in  
4 turn is being paid by the taxpayers. I don't really see  
5 that the subs get any quid pro quo benefit out of that,  
6 because they are all competing on an equal basis.

7 Proceeding now, as I say, the statute would  
8 make absolutely no sense at all, because the contractor  
9 couldn't be sued in tort and have all its defenses, and  
10 no one, if no one secured at all -- Let's take the  
11 situation that was just posed to me, where no one  
12 secured. We couldn't even be sued by either the  
13 government under the criminal sections or civilly  
14 because we hadn't secured, because that relates only to  
15 the employer.

16 So it seems to me that the only thing that  
17 makes any sense under this statute at all is for us to  
18 be deemed the statutory employer under Section 905(a).

19 Now, let me turn to the fact that they claim  
20 here that we are really an owner and not a general  
21 contractor. I think I can pass very quickly over that,  
22 because all of the courts below, including the Court of  
23 Appeals, said that we were a general contractor. If we  
24 were not, I don't know who would be, because we are the  
25 only one in overall charge of this project. We are the

1 ones who have let all of the bids out and approve  
2 everybody. We supervise. We control. We monitor.

3 And I might say that if we were the owner, we  
4 would be very happy about it, because then we wouldn't  
5 have any responsibility under this Act at all --

6 QUESTION: Can't you be both?

7 MR. PRETTYMAN: Pardon me?

8 QUESTION: Can't you be both?

9 MR. PRETTYMAN: You can be both an owner and a  
10 contractor, but I would point out to you that  
11 respondents were specifically asked that question by the  
12 Court of Appeals, are you suing them as an owner, and  
13 they said no. Most importantly, if we are not an owner,  
14 we don't have to secure, we don't have to pay, we don't  
15 have to do anything. We are totally out of the  
16 compensation picture.

17 QUESTION: You mean if you are not a what, a  
18 contractor?

19 MR. PRETTYMAN: If we are not a contractor and  
20 we are an owner. Did I misspeak myself? Excuse me.

21 So, I think it is quite clear that we are a  
22 contractor and covered here. I would submit to you that  
23 it simply makes no sense, the Court of Appeals  
24 formulation in this case, because it not only  
25 contradicts the Act, but it is really totally unworkable

1       what they suggest.

2               And as for respondent's suggestion, well, why  
3       don't you go out and get a letter from everybody saying  
4       they have secured, we have 355 subs and 2,765  
5       sub-subcontractors in this case. It would be totally  
6       unworkable. And we wouldn't know from one day to the  
7       next whether anybody still maintained their insurance.

8               QUESTION: May I ask, about this army of subs  
9       and sub-subs and all, supposing some of them in  
10      ignorance or whatever it might be had gone out and  
11      bought their own insurance. They had a very  
12      conservative lawyer who said, I don't care what the  
13      Metropolitan Area Transit Authority did, you get your  
14      own insurance, and they got it. And they did it before  
15      they signed their contract with you to have some kind of  
16      overall coverage.

17              Would they then have secured the payment  
18      within the meaning of 904(a)?

19              MR. PRETTYMAN: Yes, sir.

20              QUESTION: And then as to them you would be  
21      secondarily liable in tort as to those -- I mean, if  
22      they could identify such a situation, you would be a  
23      third party tortfeasor?

24              MR. PRETTYMAN: Unless you adopt the modern  
25      view. I hate to keep throwing that in, but the next

1 case, you may say everybody gets immunity, but if you do  
2 not do that, then we would be the third party, correct.

3 QUESTION: But under your reading of the  
4 statute, one or the other is -- you are going to say  
5 unless we adopt the modern view, but you think the  
6 statute means one or the other is liable, and you, by  
7 buying the insurance first, prevented -- I mean, you  
8 don't have to wait until they have had an opportunity to  
9 secure payment under --

10 MR. PRETTYMAN: No, because they can come in  
11 at any time. I was about to say a few minutes ago --

12 QUESTION: Well, Mr. Prettyman, why don't you  
13 -- it seems to me you have already said that you as a  
14 general contractor and your sub could sit down and as  
15 part of your deal say that you don't carry the  
16 insurance, I do, which is what you have essentially  
17 done. And even if a sub has bought insurance before,  
18 the deal is that you are carrying the insurance. He  
19 should cancel his.

20 MR. PRETTYMAN: But it is important that the  
21 sub is free to come in at any time and get its own  
22 insurance, and what I was going to say was that this  
23 happened about a month ago. A sub said, never mind your  
24 wrap-up. We are going to go out and get our own.

25 QUESTION: Why should it be free? Why should



1 it be free?

2 MR. PRETTYMAN: Because the statute says  
3 unless the subcontractor has secured.

4 QUESTION: I thought a while ago you said that  
5 if by agreement he doesn't get it, he hasn't gotten it,  
6 and hence you can get it. I thought that was your  
7 argument.

8 MR. PRETTYMAN: My argument is --

9 QUESTION: It almost has to be.

10 MR. PRETTYMAN: Let's take it from the  
11 beginning. Let's start on Day One. On Day One of the  
12 project, we both have a duty to secure. If WMATA goes  
13 and gets it pursuant to the second sentence, because  
14 this is an employer who is a subcontractor, the  
15 contractor has the duty. We go and secure. But then it  
16 says, unless the subcontractor has secured, because  
17 obviously there is no point in having two insurance  
18 programs in place at the same time for one injury.

19 Now, that means that at any point that the  
20 subcontractor wants for any reason to go out and get his  
21 own insurance, he can do it. As to his employee, he  
22 then in turn relieves us of our duty under the statute.

23 QUESTION: Why does that pose some sort of a  
24 continuing authority on the part of the sub to secure if  
25 you in fact have secured at the beginning?

1 MR. PRETTYMAN: Maybe I misspoke myself. It  
2 doesn't have a continuing duty to secure. We have  
3 relieved it of its duty to secure, but we have not  
4 preempted it. We have not cut it off from securing. It  
5 can secure if it wishes to, but it has no duty whatever  
6 to secure.

7 QUESTION: You mean although it is already  
8 covered by your policy --

9 MR. PRETTYMAN: Absolutely.

10 QUESTION: -- it could in a kind of fit of  
11 absentmindedness get a policy of its own?

12 MR. PRETTYMAN: Well, as I say, it happened  
13 recently.

14 QUESTION: Well, it is more than  
15 absentmindedness. I can see a subcontractor thinking he  
16 would rather have his own insurance so that he isn't  
17 going to be subjected to third party suits if his  
18 employees are injured, so it would make some sense for  
19 subcontractors to want to get their own. You are just  
20 saying they can do it if they want to.

21 MR. PRETTYMAN: Of course they can. Exactly.  
22 And if you look at Page 104 of the joint appendix, you  
23 will see where we tell them that, that they can go out  
24 and get it.

25 QUESTION: If on March 1st the project starts

1 with this sub, and on that date the sub has not secured,  
2 WMATA goes out and secures. Now, on March 8th the sub,  
3 following the advice of Justice O'Connor's hypothetical  
4 lawyer, says, even though you are already covered by  
5 another policy, and the sub goes ahead and buys another  
6 policy, I take it WMATA has still secured because the  
7 subcontractor did not secure.

8 MR. PRETTYMAN: Up until March 8th they had  
9 secured, and at that point the sub comes in, and the  
10 caveat that Justice Stevens pointed out comes into  
11 effect and says, unless the sub has secured. At that  
12 point the sub comes in and secures, and in turn relieves  
13 WMATA of its duty.

14 QUESTION: Well, but is that something that  
15 can just change from day to day? I thought this was  
16 kind of -- the sentence was kind of to give the parties  
17 a basis on which to structure their relationship.

18 MR. PRETTYMAN: But that is the beauty of the  
19 wrap-up, because the wrap-up says you don't have to  
20 secure, we are covering you --

21 QUESTION: Yes, but if they did.

22 QUESTION: Supposing under the wrap-up a sub  
23 -- it is all wrapped up, but Justice O'Connor's  
24 hypothetical lawyer says to a particular sub, you go buy  
25 a policy anyway. Now, does that cut that sub out so far

1 as WMATA is concerned?

2 MR. PRETTYMAN: Of course not. It can go get  
3 it. We have that right now and --

4 QUESTION: But then have you not secured so  
5 far as that sub is concerned?

6 MR. PRETTYMAN: Well, so far as that sub's  
7 employee is concerned, in effect, we have both secured,  
8 but it has relieved us of our duty to secure.

9 QUESTION: And subjected you maybe to a third  
10 party liability.

11 MR. PRETTYMAN: It is possible.

12 QUESTION: I suppose the terms of your wrap-up  
13 policy recognize this, and recognize that on any given  
14 day somebody might opt in and then relieve the wrap-up  
15 policy of its liability. Isn't that the way it is  
16 written?

17 MR. PRETTYMAN: We told them in the insurance  
18 specifications --

19 QUESTION: You tell them that when you get  
20 your wrap-up policy.

21 MR. PRETTYMAN: Absolutely. We told them in  
22 the insurance specifications that they can go out at any  
23 time and get it.

24 QUESTION: But the question that we don't have  
25 to answer here is whether immunity is granted all down

1 the line for the general and the subs. We are not  
2 answering it here, although I guess we could.

3 MR. PRETTYMAN: Well, I see no reason to do it  
4 here. The only question you have to answer here is, did  
5 we have a duty, and if we did, did we fulfill it, and if  
6 we did, do we get immunity under 905.

7 QUESTION: Well, really, we should say with  
8 respect to the subs who didn't get their own do you have  
9 a duty.

10 MR. PRETTYMAN: But none of them got them  
11 involved in this case, Your Honor. This case involves --

12 QUESTION: We don't know that, do we?

13 MR. PRETTYMAN: Yes, you do. The lower courts  
14 all held that the subs did not secure.

15 QUESTION: None of them?

16 MR. PRETTYMAN: None of them.

17 QUESTION: None of them did.

18 MR. PRETTYMAN: Involved in this case.  
19 Absolutely. This case is no one secured except us. We  
20 secured. Now, as I point out, they say that they  
21 secured, they were secured by just being named on the  
22 policy, but of course that doesn't make any sense at  
23 all, because by just -- the only reason we named them on  
24 the policy was so we would know who their employees  
25 were, and if they suddenly -- they have no control over



1 the policy whatever, including whether they themselves  
2 are taken on and off. It hardly makes sense to say that  
3 they secured under the policy just by being named.

4 QUESTION: They don't even have the right to  
5 pay for it.

6 MR. PRETTYMAN: I am sorry, Your Honor.

7 QUESTION: They don't even have the right to  
8 pay the premium, do they?

9 MR. PRETTYMAN: Yes, they do. They can go out  
10 and get it on their own.

11 QUESTION: No, I said on this particular  
12 policy.

13 MR. PRETTYMAN: Oh, on this, they do not have  
14 to pay -- the way I would put it is, they are not forced  
15 to pay the premium on this policy. Let me just --

16 QUESTION: May I ask just one rather stupid  
17 question, I am afraid?

18 MR. PRETTYMAN: Sure.

19 QUESTION: But the words "secure the payment  
20 to his employee," we are emphasizing the word "secure."  
21 Under this statute, could a big employer be a  
22 self-insurer?

23 MR. PRETTYMAN: Yes, 932, Your Honor, defines  
24 securing, and it defines it either as being a  
25 self-insurer or as getting and maintaining insurance.

1 Let me just touch briefly on one last point here, and  
2 that is the New York statute, because everybody agrees  
3 the legislative history is silent on what 904 and 905(a)  
4 as it affects us here, and so they come back to the  
5 legislative history of -- not the legislative history,  
6 but they come back to the New York statute.

7 Let me just say very briefly the New York --  
8 this Court has never had an opportunity to address this  
9 before, incidentally. You have always said the  
10 Longshoremen's Act is patterned after the New York Act.  
11 This is the one case where it isn't. There is an  
12 extraordinarily important material difference between  
13 the New York Act and Longshoremen's.

14 In the New York statute you had only a duty to  
15 secure and pay, and two New York cases have pointed out  
16 the difference. If I have a duty to secure, I have to  
17 go out on Day One before anybody is injured and under  
18 criminal penalty I have to get that insurance in place,  
19 and I have to pay the premiums even if nobody is ever  
20 injured. Under the New York Act, you don't have to.  
21 You can wait until the first injury comes along. You  
22 can pay it. You can wait until the next injury comes  
23 along. You can pay it. And you never have to secure.  
24 So that -- I will just leave you with that thought.

25 QUESTION: Let me ask one more question if I

1 may.

2 MR. PRETTYMAN: Sure.

3 QUESTION: You mentioned the criminal  
4 responsibility. Is there any possibility that a  
5 subcontractor here who did not secure because you  
6 secured is subject to criminal liability?

7 MR. PRETTYMAN: None whatever, because we have  
8 relieved him of his responsibility to secure. We did  
9 our duty under 904(a) and 905(a) by securing ourselves,  
10 and as is shown by the caveat --

11 QUESTION: You say he has no independent duty  
12 to secure?

13 MR. PRETTYMAN: Oh, absolutely not, as shown  
14 by the unless clause, which clearly shows that they both  
15 don't have to get insurance for the same injury.

16 Thank you.

17 CHIEF JUSTICE BURGER: Mr. Mulroney.

18 ORAL ARGUMENT OF WILLIAM F. MULRONEY, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. MULRONEY: Mr. Chief Justice, and may it  
21 please the Court. The issue in this case is whether  
22 Metro should be given immunity from third party suits by  
23 these respondents despite the plain language of Section  
24 905(a) granting immunity only to employers, and despite  
25 the plain language of Section 933(a), preserving the

1 injured employee's right to proceed against any person  
2 other than the employer.

3 The issue is not, as Metro states, whether  
4 Metro must be responsible for both damages in tort and  
5 for workers compensation benefits to the respondents.  
6 The compensation paid to the respondents in these cases  
7 were paid by Lumbermens Mutual Casualty Company on  
8 behalf of and in the name of the employers who are  
9 insured entities under the policy.

10 Metro merely voluntarily paid the premium for  
11 these coverages in order to save millions of dollars.

12 QUESTION: That is what employers usually do.  
13 They just pay the premiums.

14 MR. MULRONEY: That is what employers normally  
15 do. The statute normally, under the traditional scheme,  
16 an employer pays his own premium. That hasn't happened  
17 here. Metro has provided the coverages for the  
18 employers, and has informed them under the coordinated  
19 insurance program not to submit bids that do not take  
20 into account the coordinated insurance program's  
21 coverages.

22 Now, as a practical matter, this means that  
23 any contractor who has been awarded a contract under  
24 Phase 2 has not submitted the cost of workers  
25 compensation in his bid. He can't, because Metro decides

1 who is going to get the contract, and it usually awards  
2 the contract to the low bidder, so that when the  
3 contract is awarded, Metro assures itself that the  
4 contractor who is given the contract has not secured his  
5 own workers compensation insurance.

6 Now, before I go forward, I would want to make  
7 one thing perfectly clear, and that is that it is very  
8 much in issue, and the respondents deny that Metro has  
9 secured compensation pursuant to its 904(a) duty, and  
10 that is for two reasons. Number One, it is that the  
11 employer has the primary obligation to secure benefits.  
12 If the employers herein, the respondents employers, have  
13 not secured compensation, and if the coordinated  
14 insurance program in fact prevents them from securing  
15 compensation, there is something basically flawed about  
16 the program itself.

17 QUESTION: Well, Mr. Mulroney, if the  
18 contractor gets the insurance, why doesn't the  
19 contractor become the employer for the purpose of this  
20 and the other sections? That seems to be a reasonable  
21 reading of the statutory scheme.

22 MR. MULRONEY: Your Honor, because the statute  
23 does not make them an employer. A contractor's duty, if  
24 you understand the second sentence of Section 904(a),  
25 imposes the duties of a guarantor. It is the practical



1 equivalent of Section 56 of the New York Act. It imposes  
2 on the contractor a secondary obligation to secure the  
3 compensation in the event that the employer he hires is  
4 uninsured.

5 QUESTION: But that answer doesn't make any  
6 sense to me in view of the dependent clause at the end,  
7 "unless the subcontractor has secured such payment."  
8 That isn't the language of a guarantor.

9 MR. MULRONEY: Your Honor, that is because it  
10 is the primary obligation of every employer to secure  
11 compensation under this Act. That includes  
12 subcontractors. The second sentence of 904(a) is what  
13 they call a contractor under provision, and the purpose  
14 of it, if you go back to the original New York '22 --  
15 1922 New York law, is to prevent an unscrupulous  
16 contractor who has obtained a contract for a given  
17 price, including the cost of his compensation, to  
18 contract out work he would ordinarily do to uninsured  
19 subcontractors, thereby saving himself money, and the  
20 protection afforded by that provision is to guarantee  
21 that he hires insured subcontractors.

22 QUESTION: Well, now, that may be one of the  
23 purposes, but the language is, it seems to me, quite  
24 clear when it says the contractor shall be liable for  
25 and shall secure the payment of such compensation unless

1 the subcontractor has secured such payment. If the  
2 subcontractor has not secured such payment, then surely  
3 that means that the contractor shall secure the  
4 payment.

5 MR. MULRONEY: Your Honor, the way the statute  
6 is written, it comes directly from the New York law.

7 QUESTION: Well, what have you got to say  
8 about the precise language that I just quoted you?

9 MR. MULRONEY: The precise language means that  
10 the contractor is to secure his secondary coverage. It  
11 all comes --

12 QUESTION: No, it doesn't say anything --

13 MR. MULRONEY: It is all done by means of  
14 insurance.

15 QUESTION: Just a minute. It doesn't say  
16 anything about secondary coverage. It says the exact  
17 language that I read to you.

18 MR. MULRONEY: That's right. Your Honor, I  
19 think that you have to look at the first sentence of  
20 Section 904, which requires every employer to secure the  
21 payment of compensation for his employees. This does  
22 not exclude subcontractors from this. The second  
23 sentence of Section 904(a) can only be read if you  
24 understand that every employer, including  
25 subcontractors, have a statutory obligation to secure

1 the payment of compensation.

2 What the second sentence is referring to is  
3 that a contractor is in a position by virtue of his  
4 contractual and financial position to hire someone who  
5 is uninsured, and that puts on him the onus to hire a  
6 contractor who is insured. Otherwise, he is going to be  
7 liable for --

8 QUESTION: That may be a reason, but I think  
9 you are just making mincemeat of the statutory language.  
10 You are trying to kind of push it in one direction that  
11 to me the words just don't let it go.

12 QUESTION: Suppose there is a contractor who  
13 has -- there are two subs, a general has two subs. One  
14 of them has his own insurance, and the other one  
15 doesn't, and the contractor knows it. The statute would  
16 then put a burden on the employer or the general to get  
17 some insurance for the one who didn't. Is that right?

18 MR. MULRONEY: That's right, Your Honor.

19 Now --

20 QUESTION: And suppose he did. Suppose he  
21 did, and an employee of that sub who didn't have  
22 insurance is hurt. And the employer then pays the  
23 benefits. Is that his exclusive liability then? Is he  
24 subject to any kind of a tort suit?

25 MR. MULRONEY: Yes, he is, Your Honor,

1 because --

2 QUESTION: Even though he has secured the  
3 insurance and paid out the benefits?

4 MR. MULRONEY: That's right. Absolutely.  
5 Because the second --

6 QUESTION: And I take it you say that the sub  
7 is immune. Somebody is immune.

8 MR. MULRCNEY: If the employer has not secured  
9 compensation coverage, he is not immune by virtue of the  
10 provisions of 905(b).

11 QUESTION: So both are subject to tort suit  
12 then.

13 MR. MULRCNEY: That's right.

14 QUESTION: Bcth the sub and the general.

15 MR. MULRONEY: One is subject to an elective  
16 remedy under 905(b), and one would remain a third person  
17 because of the plain language of 905(a) and 933(a).

18 QUESTION: Sc the employer, because he wasn't  
19 -- the general -- you go ahead if you think you are  
20 wasting your time.

21 MR. MULRONEY: No, I am --

22 QUESTION: I mean, ycu think nobody gets  
23 immunity?

24 MR. MULRCNEY: Understand, Your Honor, if you  
25 understand the statute --

1 QUESTION: That is an incredible proposition.  
2 I mean, I cannot believe that you are asserting that.

3 MR. MULRONEY: Your Honor, the general  
4 contractor, when he purchases his insurance policy to  
5 cover his employees, every contractor insurance policy  
6 automatically covers employees of subcontractors. That  
7 is the way every insurance policy in the country is  
8 written. Unless he provides proof to his carrier that  
9 the subcontractor he hired is insured, he will have to  
10 pay an additional premium for the employees of the  
11 subcontractor.

12 If he does provide the proof, and if he hires  
13 a subcontractor who is insured, then there is no  
14 additional premium for the contractor. If he does not,  
15 then he is going to be assessed a premium based upon the  
16 payroll of the subcontractor. That is the way the  
17 statute has worked to protect employees of  
18 subcontractors. The contractor must secure his  
19 contingent liability. He must secure it, because the  
20 statute uses the word "secure." The contingent  
21 liability that a contractor has has to be secured  
22 pursuant to Section 932, and it is automatic.

23 QUESTION: Well, if the employee ultimately  
24 recovers under the general contractor's policy, why  
25 shouldn't the general contractor have immunity?



1 MR. MULRONEY: Because the statute doesn't  
2 give it to him. The statute says quite simply that the  
3 employer is entitled to statutory immunity under 905(b)  
4 and --

5 QUESTION: Well, we are back to that same  
6 fruitless inquiry, I guess, but it seems to me that you  
7 are taking the position that the general contractor, if  
8 the subcontractor doesn't provide insurance, has the  
9 legal responsibility to provide the compensation to the  
10 injured worker, and becomes liable by virtue of the  
11 provisions of Sections 907, 908, and 909. They all  
12 speak in terms of an employer, and yet we are invoking  
13 those sections against the general contractor, so you  
14 are in effect saying the general is an employer under  
15 some sections but not under 905.

16 MR. MULRONEY: Your Honor, we are saying that  
17 employer means employer throughout the Act. The  
18 contractor's duty to secure payment for compensation to  
19 the injured worker comes under Section 904, and that  
20 statute is self-effective. It makes the contractor  
21 liable for the payment in Section 907, 908, 909, by its  
22 own terms.

23 The statute presumes compliance with its  
24 terms. Every employer must secure, must secure  
25 compensation. That includes subcontractors. The

1 statute doesn't presume that subcontractors are going to  
2 be in default of their statutory obligations, and in  
3 fact every subcontractor on the Metro project and every  
4 prime contractor has presumed that by participating in  
5 the coordinated insurance plan, and by becoming a named  
6 insured, they have secured coverage within the meaning  
7 of the Act. They must.

8 And the coordinated insurance plan must  
9 succeed in doing that. The contractor cannot extinguish  
10 a subcontractor's duty to obtain insurance by providing  
11 an overall policy and saying don't submit insurance  
12 coverage. It doesn't work that way. The subcontractor  
13 must necessarily provide insurance coverage for his own  
14 employees, and a look at the legislative history  
15 supports this completely.

16 As late as the 1972 amendments, Congress  
17 indicated specifically it intended the employer to  
18 shoulder the burden of insurance premiums in order to  
19 give him an incentive to provide a safe work place.

20 QUESTION: Is there any way out of this other  
21 than for both of them to take out insurance?

22 MR. MULRONEY: No, Your Honor --

23 QUESTION: Under your plan?

24 MR. MULRONEY: -- but that -- this is the way  
25 it works. Basically what happens is --

1 QUESTION: My question is, is there any way  
2 out other than that?

3 MR. MULRONEY: No. The contractor's policy --

4 QUESTION: They've got to take out --

5 MR. MULRONEY: A contractor's policy --

6 QUESTION: Well, is the injured employee going  
7 to collect from both?

8 MR. MULRONEY: No, the injured worker makes  
9 his claim against the employer. And he has made his  
10 claim against the employer in all of these cases, and  
11 the carrier has responded on behalf of the employer.  
12 That is the named insured. Not on behalf of Metro.

13 QUESTION: Well, isn't the employer insured?

14 MR. MULRONEY: The employer in these cases is  
15 insured. That's correct.

16 QUESTION: And normally that would be it,  
17 wouldn't it?

18 MR. MULRONEY: Against the employer, but the  
19 employee retains his third party rights of action  
20 against any person other than the employer.

21 QUESTION: But the other one has the same  
22 insurance, doesn't he? Doesn't the policy include the  
23 contractor, too?

24 MR. MULRONEY: This policy --

25 QUESTION: Well, that is the only one I am

1 talking about.

2 MR. MULRONEY: For workers compensation, Metro  
3 is not covered under the principles of the coordinated  
4 insurance plan. With regard to its own employees, WMATA  
5 is a self-insured. They have no need of coverage under  
6 the coordinated insurance plan for its own employees.

7 QUESTION: I am talking about the coordinated  
8 insurance plan. Isn't the contractor a party to that?

9 MR. MULRONEY: All the contractors are a party  
10 to the coordinated insurance plan, yes.

11 QUESTION: But doesn't the employer pay the  
12 bill?

13 MR. MULRONEY: No.

14 QUESTION: Who pays the bill?

15 MR. MULRONEY: Metro pays the premium for the  
16 benefit of the contractor.

17 QUESTION: That's what I thought.

18 MR. MULRONEY: The coordinated insurance plan  
19 expressly states that the policies are for the benefit  
20 of the worker.

21 QUESTION: The contractor pays, right? Who  
22 puts the money out? The contractor.

23 MR. MULRONEY: I'm sorry, Your Honor?

24 QUESTION: Who puts the money out for the  
25 policy? The contractor.

1 MR. MULRONEY: No, Metro -- normally, outside  
2 of the context of wrap-up insurance, the subcontractor  
3 purchases his own policy and the contractor purchases  
4 his own policy.

5 QUESTION: I am sorry. The more I get from  
6 you, the more confused I get.

7 MR. MULRONEY: Under wrap-up, Metro pays the  
8 premium, but the policy names the employer as the  
9 insured. This is a plan that was instituted to save a  
10 great deal of money. This way they don't have a great  
11 deal -- many insurance companies. There is no  
12 subrogation.

13 QUESTION: There is also another reason, to  
14 make sure everybody is covered at all times.

15 MR. MULRONEY: Your Honor, there is no  
16 evidence in the record at all that any default has  
17 occurred under Phase 1 of the Metro project. There is  
18 no evidence that there was ever a default.

19 QUESTION: Well, is my statement incorrect  
20 that it assures that everybody is covered?

21 MR. MULRONEY: The policy --

22 QUESTION: Is there anything wrong with that  
23 statement?

24 MR. MULRONEY: No, Your Honor.

25 QUESTION: May I ask you -- I have to get back



1 to kind of elementary stuff -- is there a definition of  
2 the word "employer" in the statute?

3 MR. MULRONEY: Under the District of Columbia  
4 extension, the employer-employee relationship is  
5 explicitly limited to the traditional notion of master  
6 and servant.

7 QUESTION: So your answer is no, I guess.

8 MR. MULRONEY: The answer is yes.

9 QUESTION: Oh, I am sorry.

10 MR. MULRONEY: The answer is yes, that an  
11 employer is defined as the person who employs and  
12 controls the activities of the employee.

13 QUESTION: What statutory section defines  
14 employer?

15 MR. MULRONEY: Under the District of Columbia  
16 Compensation Act, it is the actual extension itself that  
17 limits the definition of employer to the person who  
18 employs the person that works for him.

19 QUESTION: Because nobody seemed to quote the  
20 definition, but it is beginning to sink through to me  
21 that perhaps the issue in the case is whether the word  
22 "employer" in 905(a) includes someone who pays the  
23 insurance or just someone who hires the people. I mean,  
24 is there really something -- Your opponent talks about a  
25 statutory employer, and is there such an animal? I

1 guess that's -- Can we say that is the issue?

2 MR. MULRONEY: Under our statute, there is no  
3 indication in the plain language of the legislative  
4 history that the Congress intended anybody other than  
5 the employer to obtain the immunity in Section 905.

6 QUESTION: So that you are saying that the  
7 general contractor, simply because he buys the  
8 insurance, he doesn't become an employer --

9 MR. MULRONEY: That's right.

10 QUESTION: -- a statutory employer --

11 MR. MULRONEY: That's right.

12 QUESTION: -- or any other kind of employer.

13 MR. MULRONEY: That is exactly what we are  
14 saying.

15 QUESTION: Mr. Mulroney, there is a federal  
16 regulation that defines employer, isn't there,  
17 70.1301(a)(13).

18 MR. MULRONEY: Right.

19 QUESTION: Isn't that so?

20 MR. MULRONEY: If you --

21 QUESTION: And it basically defines employer  
22 as the person obligated to pay and secure compensation  
23 as provided in the Act, and under that definition, it  
24 certainly is reasonable to say that the contractor is an  
25 employer.

1           MR. MULRONEY: Your Honor, the employer is  
2 obligated as an employer to secure compensation. A  
3 contractor is never obligated as an employer. He is  
4 obligated as a contractor, and the duties imposed by the  
5 second sentence of 904(a) are specifically there only  
6 because of the relationship that the contractor has with  
7 a subcontractor. The contractor is in a position to  
8 hire for purposes not consistent with the Act an  
9 uninsured subcontractor, so the second sentence puts a  
10 duty on him to hire an insured subcontractor or he is  
11 going to be held liable himself. It does not entitle  
12 the contractor to any immunity that he would otherwise  
13 have.

14           All he has to do is hire an insured  
15 subcontractor in order to protect the injured employee,  
16 and the statute does not accord him any immunity for  
17 that. There is no evidence in the plain language of  
18 Section 33, or Section 905, 933(i), which was amended in  
19 1959, to indicate that the Congress intended the  
20 immunities of an employer to extend any further than  
21 what the Congress called in 1959 the employer-employee  
22 family, and that is very important, because this Act is  
23 based on the New York Act; 904(a) is based on Section 56  
24 of the New York statute, and in 1946, the New York Court  
25 of Appeals in the Sweezy case held that under no

1 circumstances, whether the contractor has to pay or not  
2 pay, is he an employer entitled to immunity within the  
3 meaning of the New York statute.

4 The Fiori case here under the Longshore Act  
5 follows precisely the same rationale as that. The  
6 contractor is not entitled to immunity by virtue of a  
7 secondary obligation he has pursuant to the second  
8 sentence in 904(a). He is not entitled to it because  
9 all the statute does is what the statute does in 937 to  
10 a vessel owner. He has to hire an insured contractor,  
11 and if he doesn't, the statute is going to hold him  
12 responsible.

13 If he doesn't hire an insured contractor, it  
14 would reward him. It would reward him for subverting  
15 the purposes of the Act by hiring an uninsured  
16 subcontractor.

17 QUESTION: Well, if the purpose of the Act is  
18 to secure workmen's compensation for employees, it seems  
19 to me the Act's purpose is served by the wrap-up  
20 policy.

21 MR. MULRONEY: There is much more to it than  
22 that, Your Honor. The Act also serves to preserve the  
23 employee's common law rights of action which are not  
24 specifically eliminated by Section 905(a), and the only  
25 remedies that the injured worker has that are eliminated

1 by the statute by its clear terms are those that he had  
2 at common law against the employer.

3 Now, wrap-up insurance should not change the  
4 legal liabilities or the obligations or the rights  
5 between any of the parties. If wrap-up insurance  
6 satisfies the statute, it must allow the employers who  
7 participate in it, what Metro calls their  
8 subcontractors, to secure compensation coverage. By  
9 instituting an insurance plan that saves them money,  
10 they should not be able to cloak themselves with the  
11 immunity of an employer. It goes beyond the plain  
12 purpose of the Act in permitting the injured worker, his  
13 common law remedies against anybody but the employer.

14 In 1972, the Congress amended the Act and  
15 indicated a number of things that are relevant to the  
16 inquiry here. First, the Congress specifically declined  
17 the opportunity to extend the immunity of an employer  
18 any further than the plain language indicates. There  
19 were bills passed or pending in front of Congress at  
20 that time to extend the immunity of an employer to a  
21 vessel, making the vessel and the stevedore joint  
22 employers. The rejected that, and indicated  
23 specifically the beneficial purpose of allowing the  
24 injured employee to proceed against a third party at  
25 common law, because it encouraged safety.



1           Another consideration is, Congress indicated  
2           it wanted the vessel owner to be in precisely the same  
3           situation as a third party would be in a land-based  
4           setting, indicating that Congress was aware of the case  
5           law under the District of Columbia Act allowing the  
6           injured worker the right to proceed against the general  
7           contractor.

8           There is no question that the case law has  
9           been unanimous in allowing suits by subcontractor  
10          employees against the general contractor, despite the  
11          fact that 904(a) imposes a secondary obligation on the  
12          contractor to secure compensation in the event that his  
13          own employer fails to do so.

14          In these cases, Metro has preempted the  
15          obligation of the employers to secure compensation if in  
16          fact the Metro wrap-up plan does not satisfy the  
17          obligations of the employer to secure compensation. The  
18          respondents submit that the employers have secured  
19          compensation by participating in this plan. Metro  
20          hasn't secured it merely by purchasing it for the  
21          benefit of the employers who are under a statutory  
22          obligation to secure it in the first place.

23          In fact, there is an important reason why  
24          Metro should be denied immunity and that is because by  
25          purchasing the premium they have tended to undermine

1 safety in the work place. Congress indicated in 1972, as  
2 I stated earlier, that the employer should shoulder the  
3 burden of the premium payment in order for him to have  
4 an interest in safe conduct.

5 When Metro instituted this program in 1971,  
6 precisely the opposite thing happened. The contractors  
7 who were insured entities had no interest in getting the  
8 work done, and we are talking about very dangerous  
9 work. We are talking about tunneling. We are talking  
10 about underground mining. And the contractors, by not  
11 having the right to have their premium reduced, by  
12 having no rebate system, they lost the incentive,  
13 resulting in higher losses than what ordinarily have  
14 occurred.

15 Metro has indicated that this is true by  
16 virtue of the fact that in June of 1978, to replace that  
17 incentive, they had to institute a safety awareness  
18 program which was a system of bonuses for contractors  
19 who had better safety records, to --

20 QUESTION: Are you opposed to workmens  
21 compensation?

22 MR. MULRONEY: No, not at all, Your Honor. I  
23 think workmens compensation is a wonderful thing. It is  
24 the employer's burden to secure it for his employees, in  
25 return for which he obtains a benefit, immunity from

1 suit. But a third party should not be allowed to come  
2 into this relationship and say I am going to pay the  
3 premium for you, but I am taking your immunity from you,  
4 because that upsets the entire applecart. It interferes  
5 with the statutory scheme, and basically preempts the  
6 employer's duties which contribute to safety in the work  
7 place.

8 The Congress was interested in more than just  
9 workers compensation benefits when it instituted this  
10 statute. The incentive to prevent the accidents is  
11 built into this scheme. The employer has an incentive  
12 to prevent accidents by virtue of the premium payment.  
13 Metro should not be accorded immunity by tending to  
14 undermine Congress's intent in preventing these  
15 accidents.

16 QUESTION: Mr. Mulroney, is this your  
17 position, that Section 905 is the exclusivity provision  
18 that confers immunity. It talks about the liability of  
19 an employer proscribed in Section 904 of this title  
20 shall be exclusive. You say in effect your opponents  
21 are claiming that because Section 904 requires the  
22 contractor in some circumstances to secure the payment,  
23 that the contractor thereby becomes an employer under  
24 Section 904, but you say that is not the way to read  
25 Section 904. Is that a fair summary of your --

1 MR. MULRONEY: I am saying, Your Honor, that  
2 904 is the duty provision of the statute, and 905 is the  
3 immunity provision. 905 simply doesn't award immunity  
4 to anybody but the employer.

5 QUESTION: Mr. Mulroney, I would find it  
6 extremely helpful -- I am trying to understand your --  
7 if you could answer questions instead of simply going  
8 into your own line of thought, but apparently you are  
9 either unable or unwilling to do that.

10 MR. MULRCNEY: I am sorry, Your Honor.

11 QUESTION: Well, I am sorry, too.

12 QUESTION: Well, let me see if I can get into  
13 this a little bit. You are contending, are you not,  
14 that the general contractor is not an employer.

15 MR. MULRONEY: That's correct.

16 QUESTION: And therefore he is not an employer  
17 within the meaning of 905(a).

18 MR. MULRCNEY: That's correct.

19 QUESTION: And 904 deals with paying of  
20 premiums and getting insurance, doesn't deal with the  
21 immunity.

22 MR. MULRONEY: That's correct.

23 QUESTION: That's your whole case, as I  
24 understand it.

25 MR. MULRCNEY: That's basically the entire

1 case, and the statutory scheme is consistent.

2 QUESTION: And that is why I asked you if  
3 there was a definition of employer, and you gave me an  
4 answer, but I don't know exactly where I am going to  
5 find it, still, because that would be helpful to me,  
6 because as I understand the case, the case turns on what  
7 the word "employer" means in 905(a).

8 MR. MULRONEY: That is essentially right, Your  
9 Honor, and the statute by its clear terms defines the  
10 employer as an employer. An employer is based in the  
11 same way as to the New York statute's definition of  
12 employer, and the New York courts have held consistently  
13 that the employer-employee relationship is that  
14 contractual relationship that exists between a person  
15 who hires another person to perform services.

16 Therefore, Congress is essentially only  
17 prescribing the rights and obligations between an  
18 employer and employee, and it expressly preserves the  
19 common law rights of the injured employee against any  
20 other person. The language of 933(a) says that the  
21 injured worker can sue any person other than the  
22 employer and persons in his employ. It doesn't say, but  
23 not when the contractor secures the compensation  
24 coverage for him.

25 QUESTION: Does the insurance contract



1 identify the employer?

2 MR. MULRONEY: The policies are issued to the  
3 employers of the respondents. As soon as you come onto  
4 the -- if WMATA awards a contract, a policy is issued to  
5 the employer.

6 QUESTION: Is employer defined or identified?  
7 Are the employers identified in the contract?

8 MR. MULRONEY: Yes, Your Honor.

9 QUESTION: Is there --

10 MR. MULRONEY: In the joint appendix there is  
11 an example, on joint appendix Page 225 is a copy of the  
12 insurance certificate issued to the employer of a number  
13 of the respondents in these cases, to Ball, Healey, and  
14 Granite. The insurance certificate is issued to them,  
15 and they are the insured entity, and they are the ones  
16 on whose behalf the benefits have been paid by this  
17 insurance carrier. This insurance carrier has listed  
18 the employer as the insured party with the Department of  
19 Labor in all compensation proceedings. They have --

20 QUESTION: Is Metro named in the policy?

21 MR. MULRONEY: Metro is listed everywhere as a  
22 policyholder. It is listed everywhere. But the insured  
23 entity --

24 QUESTION: Is it ever listed as an employer?

25 MR. MULRONEY: No, it is not.

1 QUESTION: Is it ever listed as a contractor?  
2 As a contractor?

3 MR. MULRONEY: It is not listed anywhere as a  
4 contractor.

5 QUESTION: Who pays the premiums?

6 MR. MULRCNEY: Metro pays the premiums for the  
7 policies for everyone insured under the coordinated  
8 insurance program.

9 QUESTION: And it is named, but not  
10 characterized as to what its status is?

11 MR. MULRONEY: Your Honor, not in the  
12 insurance policies, but Metro's status is listed in the  
13 contracts as the authority. It is never listed as a  
14 contractor. I don't have the time to go into it, but  
15 basically the respondents maintain that Metro here is  
16 not a contractor within the meaning of contract law or  
17 within the meaning of the policy considerations of the  
18 second sentence of 904(a), for the simple reason that  
19 they are not under a duty to perform a contract for a  
20 given price. They are not in the construction business.

21 CHIEF JUSTICE BURGER: Mr. Prettyman, do you  
22 have something further?

23 ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

24 ON BEHALF OF THE PETITIONER - REBUTTAL

25 MR. PRETTYMAN: Unless the Court has

1 questions, I just want to read one sentence to you from  
2 respondent's brief, particularly in response to you,  
3 Justice O'Connor, and to you, Justice Rehnquist. After  
4 discussing Sections 907, 8, and 9, respondents say,  
5 "Obviously, the contractor," and by that they mean  
6 WMATA, "would also be responsible for obeying other  
7 sections which relate to the payment of those benefits,"  
8 but all those other sections just refer to employer, so  
9 you are right. They want us to be an employer for some  
10 sections but not for Section 905.

11 Thank you.

12 QUESTION: Well, Mr. Prettyman, I do have a  
13 question.

14 MR. PRETTYMAN: Yes, sir.

15 QUESTION: Why does the second sentence of  
16 Section 904 make a contractor who pays insurance  
17 premiums or who secures compensation an employer for  
18 purposes of the Act?

19 MR. PRETTYMAN: The concept of statutory  
20 employer, Your Honor, goes way back in compensation law  
21 and comes all the way forward. It has been  
22 recognized --

23 QUESTION: Well, that doesn't answer the  
24 question.

25 MR. PRETTYMAN: Oh, I am sorry. Maybe I

1 misunderstood your question.

2 QUESTION: Well, why does the second sentence  
3 make the contractor who secures payment an employer for  
4 purposes of 905?

5 MR. PRETTYMAN: Oh, I understand. Because  
6 what they wanted to do was, they wanted to make sure  
7 that each person on the tier above a subcontractor would  
8 be responsible and couldn't get rid of its  
9 responsibility by just getting an irresponsible sub and  
10 say, well, I don't have any --

11 QUESTION: Okay, but your opponent says, sure,  
12 they wanted the contractor to make sure that the subs  
13 had insurance, but the fact that the contractor was  
14 obligated to guarantee the presence of insurance doesn't  
15 mean that the contractor became an employer for Section  
16 905.

17 MR. PRETTYMAN: Well, the important thing is  
18 not whether you call him an employer or a statutory  
19 employer. The point is, does he get the quid pro quo  
20 that comes from -- that immunity is built on.

21 QUESTION: Yes, but that depends on language  
22 of Section 905, and all it says there is an employer.

23 MR. PRETTYMAN: I understand that, Your Honor,  
24 but what I am saying is that it has to include WMATA in  
25 this case, the statutory employer, or none of the rest

1 of the statute makes sense, because the whole rest of  
2 the statute says if you don't secure the employer you  
3 can sue. The employer is criminally liable. If you  
4 don't say that that's not WMATA, WMATA has no  
5 obligations here. It says it has to secure, but there  
6 is no way to enforce it.

7 Thank you.

8 QUESTION: Thank you, gentlemen. The case is  
9 submitted.

10 (Whereupon, at 2:50 o'clock p.m., the case in  
11 the above-entitled matter was submitted.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



# CERTIFICATION

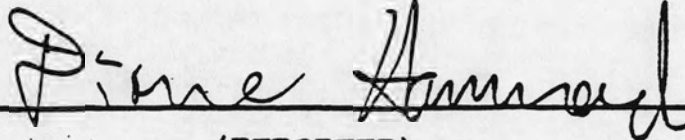
Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-747 - WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Petitioner v.

PAUL D. JOHNSON, ET AL

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 Hunsaker", written over a horizontal line.

(REPORTER)

84 MAY -1 P2:36

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE