

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SOUTHWEST MARINE, INC., Petitioner

V. BYRON GIZONI

CASE NO: 90-584

PLACE: Washington, D.C.

DATE: October 15, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SOUTHWEST MARINE, INC., :

4 Petitioner :

5 v. : No. 90-584

6 BRYON GIZONI :

7 - - - - - X

8 Washington, D.C.

9 Tuesday, October 15, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 12:59 p.m.

13 APPEARANCES:

14 GEORGE J. TICHY, II, ESQ., San Francisco, California; on
15 behalf of the Petitioner.

16 PRESTON EASLEY, ESQ., San Pedro, California; on behalf of
17 the Respondent.

18 ROBERT A. LONG, JR., Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Respondent.

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

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-584, Southwest Marine, Inc., v. Bryon
5 Gizoni.

6 Mr. Tichy.

7 ORAL ARGUMENT OF GEORGE J. TICHY, II

8 ON BEHALF OF THE PETITIONER

9 MR. TICHY: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case presents the issue whether land-based
12 maritime employees, specifically included in the coverage
13 of the Longshore and Harbor Workers Compensation Act,
14 nonetheless are entitled to go to a jury trial to
15 determine their alleged status as Jones Act seamen.

16 The facts of this case are very straightforward,
17 as it comes to this Court after reversal by the Ninth
18 Circuit Court of Appeals of a summary judgment issued by
19 the District Court of the Southern District of California.

20 The respondent, Bryon Gizoni, is a rigger and
21 rigger foreman for petitioner, our client, Southwest
22 Marine. One day while working on a floating platform, a
23 platform commonly used for ship repair work and devoid of
24 navigational qualities, Gizoni was injured when his foot
25 went through a hole in the platform.

1 Typical of any ship repair person, Gizoni filed
2 for an obtained Longshore Act benefits. In fact, he
3 obtained in excess of \$18,000 worth of benefits, which he
4 then used as he went out forward, not only to take care of
5 his medical needs, but we assume, to bring a Jones Act
6 claim, seeking to get an even bigger recovery by ignoring
7 the administrative process and invoking the full processes
8 of the Federal court system, including the use of a jury
9 to determine his alleged seaman status and his Jones Act
10 claim.

11 What makes Gizoni's Jones Act claim peculiar and
12 bizarre is that he is land based. He works strictly in
13 San Diego Harbor and, by stipulation, is a ship repairman.
14 Yet with the conviction that just about any ship repairman
15 can also make out a Jones Act claim, regardless of
16 congressional intent --

17 QUESTION: May I ask you a question, just to be
18 sure I get something straight in my mind?

19 MR. TICHY: Yes, you certainly can.

20 QUESTION: If he wins the Jones Act claim,
21 assume you lose, just for purposes of argument, will you
22 be entitled to a credit for the amount paid on the
23 Longshoreman Act claim?

24 MR. TICHY: That is correct.

25 QUESTION: So is there any risk of double

1 recovery in this case? That is what I just want to make
2 sure I --

3 MR. TICHY: There is no risk of double recovery.
4 However, the problem is that the right to have the offset
5 is judicially created. It is not provided in the Jones
6 Act, and as a result, unfortunately, of what has occurred
7 over the years with regard to the ambiguity as to whether
8 or not one is in fact a Jones Act seaperson.

9 In fact, there is language in the Longshore Act,
10 which is specifically section 3(e), which provides for a
11 credit in the event one mistakenly gets payments under the
12 Jones Act or some other State compensation form of
13 coverage.

14 Essentially what has happened here, Justice
15 Stevens and members of the Court is this: in 1927, when
16 the Longshore Act was passed, this was the first time in
17 which Congress had an opportunity to deal with the void
18 which had been created in the law. That is to say, to
19 deal with the stevedores and longshoring people. And over
20 the years what happened unfortunately was that there was a
21 recognition through the situs test, as opposed to the
22 status test which was developed in 1972, that essentially
23 what would happen is that a person could walk in or out of
24 coverage under the Jones Act.

25 In fact, this Court stretched to the ultimate

1 before the passage of the Longshore Act to try and bring
2 stevedores within the Jones Act, simply to avoid this
3 problem of coverage.

4 But what happened was the Congress took the
5 baton and started roll -- running with it, if you will,
6 and determined essentially, that it would set forth a law
7 in which it could provide coverage for those who were
8 injured upon navigational waters who were nonsea people
9 and additionally, by the passage of the 1972 amendments,
10 in essence, were able to cover those who were on the
11 adjoining areas.

12 QUESTION: Well, Mr. Tichy, the plain language
13 of the Longshoremen and Harbor Workers Act excludes from
14 coverage any repairman who is a member of a crew of any
15 vessel, and it seems to me that your position just reads
16 that right out of the statute.

17 MR. TICHY: To the contrary, Justice O'Connor.
18 You know, I wrestled with the arguments that were raised
19 by the Solicitor, as well as by Mr. Gizoni's counsel, and
20 I guess the way that you have to deal with the issue that
21 you raise is you have to go back to the statute and you
22 look at the language which Congress used.

23 Congress divided those who were maritime
24 employees into two types, and the unique language they
25 used was shall be included, and shall not be included. We

1 are talking about fundamental Aristotelian logic. They
2 didn't use words other than nonincluded. They said,
3 included are A, B, C, and D -- which by the way, in this
4 case includes harbor workers, which are a specifically
5 designed category of maritime employee. And then Congress
6 went one step further.

7 Congress said, look, we are not simply covering
8 harbor workers. We are going to specifically cover those
9 who are ship repair persons, and so they specifically
10 included that. By definition, Congress having provided an
11 inclusion --

12 QUESTION: Can't a ship repair person be a
13 member of the crew of a vessel? Isn't that possible?

14 MR. TICHY: No. And the reason for that is, it
15 goes back to congressional intent in this particular
16 situation. As you so vividly wrote in your Wilander
17 decision, a master or member of a crew of a vessel is a
18 Jones Act seaperson. That is a specifically, not included
19 category. What has happened here is, and the issues comes
20 to you because of the confusion in the courts.

21 What has happened is --

22 QUESTION: The statute uses the term "seaman,"
23 doesn't it, not member of a crew or --

24 MR. TICHY: Not the Longshore Act.

25 QUESTION: Not the Longshore Act, okay.

1 MR. TICHY: No, it uses a term "master" or
2 "member" of a crew of a vessel.

3 QUESTION: But the Jones Act uses the term
4 "seaman," does it not?

5 MR. TICHY: That is correct, and --

6 QUESTION: Where does the term, seaperson, come
7 from in the statute?

8 MR. TICHY: Your Honor, I suppose that is my
9 introduction. It is seaman, Your Honor. I recognize the
10 act, when it was amended in 1984, however, eliminated the
11 term "longshoreman" and used the term "Longshore and
12 Harbor Workers Act," and I suspect that the Congress very
13 well may make that sort of change --

14 QUESTION: If it does, you should refer to it
15 accordingly.

16 MR. TICHY: Thank you, Your Honor, and I
17 certainly will.

18 In any event, Justice O'Connor, the term "a
19 master and a member of a crew," as you pointed out is the
20 equivalent of a Jones Act seaman.

21 And as such, was specifically excluded from the
22 Longshore Act, but as the language was used, and
23 specifically in Section 2(3), the term employee means any
24 person engaged in maritime employment, including any
25 longshoreman or other person engaged in longshoring

1 operations and any harbor worker, including a ship
2 repairman.

3 It is unequivocally stipulated in this
4 particular case, that Mr. Gizoni is in fact a ship
5 repairman.

6 QUESTION: But you, of course go on. It says,
7 "but does not include a master or member of the crew of
8 any vessel." So you are suggesting, I gather, that a
9 person could not be a ship repairman on board an ocean
10 liner or something like that? Couldn't do it.

11 MR. TICHY: There are situations where an
12 individual is land based, which is the other pivot in the
13 Wilander decision --

14 QUESTION: No, but the exception talks about
15 people who are vessels.

16 MR. TICHY: That's right. If somebody were
17 attached to a vessel on the high seas, out there as you
18 will --

19 QUESTION: What about a vessel --

20 Mr. TICHY: -- for weeks, and was taking care of
21 that vessel out there, outside the 3-mile limit, that
22 individual would probably be a master or member of the
23 crew.

24 QUESTION: What about a vessel within the 3-
25 mile limit or within the harbor itself?

1 MR. TICHY: I would submit to you, Justice
2 Stevens, that the use of the term, harbor worker was
3 intended to --

4 QUESTION: No, I am asking about the use of the
5 term, vessel.

6 MR. TICHY: Yes.

7 QUESTION: Aren't there vessels that do not
8 leave the harbor?

9 MR. TICHY: Indeed, there are vessels that do
10 not leave the harbor.

11 QUESTION: And a person who is a member of a
12 crew of such a vessel is not a ship repairman within the
13 meaning of the statute, even if he spends all his time
14 doing ship repair work. Isn't that right?

15 MR. TICHY: I would submit to you that it was
16 the 1972 amendments that clarified that if that individual
17 worked exclusively within the harbor, that that individual
18 would in fact be covered by the Longshore Act.

19 The underlying --

20 QUESTION: He would not be on a vessel, even
21 though the vessel never left the harbor. Because he was
22 in the harbor, even though he was on a floating vessel, he
23 would not be on a vessel, because the vessel stayed in the
24 harbor. Is that your position?

25 MR. TICHY: No. What I am saying is that for

1 purposes of the Longshore Act --

2 QUESTION: Right.

3 MR. TICHY: -- that the 1972 amendments made it
4 clear that there are those individuals who work
5 exclusively within the harbor, exclusively, if you will,
6 within the break-water, who are not subject to the type of
7 perils of the sea which a normal seaman is; therefore,
8 Congress used the term "harbor worker" to specifically
9 indicate a form of inclusion.

10 I would point out to you, that is not the issue
11 that we have here because this is a ship repair person who
12 is part of a shipyard who is repairing something
13 essentially next to the shore.

14 But the use of the term "harbor worker," I would
15 submit to you, is intended to necessarily exclude from the
16 inclusion of a master or a member of a crew of a vessel,
17 those people who work exclusively within the confines of a
18 harbor because -- there are a number of reasons.

19 One is, Congress created the Longshore Act with
20 the object of having a no-fault, uniform system of
21 compensation. Secondly, Congress in doing this,
22 recognized that those people who are normally covered are
23 land based. Those who work within the harbor areas --

24 QUESTION: But the hypothesis, we are talking
25 about someone who is not land based. You are talking

1 about somebody who is based on a vessel that floats around
2 in a harbor. You say we should treat him as though he
3 were land based because of the term used -- "harbor
4 worker."

5 MR. TICHY: I would submit that that is in fact
6 the case, and I cannot imagine a situation in the real
7 world where an individual is assigned to a vessel that
8 operates strictly within a harbor who is not land based.
9 And in fact, I think that really is a pivot in the
10 Wilander decision, the recognition which the Court came
11 to, essentially, which was that if you are talking about
12 somebody who was land based, it was the intent of Congress
13 to provide them with this uniform method of compensation,
14 this no-fault method of compensation to avoid multiple
15 awards, to avoid the multiplicity of litigation, to avoid
16 the problem that you alluded to about the possibility of
17 inconsistent results or the necessity to achieve --

18 QUESTION: Let me ask you this question. Maybe
19 we have got the wrong case here, but supposing you have a
20 case in which there are good arguments on both sides of
21 the question of whether a person is under the statute or
22 under the Jones Act? There must be some borderline cases.

23 MR. TICHY: Sure.

24 QUESTION: How are they to be resolved?

25 MR. TICHY: Very simply, and I am glad you asked

1 the question. This Court, in dealing with other
2 administrative types of procedures, and in particular, we
3 cite the Court to the National Labor Relations Act type of
4 situations, where Congress has established an
5 administrative agency with expertise in the particular
6 area which is involved, what this Court has said in the
7 past is where someone is arguably covered by that
8 administrative act, where an agency such as the OWCP has
9 administrative expertise, the obligation on the party
10 asserting the claim, which is an arguable claim, must
11 first go through that administrative agency before
12 attempting to burden the courts in any manner, shape, or
13 form with the type of litigation which is involved here.

14 What you have here is a mirror image of the type
15 of result which I think was intended --

16 QUESTION: Then supposing an employee files a
17 claim under the Harbor Workers Act because he is not
18 really sure --

19 MR. TICHY: Yes.

20 QUESTION: -- and the employer goes ahead and
21 acknowledges the claim and there is adjudication of the
22 issue, does that mean he is estopped from saying well, I
23 really think I am entitled to Jones Act benefits, but in
24 order to protect myself, I filed this claim as well.

25 Is he estopped from bringing a Jones Act claim?

1 What is the employee supposed to do?

2 MR. TICHY: If the matter were adjudicated, I
3 would say yes. That is, if there was a finding of fact --

4 QUESTION: Supposing it is not adjudicated.
5 Supposing the employer just goes ahead and starts --

6 MR. TICHY: Voluntarily provided the payments,
7 as he did here. And let's assume the worst-case scenario,
8 the employer made a mistake and everybody made a mistake
9 because they filed under the wrong act. That, under the
10 hypothesis that I have submitted, would not preclude him
11 from making a Jones Act claim. That is not the fact
12 however of this case.

13 QUESTION: Yes, but where would he go?

14 MR. TICHY: If the individual made a total
15 error, the employer made a total error, provided the
16 benefits, then he would have to go court, certainly.

17 QUESTION: I thought you said you -- I thought
18 you said you wanted the administrative agency to decide
19 this case.

20 MR. TICHY: I do. I took the very worst-case
21 scenario, Justice White, which was that it was blatantly
22 obvious that it was a mistake, and those where it is
23 arguably covered by the Longshore Act --

24 QUESTION: But what if it is just close? What
25 if it is just close, and the employer goes ahead and pays

1 it. It isn't adjudicated --

2 MR. TICHY: That's right --

3 QUESTION: Well --

4 MR. TICHY: Then they should go to the
5 administrative agency, Justice White. If it is arguably
6 covered by the Longshore Act, then the administrative
7 agency with the administrative expertise should make that
8 determination in the first instance.

9 QUESTION: Then the employee who has been
10 getting benefits because the employer has been paying them
11 --

12 MR. TICHY: Yes --

13 QUESTION: If he now wants to go to the Jones
14 Act, he has to go to the administrative agency and say, by
15 the way, I am really not covered by the Longshoremen Act?

16 MR. TICHY: He needs to get a determination from
17 that agency, if it is arguable that he is covered, that is
18 what he should do. That is exactly what has happened in
19 the litigation involving the National Labor Relations Act.

20 QUESTION: So he goes up, wants, in a sense, a
21 declaratory judgment from the agency.

22 MR. TICHY: That is the equivalent of it, but in
23 this Court's Garmon decisions, essentially what the Court
24 has said is, we've created the law -- Congress created the
25 law which establishes coverage, and that particular

1 coverage is articulated on the face of the statute.

2 If you arguably come within that, it was the
3 intent of Congress to have that administrative agency
4 assume the burden of determining coverage.

5 QUESTION: When did this requirement emerge, in
6 the enactment of the 1972 amendments?

7 MR. TICHY: I believe so, because prior to that
8 --

9 QUESTION: So before that, there was no such
10 requirement.

11 MR. TICHY: What happened was, prior to '72
12 there was only a situs test and therefore, what was
13 happening was that an individual had to establish, in
14 order to obtain coverage, that he was not a seaman under
15 the Jones Act. That's what he had to establish, and that
16 his injury occurred upon navigable waters.

17 What happened in 1972 is that Congress
18 established a status test and actually affirmatively
19 designed for the first time descriptions of categories of
20 covered people.

21 QUESTION: And you say, the Congress, I suppose
22 by implication, since they didn't do it expressly, also
23 established kind of an administrative exhaustion
24 requirement?

25 MR. TICHY: Yes, yes. By the same parallel

1 analysis which was utilized in the National Labor
2 Relations Act setting, there was, I would point out to
3 you, essentially, the same type of approach which was
4 judicially created, recognition of, if you will, the
5 administrative expertise side of it and a recognition that
6 it was the intent of Congress not to allow the courts or
7 create further burdens for the courts in the
8 administration of justice, and present to juries, if you
9 will, issues for which other people had been specifically
10 trained and developed the type of expertise which is
11 relevant to the determination of rights.

12 QUESTION: Is there anything in the 1972
13 amendments or their legislative -- that suggests Congress
14 intended to effect the traditional Jones Act procedures,
15 which you start in court, I take it, in the Jones Act.

16 MR. TICHY: Yes, that is correct. And specific
17 reference to your question, what we see in terms of the
18 legislative history is the development in '72 of a status
19 test. What had happened historically, looking at the --

20 QUESTION: My question was: Is there any
21 indication in that legislative history that Congress
22 wanted to depart from traditional Jones Act procedures,
23 where you could go directly into court if you have a Jones
24 Act claim?

25 MR. TICHY: I believe the answer to that and

1 perhaps I am not stating it as clearly as I should, is by
2 adopting the status requirement, Congress attempted to
3 delineate those people who must absolutely go to the OWCP
4 for their relief, because there was a tradeoff. Employers
5 now have to pay substantially greater benefits under that
6 Longshore Act and the employees, of course, get greater
7 benefits as a result. And it is a no-fault system which
8 Congress created.

9 QUESTION: So that even if a claimant is saying,
10 I don't claim under that system, I claim under the Jones
11 Act, the claimant must still go through the administrative
12 procedure for the Harbor Workers Act?

13 MR. TICHY: That's correct, if he is a ship
14 repair -- ship repairman, such as Mr. Gizoni. Absolutely,
15 absolutely. Any other system would be a catastrophe for
16 the courts as well as the administrative agencies because
17 of the possibility of inconsistency of results.

18 Also, it would be inconsistent with Congress'
19 intent, because this is what would happen. If the
20 stevedoring company or the ship repair company saw that
21 they would have to face two types of litigation, they
22 would controvert on the Longshore Act, instead of giving
23 the immediate and speedy payments which Congress intended,
24 because they would want a determination of their judicial
25 obligations or their statutory obligations before they

1 would pay.

2 So the net result would be, if Gizoni prevails
3 here, the very intent of all these laws, that is to
4 provide benefits to people who are injured, would in fact
5 be delayed.

6 The beauty of the Longshore Act is they get the
7 payments immediately. They get them when they have the
8 need. Employers are encouraged to make those payments as
9 quickly and rapidly as they can in order to meet the needs
10 of those particular people.

11 QUESTION: I am not sure I understand. Wouldn't
12 the agency determination, of course, be reviewable in the
13 courts?

14 MR. TICHY: It would.

15 QUESTION: So these things are going to be
16 decided by the courts eventually, aren't they?

17 MR. TICHY: Except, it would be reviewable in
18 the same way that the National Labor Relations Board
19 determination is reviewable. Since the administrative law
20 judge would in fact be a finder of fact, that would be
21 reviewable only if there were some -- there were not
22 substantial evidence to support the result.

23 QUESTION: Is that a question of -- whether you
24 are a seaman under the statute, is a question of fact
25 rather than law? I thought that the reason we are here is

1 that this is a question of law.

2 MR. TICHY: In the case of somebody who is
3 specifically enumerated within the included categories of
4 2(3), it is as a matter of law. Anybody who is within
5 those is covered. There are however potentially maritime
6 employees who are not within the included categories but
7 who were intended for coverage. Those do involve issues
8 of fact and to that extent, a factual determination may
9 have to be made by the administrative agency.

10 But to the extent that there would be any review
11 of the administrative agency, to the extent that there are
12 factual issues, it would be on a substantial evidence
13 test, as indeed is the case with the National Labor
14 Relations Act. And as to issues of law, that would be a
15 matter for the court to determine on its own.

16 QUESTION: You say, as is the case with the
17 National Labor Relations Act. How does it come up in the
18 context of the National Labor Relations Act?

19 MR. TICHY: In the Garmon case, essentially what
20 happened was that an employer sued a union for picketing,
21 which was arguably protected under the National Labor
22 Relations Act. And what happened was the State courts of
23 California twice said, look, you make out a claim. We are
24 willing to listen to what you have to say. You can
25 present it to a jury and you can get a determination.

1 What the Supreme Court said was that you have
2 set forth facts which are arguably within the coverage of
3 the National Labor Relations Act.

4 QUESTION: Sure --

5 MR. TICHY: Gentlemen, you must go to the
6 administrative agency, the NLRB.

7 QUESTION: It isn't a matter of having to go to
8 the administrative agency, not just a matter of that. It
9 is a matter of having to go to the Feds. I mean, you have
10 a question of preemption and we want the labor board to
11 have the first determination rather than what could be a
12 State court for the violation of law.

13 That is a big difference. In this case, it is
14 going to be a Federal agency in either case, either an
15 administrative agency or a court.

16 MR. TICHY: Yes. It just so happened that
17 Garmon arose in the context of a State action. But I
18 would point out to you that that same type --

19 QUESTION: No, but that is the crucial
20 distinction. The issue is always going to be whether
21 State law is preempted by Federal law, and I can see why
22 there is strong reason to have the labor board have the
23 first say on that. But here, it is a question of Federal
24 law. It is either Federal maritime law or it's the
25 Longshore Act.

1 MR. TICHY: Let me point out one thing if I may.
2 It is just happenstance that Garmon arose out of a State
3 court action. You know, the Anheuser Busch case, I
4 believe, arose out of Federal action. I think that
5 involved, if you will, alleged antitrust violations which
6 were perceived to be within the coverage of the National
7 Labor Relations Act.

8 So the fact that the action, just by
9 happenstance, was brought in the State court as opposed to
10 the Federal court wouldn't any less make the National
11 Labor Relations Act dispositive, and the same parity of
12 analysis would apply in this case.

13 QUESTION: Do you know of any other instance
14 like this where the issue is which of two Federal schemes
15 would apply and where you must go to the administrative
16 agency first?

17 MR. TICHY: Sure, Title VII of the EEOC.

18 QUESTION: No, no. Where it says so, yes --

19 MR. TICHY: Yes.

20 QUESTION: But I mean where it doesn't say
21 anything and where we have created a -- by judicial
22 determination, the rule that you have to go to the
23 administrative agency first. I am trying to think of a
24 parallel --

25 MR. TICHY: Sure.

1 QUESTION: And I offhand can't think of any.

2 MR. TICHY: If I can think of one, when I come
3 back on rebuttal, I will let you know.

4 QUESTION: Okay.

5 MR. TICHY: But the one most in line is, of
6 course, the National Labor Relations Act.

7 Mr. Chief Justice, if I may, I would like to
8 reserve some time for rebuttal.

9 QUESTION: Very well, Mr. Tichy.

10 Mr. Easley, we will hear now from you.

11 ORAL ARGUMENT OF PRESTON EASLEY

12 ON BEHALF OF THE RESPONDENT

13 MR. EASLEY: Mr. Chief Justice, and may it
14 please the Court:

15 There are issues in this case that go far beyond
16 the bounds of Mr. Gizoni and Southwest Marine. It affects
17 the rights of many other maritime employees, and by way of
18 example, I concluded a jury trial in Federal court in San
19 Diego on Friday in which a tugboat operator was hurt on a
20 tugboat owned by a shipyard in San Diego, and the jury
21 found that he was a seaman and awarded benefits under the
22 Longshore Act, and the shipyard does not accept that
23 finding and has vowed that they will follow Gizoni to the
24 Supreme Court because they -- as it seems that every
25 shipyard has this attitude -- that the Longshore Act

1 grants them some type of blanket immunity from the Jones
2 Act. Somehow they were --

3 QUESTION: You just said that he was given
4 damages under the Longshore Act, do you mean to say the
5 Jones Act?

6 MR. EASLEY: He was awarded benefits under the
7 Jones Act.

8 QUESTION: Under the Jones Act?

9 MR. EASLEY: Yes, he was awarded benefits under
10 the Jones Act, but the shipyard employer believes that the
11 Longshore Act gives them a blanket immunity from Jones Act
12 claims.

13 Section 902 of the Longshore Act describes the
14 covered employees under the act, and I won't read all the
15 covered employees but it indicates ship repairman,
16 shipbuilders, ship breakers, and people in those
17 occupations. It then goes on to list eight exclusions to
18 coverage.

19 There are many, many ship repairmen that are not
20 covered by the Longshore Act. If you're repairing a
21 recreational vessel under 65 feet, you're not covered by
22 the Longshore Act. If you're repairing a vessel under 18
23 tons, you're not covered by the Longshore Act.

24 If you're repairing a vessel that is being used
25 as a floating museum or a floating restaurant, you're not

1 covered by the Longshore Act. If you're a member of the
2 crew of a vessel, you're not covered by the Longshore Act.

3 It seems that Southwest Marine wants to
4 recognize all the exclusions to the Longshore Act except
5 that one exclusion because they believe it works to their
6 disfavor. Rather than immunizing shipyards from Jones Act
7 lawsuits, the Longshore Act, I believe in its language
8 contemplates and allows the employee to attempt his Jones
9 Act claim first.

10 And I will tell you why I believe that. Section
11 903 of the Longshore Act, paragraph (e) says
12 notwithstanding any other provisions of law, any amounts
13 paid to an employee for the same injury, disability, or
14 death for which benefits are claimed under this act,
15 pursuant to any other worker's compensation law or Section
16 20 of the act, and then it describes in parentheses, 46
17 U.S. Code 688, parentheses, relating to recovering for
18 injury or death of seaman shall be credited against any
19 liability imposed by this act.

20 So that provision gives a credit under the
21 Longshore Act for any benefits paid under the Jones Act.
22 So they realize that some people may take the Jones Act
23 route first.

24 There is another section of the Longshore Act
25 that I believe specifically gives --

1 QUESTION: Excuse me, it doesn't necessarily
2 recognize that. I mean, it may have just been a voluntary
3 payment, assuming that the person was entitled to them
4 under the Jones Act, right?

5 MR. EASLEY: I agree with that, it doesn't
6 authorize a Jones Act claim, but it contemplates that a
7 worker who is employed in one of those occupations might
8 seek Jones Act benefits.

9 QUESTION: Yes, but -- okay.

10 MR. EASLEY: There is another provision in the
11 Longshore Act that I believe more specifically gives a
12 shipyard employee a right to go under the Longshore Act
13 first, although it doesn't specifically say that, and that
14 is Section 913(d) of the Longshore Act, Filing of Claims.

15 And it says, tolling provision: where recovery
16 is denied to any person in a suit brought at law or an
17 admiralty -- and the Jones Act is law and maintenance and
18 cure are admiralty -- to recover damages in respect of
19 injury or death on the ground that such person was an
20 employee and that the defendant was an employer within the
21 meaning of this act, and that such employer had secured
22 compensation to such employee under this act, the
23 limitation of time prescribed in subdivision (a) shall
24 begin to run only from the date of termination of such
25 suit.

1 So I interpret that to say, if you work for a
2 shipyard, you can go file your Jones Act lawsuit, and if
3 the trier of fact finds that you are covered by the
4 Longshore Act, that you are not excluded as a vessel crew
5 member, then that tolls the statute and they keep your
6 Longshore Act remedies alive so you can come back and
7 reenter the Longshore Act.

8 QUESTION: Suppose -- what is the name of the
9 bureau that is supposed to make the determinations under
10 the Longshore Act?

11 MR. EASLEY: It is the U.S. Department of Labor.

12 QUESTION: Yes, but I mean, it's a sub -- Office
13 of Workers' --

14 MR. EASLEY: It is the Office of Workers'
15 Compensation Program.

16 QUESTION: OWCP, right?

17 MR. EASLEY: Yes, sir.

18 QUESTION: Suppose OWCP issues a regulation in
19 addition to making individualized determinations of who is
20 covered? I assume they are authorized to issue a
21 regulation saying, we will hence forward determine that
22 this kind of a person, and it gives a detailed
23 description, is covered by the Longshore Act, okay.

24 Then, in a later lawsuit, somebody seeks to get
25 Jones Act recovery, and seeks to get to the jury, in the

1 face of this regulation that the Labor Department has
2 issued, what is the result? Does that regulation have no
3 effect?

4 MR. EASLEY: I think that would be subject to
5 determination of the courts, whether or not it has an
6 effect.

7 QUESTION: All right.

8 MR. EASLEY: I would think that such a
9 regulation violates the Longshore Act. The agency doesn't
10 have unlimited license to modify the provision. Suppose
11 the agency said, we are going to issue a regulation that
12 the Longshore Act does not apply to women. Nobody's going
13 to recognize that.

14 So I think the regulations have got to be
15 consistent with the act.

16 QUESTION: You don't think we were -- we're
17 entitled to give the regulation any deference? Unlike
18 other regulations where if it is within the broad range of
19 what's reasonable, we'll say it is okay. This regulation
20 alone has to be precisely right? There is only one
21 meaning and we will give it that meaning?

22 MR. EASLEY: I think that is fair to say, that
23 the courts give the final meaning to the regulation and
24 the determination of whether the regulation is consistent
25 with existing law.

1 QUESTION: That's unusual, if it is so.

2 MR. EASLEY: I have a description of a maritime
3 employee here that is two sentences long. It says: His
4 duties consisted of taking general care of the barge.
5 They included taking care of lines at docks, tightening or
6 slackening them as necessary, repairing leaks, pumping out
7 the barge, taking lines from tugs, responding to whistles
8 from tugs, putting out navigational lights and signals,
9 taking orders from the tugboat when being towed.

10 QUESTION: Where is that from?

11 MR. EASLEY: That is what I am going to --
12 that's from a Supreme Court case called Norton v. Warner
13 that's cited in my brief. In reading those lines, that is
14 a near-perfect description of my client, Bryon Gizoni, who
15 was a rigger in the shipyard and he handled these barges,
16 moved them around the shipyard from pier to pier, moved
17 them to the Navy base, took them where they needed to --

18 QUESTION: Do you think cases like Norton
19 against Warner and some of those cases decided in the
20 fifties by this Court, where the Court in effect said the
21 sky is the limit so far as a jury finding someone is a
22 seaman -- do you think those have survived in tact after
23 our Wilander opinion?

24 MR. EASLEY: I believe that Wilander is
25 consistent with those earlier Supreme Court decisions.

1 QUESTION: You don't think that there was
2 language in it that intended to cut back somewhat on some
3 of those odd decisions that occurred some years back that
4 made everything, including questions of law, a jury
5 question? You don't think there was an indication in
6 Wilander that that was no longer our view, if it ever was
7 the view of the Court?

8 MR. EASLEY: I would say that in one way
9 Wilander liberalized the situation, and in another way it
10 restricted the remedy. It restricted it by making it a
11 combined issue of fact and law rather than just fact; but
12 it, by getting rid of the aid to navigation test, that
13 probably swung open the biggest door that has ever been
14 swung open since the courts have been defining seaman
15 status.

16 So I think Wilander ultimately makes it a lot
17 easier to prove seaman status, because you had so many
18 cases where people were performing functions on vessels
19 and the vessel had no transportation function. The vessel
20 was a dredge or used to pump waste oil or something like
21 that. So I think that Wilander opened it up quite a bit.

22 There is also an interesting sentence in
23 Wilander that directly addresses the issue that is raised
24 for review in this case, and that's, should people's
25 status be determined by their occupation, or should their

1 remedy be determined by their occupation?

2 And in Wilander it says it is not the employee's
3 particular job that is determinative, but the employee's
4 connection to a vessel. And that's Mr. Gizoni's position
5 here.

6 As far as making seaman status a factual issue,
7 Wilander creates some bounds for it, but it still, I
8 think, leaves it pretty wide open because it says, if
9 reasonable persons, applying the proper legal standard
10 could differ as to whether the employee was a member of
11 the crew, it was a question for the jury.

12 And I think that's a scenario --

13 QUESTION: In this case, if you prevail and it
14 goes to the jury, does the jury determine both whether or
15 not there was a vessel and his -- the extent of his
16 connection to that vessel?

17 MR. EASLEY: The jury usually just makes a
18 general determination as to whether he had seaman status,
19 and the judge --

20 QUESTION: Well, is one of the issues that is
21 argued and submitted to the jury the question of whether
22 or not there is a vessel?

23 MR. EASLEY: Yes, it is. Yes, it is.

24 QUESTION: Couldn't that be a question of law,
25 and has this Court ever decided whether all floating

1 things in the water are vessels?

2 MR. EASLEY: Sometimes it can be a question of
3 law. There have been judicial decisions that a floating
4 drydock is not a vessel, and even though I take issue with
5 that judicial determination, the law has stated that
6 floating drydocks, even though they can move from port to
7 port, are not vessels in navigation for Jones Act
8 purposes.

9 There is another scenario --

10 QUESTION: It is always a jury question?

11 MR. EASLEY: Not always.

12 QUESTION: And I suppose the facts could be
13 clear enough that there is just no evidence at all that
14 the person was a crew member.

15 MR. EASLEY: That's right.

16 QUESTION: I suppose that also would be taken
17 away from the jury. So you are not claiming it always go
18 to the jury.

19 MR. EASLEY: That's right. There is another
20 situation where the law has determined vessel status, and
21 that is, if you are using a barge to move things around in
22 a shipyard or some other location, the barge will probably
23 qualify as a vessel in navigation.

24 Some shipyards and maritime employers take
25 barges and they fasten them all to the dock and they tie

1 up vessels against the outboard side of the barge and they
2 use the barge as a dock. And the courts have held that if
3 you are using a barge for a dock, then the barge does not
4 become a vessel in navigation.

5 So there are certain scenarios where the court
6 has said, this is just not a vessel in navigation for
7 Jones Act purposes, and I'm not saying that those should
8 be thrown to the jury every time and let the jury overturn
9 these legal decisions. But I agree with the language in
10 Wilander that when reasonable minds can differ, then it's
11 a question that should go to the jury.

12 I want to point out something else about how
13 ridiculous this occupation test is if you want to read it
14 literally. And that is, the Longshore Act is extended to
15 the outer continental shelf by the Outer Continental Shelf
16 Lands Act, and the occupations enumerated in the Outer
17 Continental Shelf Lands Act are workers involved in
18 exploring, developing, removing, or transporting natural
19 resources of the outer continental shelf.

20 So if we are going to devise a statutory
21 occupational test, then I guess every member of a crew
22 boat that takes workers offshore, every kind of vessel
23 used in this offshore oil drilling and exploration and
24 transportation would fall under the Jones Act.

25 Even some of the oil companies have proposed

1 removing oil from fixed platforms with oil tankers and
2 shipping the oil away from the platform. So if we are
3 going to be literal on the occupation, then all those
4 tanker crews that are pumping oil off the outer
5 continental shelf are going to have to first submit
6 themselves to the Department of Labor for a finding of
7 seaman status. That's why the occupational test is too
8 unreasonable to apply.

9 The Court has made a similar ruling or a ruling
10 in a case similar to this. It is a footnote in Gray v.
11 Herb's Welding which dealt with longshore jurisdiction
12 versus State workers' compensation jurisdiction for the
13 first 3 miles offshore. And there is a footnote by the
14 Supreme Court that says, "Floating structures have been
15 treated as vessels by lower courts. Workers on them,
16 unlike workers on fixed platforms, enjoy the same remedies
17 as workers on ships."

18 So I think there is some precedent that says
19 that there is no Longshore Act exclusion from people in
20 those occupations seeking seaman status.

21 Something that's an interesting comparison that
22 has come into my own mind with regard to your Wilander
23 case is virtually every shipyard has a paint barge.
24 That's a barge that has scaffolding permanently mounted on
25 it that is moved all around the shipyard to paint the

1 offshore side of each vessel. And I would think it
2 unusual to have a system where an individual painting a
3 fixed oil rig from a boat could have seaman status, but a
4 man painting a vessel from a floating barge that moves
5 around the shipyard could not seek seaman status.

6 In a lot of these cases that were decided by the
7 Supreme Court in the fifties, the individuals very
8 arguably had harbor worker status rather than Jones Act,
9 but they were still given the right to have these issues
10 determined by the jury.

11 QUESTION: What's the difference between a
12 vessel and a barge?

13 MR. EASLEY: In legal terms, none. The barge is
14 a vessel in navigation for purposes of the Jones Act, and
15 that's stated in the Norton v. Warner case and it's stated
16 in other cases. It is defined as any contrivance capable
17 of transportation on water.

18 The Longshore Act provides some immunity to
19 shipyards that I am going to concede them. If the person
20 is not a member of the vessel crew, the '84 amendments did
21 away with the dual-capacity doctrine, where the shipyard
22 has a dual capacity as vessel owner in addition to its
23 capacity as the employer.

24 So when vessels are in the yard for repair, the
25 shipyard repairman cannot claim that the shipyard is owner

1 pro hac vice of the vessel being repaired and then sue the
2 shipyard in a second capacity as owner pro hac vice of the
3 vessel.

4 But for the shipyard to get that immunity, there
5 has to be a showing that the worker is covered by the
6 Longshore Act and not a member of the crew.

7 I have heard the term "land based" bantered
8 around a lot in this litigation. Whether a person is land
9 based or not I don't think determines the issue. There
10 are many people that are land -- that don't sleep on the
11 vessel, that are land based: ferry boat operators, tour
12 boat operators, tugboat operators in a harbor.

13 Shipyards want to force Jones Act employees into
14 the Longshore Act, and the test they want to use is,
15 workers that are arguably covered by the Longshore Act
16 should have to go to the Department of Labor first. And
17 that raises a real interesting question as to who makes
18 this determination as to who is arguably covered by the
19 Longshore Act, who then has to go to the Department of
20 Labor, because according to the shipyards, the tugboat
21 operators and captains are arguably covered by the
22 Longshore Act.

23 Thank you.

24 QUESTION: Thank you, Mr. Easley.

25 Mr. Long, we will hear from you.

1 ORAL ARGUMENT OF ROBERT A. LONG, JR.

2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

3 SUPPORTING THE RESPONDENT

4 MR. LONG: Thank you, Mr. Chief Justice, and may
5 it please the Court:

6 Let me begin by saying a word about this primary
7 jurisdiction point. We see no basis in the Longshore Act,
8 including its 1972 amendments or the Jones Act for
9 concluding that Congress intended to remit the
10 determination of seaman status to the special expertise of
11 the Secretary of Labor.

12 Juries have been making that determination under
13 the Jones Act since 1920. Federal courts sitting in
14 admiralty have been making that determination since long
15 before that, and in fact, we think a provision of the
16 Longshore Act refutes the primary jurisdiction argument.

17 Section 13(d), 33 U.S.C. 913(d) tolls the
18 statute of limitations under the Longshore Act, in the
19 event that a suit is brought at law or in admiralty. We
20 think if the Secretary were meant to have primary
21 jurisdiction, there would be no reason to have a tolling
22 provision, certainly not a perfectly general tolling
23 provision such as 13(d).

24 QUESTION: What happens if the Secretary issues
25 a regulation dealing with this subject? Would the court

1 in admiralty ignore it or what? Or he shouldn't issue it?

2 MR. LONG: I would think not, after -- it is
3 perfectly clear after Wilander that seaman is linked to
4 master or member of a crew of a vessel. If the Secretary
5 were to issue a regulation interpreting that phrase, I
6 would think it would be entitled to deference from the
7 courts.

8 QUESTION: It would be?

9 MR. LONG: Yes, it would be.

10 QUESTION: So if he issues a regulation, the
11 courts, in the Jones Act case, would have to follow his
12 regulation, even though he is issuing it under --

13 MR. LONG: If it is a reasonable interpretation
14 of the phrase "master or member of a crew of a vessel."
15 And I draw that conclusion from the Court's holding in
16 Wilander that master or member of a crew restates who is a
17 seaman under the Jones Act.

18 QUESTION: All right, and then suppose he
19 doesn't issue a regulation, but in fact the claimant goes
20 to him for a case determination initially and he decides
21 that the work is covered. That worker could then not
22 later challenge that and bring a Jones Act --

23 MR. LONG: If the issue of seaman status is
24 actually litigated and adjudicated in the proceeding under
25 the Longshore Act, then we do think that there would be

1 issue preclusion.

2 Our position in this case does rest on the plain
3 language of the statute. We do think it's quite clear,
4 under the exclusions of Section 2(3) of the Longshore Act,
5 that a ship repairman, if he or she is a member of a crew
6 of a vessel, is not covered by the Longshore Act and is
7 entitled to a remedy under the Jones Act.

8 If the ship repairman has a sufficiently
9 permanent connection to a vessel in navigation, which may
10 be a vessel that stays entirely within a harbor, and if
11 that ship repairman contributes to the function of the
12 vessel or the accomplishment of its mission, which may be
13 a special purpose, then that repairman would meet the
14 definition of a seaman or a member of a crew.

15 QUESTION: Mr. Long, that is how you would give
16 effect to the mutual exclusivity of the two acts?

17 MR. LONG: No, we don't -- well, yes, excuse me,
18 Justice O'Connor. They are mutually exclusive, if you are
19 a master or a member of a crew, then you are covered by
20 the Jones Act and not by the Longshore Act.

21 We think petitioner's argument is inconsistent
22 with the language and the structure of the other
23 exclusions. There are eight of them. The exclusion for a
24 master or member of a crew is only one. There is an
25 exclusion for a ship repairman who is employed to repair a

1 recreational vessel under 65 feet. That's Section
2 2(3)(f). There is an exclusion for a ship repairman
3 engaged by the master to repair a vessel under 18 tons
4 net. That's Section 2(3)(h). We think it is quite clear
5 from the structure of the statute that Section 2(3)
6 defines a very broad category of maritime employee and
7 then cuts out various subcategories, including a master or
8 member of a vessel.

9 We also think petitioner's position to contrary
10 to this Court's recognition in Wilander that seaman status
11 is not a pure question of law, but a mixed question of law
12 and fact; and therefore, if reasonable persons, applying
13 the correct legal standard could differ as to whether the
14 employer was a member of a crew, it is a question for the
15 finder of fact.

16 QUESTION: Do you think it is a question of law,
17 whether a vessel is a vessel?

18 MR. LONG: It can be, Your Honor. We think in
19 certain cases it would be quite proper for the District
20 Court to decide that question as a matter of law. As we
21 understand it for example, a construction platform, even
22 if it floats on water, is not a vessel as a matter of law.

23 QUESTION: May I go back to Justice Scalia's
24 hypothetical with you a moment? And you suggested that if
25 there had been an actual adversary adjudication by the

1 agency in this case, that would be binding on the
2 employee. Are there cases that so hold?

3 MR. LONG: I am not aware of cases that so hold.
4 There are cases that suggest that. Fontenont against AWI
5 is one. This is a long proceeding that involves a number
6 of informal stages under the Longshore Act. There are
7 cases such as Boatel v. Delaware that hold that the
8 informal stages are not sufficient to give a collateral
9 estoppel effect.

10 QUESTION: But the issue would have to be there
11 as to whether it's -- he is a seaman or not?

12 MR. LONG: It would have to be there and
13 actually litigated, Your Honor.

14 QUESTION: So that means, I take it, in cases
15 like this, the employer would be well advised always to
16 resist payment in order to get the benefit of adjudication
17 in a doubtful case?

18 MR. LONG: Well, we don't agree that that will
19 be the result in every case. Litigation is costly. We
20 think there are workers who are clearly covered under the
21 Longshore Act and not under the Jones Act. In those cases
22 --

23 QUESTION: No, we are just talking about
24 doubtful cases, always. I mean, if it is perfectly clear,
25 the lawyers will work that out.

1 MR. LONG: I think to be honest that in doubtful
2 cases, there is some incentive to go ahead and litigate
3 the issue.

4 We think the legislative history supports the
5 plain language of the statute. I think it is worth noting
6 that the original 1927 act actually had a provision in it
7 at one point that would have extended the Longshore Act to
8 crew members of all vessels owned by U.S. citizens, and
9 that was taken out.

10 The Court discussed that in South Chicago Coal
11 against Bassett, and the '72 amendments which added this
12 more expansive definition of maritime employment were
13 intended to extend the coverage to certain injuries on
14 land, not to restrict --

15 QUESTION: Can I ask another question about
16 tactics in this situation? If you are right, would it
17 not, if an employer could afford to do so, he would be
18 better off generally, in a doubtful case, to litigate the
19 Jones Act claim first because that tolls the statute of
20 limitations for the other, right?

21 MR. LONG: Yes.

22 QUESTION: So that would be the normal way to do
23 it is to litigate rather than filing a claim and taking
24 the risk that you would get an adverse adjudication.

25 QUESTION: I would suppose what he would want to

1 -- would he be trying to prove that the employee is a
2 seaman?

3 MR. LONG: I think under Justice Stevens'
4 hypothetical, the employee would want to prove he's --

5 QUESTION: He doesn't want to be subject to a
6 Jones Act suit.

7 MR. LONG: Right, but the employer would prefer
8 to pay under the Longshore Act in many cases because --

9 QUESTION: Exactly, so that is kind of a funny
10 position for him to be in, to go before the administrative
11 agency. He'd be trying to prove something he really
12 doesn't want to prove.

13 MR. LONG: I think in practice in many cases, of
14 course, these workers don't have the resources and may be
15 in genuine doubt about which the two schemes covers them.
16 So they will go in and make a claim under the Longshore
17 Act and then they may --

18 QUESTION: And run the risk of an adjudication
19 that would foreclose their Jones Act claim?

20 MR. LONG: It does run that risk, Your Honor.

21 Let me just say very briefly about policy, there
22 is no risk of double recovery here. It is well
23 established that you get a credit for any amount paid
24 under one statute against any liability under the other
25 statute.

1 And it's not clear to us that the costs will be
2 much higher under this system. Petitioner's proposed rule
3 we think would still leave a lot of uncertainty about
4 whether particular workers are covered, and the situation
5 we have here is basically the situation that we had in the
6 Fifth Circuit, possibly the largest admiralty circuit,
7 since 1959 when they decided the Robison case, until very
8 recently when they decided this Pizzitolo case. And as
9 far as we can tell, there have not been ruinous insurance
10 costs or a tremendous flood of litigation in the Fifth
11 Circuit.

12 So we do believe that this is a rule that the
13 employers can live with -- if there are no further
14 questions.

15 QUESTION: Thank you, Mr. Long.

16 Mr. Tichy, do you have rebuttal? You have 6
17 minutes remaining.

18 REBUTTAL ARGUMENT BY GEORGE J. TICHY II

19 ON BEHALF OF THE PETITIONER

20 MR. TICHY: Thank you very much, Mr. Chief
21 Justice.

22 I guess when I am asked a question I dwell on it
23 for some point, but in reference to Justice Scalia's
24 comments, I can think of two parallel situations in the
25 Federal jurisdiction.

1 One is the relationship between the National
2 Labor Relations Act and the antitrust laws, and the second
3 is Justice White's decision in Schwalb, which was in fact
4 decided by this Court in 1989 --

5 QUESTION: That was a Court decision, wasn't it?

6 MR. TICHY: Excuse me?

7 QUESTION: That was a Court decision, wasn't it?

8 MR. TICHY: That's correct, but it was, Your
9 Honor, and you know the case much better than I ever will
10 --

11 QUESTION: I don't even remember it.

12 MR. TICHY: But it relates, if I recall, to two
13 concurrent forms or potentially concurrent forms of
14 Federal relief. One was FELA and the other was the
15 Longshore and Harbor Workers Act, and of course, in that
16 case, you went, I think to the extent of elucidating for
17 those of us who practice in this area, the extent to which
18 the Longshore Act does in fact apply, indicating the
19 integral part of and essential characteristic to cover the
20 individuals who are involved maintenance at conveyor belt.

21 QUESTION: Just refresh my recollection, because
22 I don't remember the case even as well as Justice White
23 does.

24 MR. TICHY: Okay.

25 QUESTION: Did that case hold that you must go

1 to -- bring your administrative claim before you litigate
2 your FELA claim?

3 MR. TICHY: What happened in this case was that
4 a claim was attempted to be made under FELA, and there was
5 raised as a defense that the Longshore Act applied. And
6 it was ultimately determined by this Court that indeed the
7 Longshore Act applied because the individuals, who were
8 essentially maintenance employees, were, if you will --
9 and not very highly paid individuals necessarily, were
10 involved in picking up coal around a conveyor belt that
11 was used to load coal on to a vessel --

12 QUESTION: In other words, that case held that
13 they were covered by one statute rather than the other --

14 MR. TICHY: Correct.

15 QUESTION: But did it say anything about which
16 proceeding you must commence first?

17 MR. TICHY: I think implicit in that, and I will
18 certainly leave it to the Justices to discuss in more
19 detail, is where you arguably have a claim which is within
20 the Longshore Act, that's where you should initiate your
21 proceeding, that's where your focus should be, and that's
22 where you should go.

23 Now I would point out further --

24 QUESTION: Their claim there wasn't arguably,
25 their claim, as a matter of law was within that statute.

1 MR. TICHY: Well, ultimately you determined
2 that.

3 QUESTION: Yes.

4 MR. TICHY: Absolutely. When this Court decided
5 Wilander, there were two very interesting and articulate
6 points that were raised. First of all, on page 813 of the
7 decision, Justice O'Connor stated: Thus, it is odd but
8 true that the key requirement for Jones Act coverage now
9 appears in another statute, referencing the Longshore Act.

10 Subsequently, on the top of page 814, Justice
11 O'Connor states: Whether under the Jones Act or general
12 maritime law, seaman do not include land-based workers.

13 Mr. Gizoni is a land-based worker.

14 QUESTION: Mr. Tichy, do you know how to
15 pronounce Wilander?

16 MR. TICHY: I assume it is Wilander.

17 QUESTION: You don't know that firsthand?

18 MR. TICHY: I worked in North Shipping, Sweden
19 for some time in my youth. I am assuming that it is
20 pronounced that way. Maybe it is German I am not sure.

21 QUESTION: We ought to agree with this --

22 QUESTION: Wilander is a Swedish name.

23 MR. TICHY: That is what I assumed, and in my
24 youth many years ago I did have the opportunity to speak
25 some of the language, though not well.

1 QUESTION: That is the way it is pronounced in
2 the broadcast of tennis tournaments.

3 (Laughter.)

4 MR. TICHY: That's right, and there we have
5 decided on the dispositive determination.

6 QUESTION: Maybe we can call it McDermott and
7 solve the problem that way.

8 (Laughter.)

9 MR. TICHY: Okay, thank you very much, Justice
10 O'Connor.

11 In summation, for all the reasons which we have
12 raised before this Court: application of basic rules of
13 statutory construction, specifically 2(3); implementation
14 of congressional intent, which of course is reflected in
15 the 1972 amendments; avoidance of multiple litigation;
16 avoidance of multiple and inconsistent results;
17 maintenance of a uniform, less expensive and more certain
18 no-fault compensation system, as well as the simplicity of
19 definitional language and, I submit to you, fundamental
20 logic, petitioner, Southwest Marine, requests that the
21 decision of the Ninth Circuit Court of Appeals be
22 reversed.

23 Thank you.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tichy.

25 The case is submitted.

1 (Whereupon, at 1:57 p.m., the case in the above-
2 entitled matter was submitted.)
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NO 90-584 SOUTHWEST MARINE INC, Petitioner V.

BYRON GIZONI

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