OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: METROPOLITAN STEVEDORE COMPANY, Petitioner v. JOHN RAMBO, ET AL.

CASE NO: No. 94-820

PLACE: Washington, D.C.

DATE: Tuesday, April 25, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

METROPOLITAN STEVEDORE COMPANY,

Petitioner

v. : No. 94-820

JOHN RAMBO, ET AL.

Washington, D.C.

Tuesday, April 25, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

ROBERT E. BABCOCK, ESQ., Portland, Oregon; on behalf of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; Federal respondent supporting Petitioner.

THOMAS J. PIERRY, ESQ., Wilmington, California; on behalf of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 94-820, the Metropolitan Stevedore Company v. John Rambo.

Mr. Babcock.

ORAL ARGUMENT OF ROBERT E. BABCOCK

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether Longshore Act compensation for permanent partial disability stops when economic harm caused by injury ends or whether the benefits must continue in the absence of economic harm until the worker's physical condition improves or fully resolves.

It's an exercise in statutory construction. And the starting point must be the central and, we think, undebatable fact that the statute contains no express distinction between physical and other factors in determining the conditions which may serve as grounds for modification.

Any restrictions on modification -- this clear, bright line that Respondent Rambo found -- finds separating a worker's physical condition from all the

other factors and circumstances to collectively determine the economic effects of injury -- has to be found outside the statutory language itself.

We say that it cannot be found within the structure of the Act, the meaning or the context within which the meaning of the word must fit. It's simply not a concept suited to a wage loss system.

This bright line, this sharp distinction, would provide benefits to those who have no economic loss, and deny them to those to whom that disability -- that economic loss -- was delayed.

When Congress has decided -- and they have decided on several occasions -- to provide benefits in the absence of economic loss, they've made that intention quite clear. They've used a schedule, which now appears at Sections 8(c)(1) through (20) of the Act -- it has been there since its beginning in 1928 -- or as they did in 1984, they amended and tailored the definition of disability to require focus on impairment in the case of certain retiree cases involving occupational disease.

And they did that because, in that instance, the retirement was thought by the Benefits Review Board and some courts to have foreclosed the prospect of economic loss.

We see in the legislative history nothing that

demonstrates the presence of an intent to mark between physical and economic factors. And we certainly see in the legislative -- in -- excuse me, in the decisions of this Court no suggestion, particularly in Banks and O'Keefe, that a distinction should occur.

QUESTION: Now, the initial determination of liability is made by considering things other than the physical condition?

MR. BABCOCK: The --

QUESTION: The physical condition as well as the effect on the -- the wage-earning ability?

MR. BABCOCK: The original determination is made in accordance with some instructions appearing at Section 8(h) of the Act, and includes, in addition to the physical condition, virtually all that would affect either the stability of the current employment or the prospects and stability of future employment, both micro or personal factors such as skills and capacities, and macro factors such as the industry as a whole.

And in this situation, though, the source of this perceived distinction, in our judgment, lies not in the language, not in the structure, not in the history, not in the decisions of this Court, but, instead, it lies in what can be best called 62-year-old dicta, drawn from a case in which the central question that we're now dealing

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with was not even a factor.

That case, McCormick, a 1933 opinion out of the 9th Circuit -- we would reach the same conclusion in McCormick regardless of whether we're following the Fleetwood Rule, allowing consideration for modification purposes of all factors, or following the more rigid rule that the 9th Circuit adopted, simply because Fleetwood lost his income because there was a depression. He didn't -- and therefore he sought more compensation.

Even under our rule, no more compensation would be payable because the loss -- this additional loss -- is unrelated to the injury itself.

QUESTION: Fleetwood is the name of the person involved in the McCormick case?

MR. BABCOCK: Excuse me, Your Honor. Fleetwood is the name of the worker involved in the 4th Circuit case as to which the 9th Circuit's opinion in this proceeding stands in contrast. I've forgotten the name of the worker in McCormick.

Another case relied upon in Rambo and by Petitioner at length is Pillsbury. Once again, dicta. And in both cases is -- there has been repetition, we think thoughtless repetition, of those cases and their dicta throughout the years, and we don't think they have gained any greater significance than they originally

possessed simply because they've been used at times in other cases.

QUESTION: Do we -- do we adjust conditions for inflation? I mean, when you figure out whether conditions have changed, do you use the dollar amount he was earning or -- or -- to adjust that up or what?

MR. BABCOCK: The Benefits Review Board's rule -- and it's been approved by, I think, all the circuits that have looked at it, requires the parties who are taking earnings at a date subsequent to the date of the injury to prove, as a matter of fact, what those new jobs or that new position would have paid at the time of injury.

There's always an effort to bring it back to erode the effects of inflation and make that not a meaningful factor.

QUESTION: And what if his condition gets worse? If his physical condition gets worse, is there any remedy for him?

MR. BABCOCK: Well, it would depend on whether one were working from the 9th Circuit or the 4th Circuit position. Let's presume that Mr. Rambo had his injury after he had been trained and gained the skills to be a crane operator and was now making much higher earnings than the typical longshoremen.

If you took the 9th Circuit approach and a year passed and then containers were replaced by rail cars or some other form of unloading, Mr. Rambo would not, even if his physical -- would not, under that circumstance in the absence of a change in his physical condition, gain anything. Improvement or deterioration of physical condition is always a -- even within the 9th Circuit's view -- basis for modification.

QUESTION: Is --

QUESTION: But under the 4th Circuit rule, he would get --

MR. BABCOCK: Yes, it's just broader. It includes both the physical and the other economic factors that we believe should be included.

QUESTION: How often would that adjustment be made under the 4th Circuit rule? You lose your job for six weeks or eight?

MR. BABCOCK: I think that it's very hard -- when you move off a single definition, you start down a slippery slope to find a place that's a logical stopping point. I don't think that lies within the term "conditions" itself. You have to look to some of the other things that will limit the frequency of the claim.

The prospect of success is one, because an employer who is unsuccessful pays both his and the

claimant's attorney's fees in the process. A claimant who is unsuccessful of course pays his own.

Settlement and the frequency of it -- 90 to 95 percent of these cases settle -- is not a modifiable resolution. I don't think it'll happen very often. That's the best I can say.

I know of no studies. We lived with this rule for 10 years, since Fleetwood, since the Benefits Review Board has worked with it, and there certainly has been no torrent of these cases.

QUESTION: Of course, Fleetwood is a case where the employer got the modification, wasn't it?

MR. BABCOCK: That's correct.

QUESTION: But are there similar cases where the employee has gotten modification?

MR. BABCOCK: In the amicus brief submitted by Industrial Indemnity Insurance Company there was reference to one case -- I believe it's name was Vasquez -- where an employee had come in seeking modification as a result of a loss of skills and a loss of employment and was awarded --

QUESTION: Just -- just one case -- it would seem to me that there is a lot -- there would be a lot of possibilities for claims by employees that -- say the job had been abolished or something like that -- the example you gave -- but why do you suppose there aren't more of

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them?

MR. BABCOCK: Well, I think first, in reality, 90 percent of these cases settle before the first hearing occurs. And then you have, following that, since '84 and amendments permitted it, some settlements post-hearing and post-award, so that forecloses that basis for -- for modification. The --

QUESTION: Are you saying that in your experience there are say hundreds or thousands of cases in which adjustments are requested because of economic changes that the Board never sees?

MR. BABCOCK: No, I'm saying -- excuse me -- I see, one way or another, probably a third to half of the longshore cases on the West Coast, both shipyards and stevedoring trades. I know of five or six modification cases, including this one, that have come up in the past 10 years.

QUESTION: Were all those requests by the employer?

MR. BABCOCK: Except for the Vasquez case --

QUESTION: But the one you knew about, though?

MR. BABCOCK: All that I've -- all that I've dealt with have dealt with employer requests, that's correct.

QUESTION: What I'm trying to get some sense of

is your experience as a practitioner and just how many of these claims are made and resolved without the necessity of -- or review by the Board?

MR. BABCOCK: I -- I would say virtually none, Your Honor. It just doesn't occur. If you look through the last 10 years of the -- the reports of the administrative law judge opinions that are collected in the Matthew Bender publication of it, it's a minuscule number of cases involving the issue.

QUESTION: Well, I suppose, given your being in the 9th Circuit, I -- I should ask what the experience of some other circuits are.

MR. BABCOCK: Well, I'm speaking nationally: The 9th Circuit, of course -- those of us within it -- lived under the Benefits Review Board rule until the 9th Circuit issued its opinion in this case, striking the Board's rule down.

QUESTION: What about State workers' compensation schemes? Don't they have some analog to this?

MR. BABCOCK: There are. And -- and I did my best to try to gather them. It's kind of hard to find sometimes what States do, because they're done in an informal basis.

We were able to identify about -- if I may pull

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my note for a second, Your Honor -- 13 States that have taken very similar language, "condition" or "conditions," and have judicially determined that to encompass the economic and the physical. Six have gone the other way, taking those same terms and said it's limited to the physical.

QUESTION: So you have the same split among the States that you have between the 4th and the 9th?

MR. BABCOCK: I don't think I could do that, Your Honor, without looking at the States. I didn't see a -- a geographic pattern.

QUESTION: Well, I -- there is a split, and some States take the position that the 9th Circuit has taken and some take the position that the 4th Circuit has taken --

MR. BABCOCK: Right.

QUESTION: -- construing similar language in State statute?

MR. BABCOCK: That's right. It's about 2 to 1, with the majority favoring the Fleetwood, more open interpretation of the language. And about 15 more have just been more precise in their legislative direction, sometimes saying you must include economic factors, sometimes saying you may include only physical factors.

QUESTION: You include -- I gather -- what if

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there's just a -- just a -- a particularly good couple of years for the industry, so that all the wages in the industry are higher; is that one of those conditions?

MR. BABCOCK: I think it will get you in the door to a proceeding, seeking modification. And if you can persuade the administrative law judge that this blip, this -- this hiccup in the economy, demonstrates a permanent change in the worker's capacity to earn, one which is likely to continue, as Section 8(h) required, into the foreseeable future, then you will see an increase in the average weekly -- in the wage-earning capacity.

MR. BABCOCK: But that -- but that's an increase that would have happened anyway. I mean, you know, injury or no injury, he -- he should get the benefit of that blip. He -- he would still have been in that industry.

MR. BABCOCK: Well, that's right. And -- and so the response of any claimant in that situation is, even if you've got this number -- he's going -- you know, that -- that it increased and it's permanent, he's going to turn and say, I -- I would think, but this isn't in the interest of justice -- which is your overall equitable limitation on it and certainly one the Congress accepted -- it isn't in the interest of justice to take away some of my money because I would have been there anyway and I would be successful.

QUESTION: What -- what do you think the conditions are, other than the physical?

MR. BABCOCK: I think that they encompass the availability and suitability of employment. I think they encompass the industry and its condition, all of the factors that we deal with now.

As an example, Your Honor, when an individual has been injured and gone back to work in the shipyard -- which is probably the best example that we deal with -- we the debate always is, does his -- do his earnings that he has received within the shipyard reasonably reflect what he's likely to earn in the future? And there's always a question about how long is this shipyard going to continue, given the state of our Nation's --

QUESTION: So -- so, well, then I was just interested -- you said the lack of jobs in the depression wouldn't be a relevant factor. Why not? Well, what about inflation or just old age?

MR. BABCOCK: Well, it --

QUESTION: As you get older, it's harder, if you're handicapped, to -- to make more money.

MR. BABCOCK: If I may take them one at a time. The -- the depression situation -- earning -- earnings are down. You could say earning capacity is down if it's a long-term depression. But the amount of increased

benefits that the individual would otherwise receive are unavailable to him because there's no relationship between the injury and that job.

The injury still has to play a role at all steps in this process. Because we only will compensate for impaired earning capacity attributable to the injury. Old age -- first, I'd say that may be just as physical a condition as any of the others, and is a problem, if -- if it exists, exists under either of the definitions. But, generally, we would argue that's an intervening --

QUESTION: What I'm having trouble is finding that -- that a person, say, has -- his arm doesn't -- is -- is handicapped, and so they say, here in 1952, that's worth $80 a week, because you can't hold these jobs. And now, in 1992, of course, $80 is almost nothing, and it would be worth a lot more. So that's inflation. His injury is now causing him to lose a lot more money.

Or he's now 70 years old and -- or 60 years old, and it's much harder for a 60-year-old person without an arm to find a job than for a 30-year-old person without an arm, quite likely. And -- and so what -- do you take all those things into account?

MR. BABCOCK: All of those things are taken into account, both in the original determination and have to be taken into account in the assessment of whether a

modification is appropriate; that's correct.

If there are no further questions, I would like to reserve the balance of my time.

QUESTION: Very well, Mr. Babcock.

Ms. Minear, we'll hear from you.

ORAL ARGUMENT OF JEFFREY P. MINEAR

FEDERAL RESPONDENT SUPPORTING PETITIONER

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

The Director submits that Metropolitan may seek modification of Rambo's disability award based on his acquisition of new job skills that have restored his wage-earning capacity.

The statutory language here provides some -- some very useful guidance. Section 22 allows modification based on a change in conditions. Congress' use of the plural term "conditions" indicates that Section 22 is not limited to a change in the claimant's physical condition. If Congress had intended that result it easily could have said so.

QUESTION: May I just ask one question, Mr. Minear?

At the time that the Fleetwood case was decided back in '86, there was some discussion in the opinion about what the Board's position was. Is the Board's

position today the same as it has always been?

MR. MINEAR: The Board did not take a position on this issue. Oh, excuse me, the Board. The Director -- the Director, who we represent, has not taken a position on this issue until the Fleet -- after the Fleetwood case.

The Board's original position -- at least in 1984 -- it claimed that it was overruling its prior rulings. The only -- only ruling, though, it cited was a case called Rizzi. And Rizzi did not involve a -- a case such as we have here, where there's been an acquisition of new job skills.

Instead, Rizzi involved a situation where the individual had in fact suffered degeneration unrelated to his injury. And the court had said that that was not compensable and -- and apparently believed that because it was not a physical injury.

So, in other words, I think the -- the short answer to this is that the Board at least thought it had that position in 1974.

QUESTION: It thought it had which position in '74?

MR. MINEAR: It thought it had the position of being limited to a physical condition --

QUESTION: Physical only.

MR. MINEAR: But the fact is --

QUESTION: Well, when -- when did the -- either the Director or the Board first manifest the position that it's not limited to physical injury?

MR. MINEAR: Well, I think there were various manifest -- manifestations along the way, although no clear holdings.

QUESTION: When is the first clear indication of what their -- their position was, it was not limited to physical holding?

MR. MINEAR: I think one clear holding would have been in 1972, when the Assistant Secretary for Labor indicated that if a worker failed -- indicated in congressional oversight hearings -- that if a worker failed to -- to accept rehabilitation opportunities, his award could be reduced on that basis.

QUESTION: Well, apart from testimony in here, when in any -- any actual -- controversy -- you know, any -- any -- any actual case -- when did either the Director or the Board first manifest the position unequivocally that you now espouse?

MR. MINEAR: I don't think it was unequivocally manifested until 1984. But, on the other hand, there is no clear indication in the other direction as well. Most of those statements that we find in the -- in the various court cases are all dicta. And in fact they have not

squarely addressed the issue.

QUESTION: See, the thing that puzzles me -- just to get it on the table -- it seems to me if the -- if the -- if that rule is correct, there would have been a lot of cases. Because there are a lot of reasons why you could have changed conditions both ways, and yet there don't seem to be many.

MR. MINEAR: Well, I -- I don't think that's necessarily so. And -- and there are several reasons for that. First of all, the retraining opportunities were far less back in the 1930's and the 1940's as compared to -- to today, when there are more opportunities for retraining and rehabilitation.

The common practice, as I understand it, during the thirties and forties if an in -- if a worker was injured was that he would be put in a light-duty program. He'd receive compensation based on his decreased wages. And his situation would not change very much.

But now, because there are more opportunities on the waterfront, in fact, for white collar jobs, for jobs such as Mr. Rambo has, of operating a crane --

QUESTION: Yes, but wouldn't -- wouldn't your principle apply if he got a job as a travelling salesman and doubled his income?

MR. MINEAR: Yes. Yes, it would also apply in

that situation.

QUESTION: So, I mean, there must be lots of these people who have been able to improve their earning capacity for reasons unrelated to their injury?

MR. MINEAR: Well, another difficulty is that in fact, in those cases where the people leave the industry, the employer may not know what their current earnings are. Congress actually dealt with that issue in 1984 by enacting 8(j) of the Longshore Act, which allows an employer to require a disabled employee to submit wage statements so that the employer can keep track of what the disabled worker's wages are.

The obvious reason for that was base -- was the assumption that there would be a basis for modification of awards based on the increased earnings.

QUESTION: Yes, but the obvious one is inflation?

MR. MINEAR: Excuse me?

QUESTION: The obvious one is inflation. Why weren't all the workers coming in and saying, in the mid-seventies, late-seventies, you know, this is worth nothing now and --

MR. MINEAR: Well, the inflation -- excuse me, Your Honor --

QUESTION: Yes.

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MR. MINEAR: To answer your question, the Longshore Act does take into account inflation in Section 10, in the case of total disability, but not in the case of permanent partial disability.

QUESTION: So why weren't they all in and saying, hey, first of all, inflation, and -- and second -- well, I mean inflation is the obvious one and I -- I'm sure there -- there are a lot of others where -- where -- why wouldn't they just -- they get older -- that's the other obvious one.

MR. MINEAR: Well --

QUESTION: And it is harder to find a job when you're older.

MR. MINEAR: Well, under our construction, those types of considerations are not relevant changes in conditions.

QUESTION: Why not? That's --

MR. MINEAR: The reason why is because those factors are considered in the initial benefits award. A determination is made in terms of what the person's future wages might be. Now, if there is a mistake --

QUESTION: And you think that we're accurately in -- in the -- in the early seventies, people really predicted the Arab oil embargo and everything?

MR. MINEAR: Now, if there was a change there,

that would arise under a mistake of fact rather than a change in conditions, to the extent that that factor is considered, in the initial benefits determination.

And as this Court indicated in O'Keefe, there's no limitation to the types of facts that could be considered in a particular case. So we think that the -- the same rule should apply to change in conditions.

QUESTION: Well, what about general -- a general change in the economy? We go into a boom. Someone who was unemployable before now faces a -- a job market that is crying for -- for more workers. Does the -- does the Director consider that?

MR. MINEAR: No, the Director generally doesn't. And this is on the basis of McCormick and -- and Burley. McCormick, you recall, was a case involving a -- the depression, and the benefits -- well, actually the court at that point held -- the court of appeals -- held that you do not take into account change -- economic changes of that type in adjusting an award.

Burley was a case that involved an increase in work available to a disabled worker during World War II, because of the booming economy. The same result there. That is not a relevant condition.

QUESTION: Well, is the -- what -- what condition is relevant beyond an -- an acquisition of the

new skill?

MR. MINEAR: New skills, a change in physical condition.

QUESTION: Yes.

MR. MINEAR: The elimination of a particular job because it's obsolete, for instance. Suppose that the award was based on the understanding that this person could perform a job that is no longer available anywhere in the economy because of -- changes have made his remaining skills obsolete.

QUESTION: Yes.

MR. MINEAR: I think there's one --

QUESTION: Why -- why do you draw the line --

QUESTION: Yes, why is that different from the things you say aren't included?

QUESTION: Yes. How -- what's your criterion?

MR. MINEAR: Well, the difference there is he had a particular skill that was taken into account at that -- at that time.

I think there's a more important point, though, that ought not to be lost. And that is that Section --

QUESTION: No, but --

MR. MINEAR: Excuse me. Section 22 also applies to modification of death benefits. And death benefits are -- may -- are awarded without regard to the claimant's

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physical condition. Section 22 has to apply to that situation. It clearly applies to the situation where there's a remarriage or a termination of benefits.

QUESTION: Yes, but that could be because it covers mistakes as well as change in condition. That might explain why it applies to death benefits.

MR. MINEAR: Oh, that's -- that's a separate concern, again, whether or not there is State compensation. But under Section 909 or Section 9 of the -- the Longshore Act, it's quite clear that there are certain changes that can take place with regard to death benefits. such as remarriage, such as the termination of a minor child's dependency.

Section 22 serves the function of allowing changes with regard to those changes as well. And there's no question that it has been applied for many years with regard to those types of changes.

Section 22 cannot mean one thing with regard to disability awards and another thing with regard to death benefit awards. The real problem that I think is troubling you, Justice Souter, is the question of --

QUESTION: Well, if that's --

MR. MINEAR: -- what are the considerations --

QUESTION: -- if I'm following you, if that's the case, why can you consider a -- an acquisition of a

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new skill?

MR. MINEAR: An acquisition of a new skill is something that is a relevant change in conditions. Again, our focus --

QUESTION: You mean because the skill level was considered at the time the original award was made?

MR. MINEAR: Because he was assumed to have had only limited skills. He developed new skills.

QUESTION: Yes, but your -- I take it your criterion, in answer to Justice Scalia's question and my question, your criterion is a change in condition refers to any condition which was considered or anticipated at the time of the original award; is that your answer?

MR. MINEAR: Or -- or could have been considered as well. Any of those factors -- our basic position is any factor that was considered in the initial benefits award could be considered based on a modification, either based on a mistake of fact or a change of conditions.

But some of these changes are simply not relevant. For instance, economic changes are generally not relevant because wage capacity is -- is determined on the basis of what is described by the ALJ here as normal employment conditions.

Now, if the worker can come in and show that in fact there was a mistake made with regard to what was

normal employment conditions in the initial hearing, he would be entitled to a modification. But he is not entitled to a modification --

QUESTION: Then why -- why can't -- why can't he say they -- they anticipated a depression? Why can't the employer say they anticipated a depression and they got a boom?

MR. MINEAR: Well, he could certainly say that, but he would have to prove here -- the -- the problem here is if you move for modification you're going to have to prove the basis for your modification. And that -- the focus in the -- in the modification hearing is going to be, well, what -- what are your current earnings now? Do they accurately reflect your wage-earning capacity? And, if not, what other factors should be considered?

Thank you, Your Honor.

QUESTION: Thank you, Mr. Minear.

Mr. Pierry, we'll hear from you.

ORAL ARGUMENT OF THOMAS J. PIERRY

ON BEHALF OF RESPONDENTS

MR. PIERRY: Mr. Chief Justice, if the Court please:

This is primarily a statutory construction case, and I had planned on starting by the analogy to the Newport News decision that this Court handed down 33 days

ago. But, rather, I'd like to address the question asked by -- by Justice Stevens as to how many cases for modification have been filed. And I've only practiced law for 30 years, but I've never handled one.

My firm has handled probably more claims under the Longshore and Harbor Workers' Compensation Act in Los Angeles than anyone else in the area. And I think there's a good reason for it. The reason that we don't have a slew of claims is because of the restrictive reopening process that was passed by Congress. And that is, change in physical condition.

Mr. Babcock stated that -- in response to one of the other Justice's questions -- well, that'll get you in the door. That's always been the problem -- getting in the door. The Fleetwood decision flings open the door.

And as one of the other Justices pointed out, there will be modifications when men age and they're unable to earn what they were earning on prior situations.

QUESTION: Of course, Fleetwood flung open the door about 10 years ago, and we haven't been flooded with cases --

MR. PIERRY: Not in the 1st, 5th, 9th, or 11th Circuit.

QUESTION: Yes.

MR. PIERRY: We've still --

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QUESTION: I see. That's just in the -- in the 4th Circuit, isn't it?

MR. PIERRY: That's correct, Your Honor.

QUESTION: And how, if at all, did that re -- relate to Congress' requiring or allowing the employer to get wage reports from the employee?

MR. PIERRY: Interesting, Your Honor, on the Congressional Record, Mr. Nickles pointed out that the 1984 amendments were concerned with fraud. And after going through at least a column about fraud, he addressed the issue of requiring the employee to file, at least semiannually, wage statements to avoid the situation where a man had returned to gainful employment and was still receiving temporary total disability benefits.

That particular provision, 8(j), has nothing to do with modification. It provides for a forfeiture. If the man lies about his earnings or refuses to give the information, he then is penalized by forfeiting the benefits that he would otherwise draw during that period of time. And then, even, the Deputy Commissioner has the authority, if it's prospective in nature, of arranging some sort of a -- of a repayment schedule, if you will, that does not jeopardize the man or his family.

QUESTION: Is the reporting mandatory now, or is it up to --

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MR. PIERRY: Mandatory. It's mandatory if the employer requires it. The employer can require it semiannually.

The Newport News decision that was handed down by this Court just recently, although it's in a different area, precludes the Director from standing to sue to file appeals. And, in effect, precludes her from being the champion of either party in claims under the L&H Act.

If the Director's opinion is adopted in this case, you'll be opening the back door, and she will be able to come in, under Section 22, and file modifications on those very things that you said she had no standing to do in the Newport News decision.

QUESTION: Well, but so what? I mean, why is that bad? If she has the standing, she has the standing. In the 4th Circuit, what has happened? Has there been a big --

MR. PIERRY: It's not a question of whether she has the standing; it's a question of whether or not this Court and Congress intended that she would be in the position where she would be litigating on behalf of the parties, as opposed to as the recent decision by Justice Scalia said, that they -- the -- they are an independent arbiter and not a litigator.

QUESTION: Well, if -- what I'm actually driving

at is, is -- is it a bad thing to -- why is it a bad thing, if the language allows it, to let the Agency work out a set of rules, over time, even if nobody has thought of it before, whereby they will -- when there are changes, the worker -- usually it'll probably work in favor of the worker -- I mean the inflation will go up or there's an economic change nobody thought of and he has a harder time getting a job as he gets older -- isn't that what the Agency is there for, to work all these things out?

MR. PIERRY: The Agency is there to do as Congress delegated it to do. And Congress did not delegate to it that function. Congress delegated to it four items that Justice Scalia mentioned in his recent decision. And not one of those is to litigate on behalf of either party. It's to monitor and to administer.

QUESTION: I don't think I follow, Mr. Pierry, your contention that if we resolve this case one way there will be something contrary to the Newport News decision in it.

MR. PIERRY: I'm not sure I understand your question, Chief Justice.

QUESTION: Well, I -- I gather you're arguing that if we decide this case in favor of your opponent, we will somehow undercut our recent decision in the Newport News case. I don't think I follow that argument.

MR. PIERRY: Under Section 22, the Director.is -- is given specific authority to file a modification, whereas she is not given that authority as she is under the Black Lung Act, et cetera, et cetera. And in the Newport News decision, she had no standing to appeal for Mr. Kerram and allege permanent total disability and/or 8(f) benefits.

QUESTION: But she is authorized to file for a modification?

MR. PIERRY: Yes, she is.

QUESTION: Well, that's what Congress has provided. I mean, I don't see that it results in any inconsistency between the two cases. We said in Newport News Congress had not provided it; and in this situation, apparently everybody agrees it has provided it.

MR. PIERRY: It has provided the Director the authority to file a petition for modification. But, in my view of it, that does not carry with it the right to litigate the issue under Section 22 for anything save and except changing conditions, which has been uniformly held to be a change in physical condition.

QUESTION: Uniformly except in the 4th Circuit?

MR. PIERRY: No, uniformly except in the 1st, 5th, 9th, and 11th Circuit. In every -- every single case that I've set forth in my brief, uniformly, every single

case says that the change in conditions that is incorporated in Section 922 has been held to be a change in physical condition.

And the -- the case I think that's telling is the Golubiewski case from Maryland, where the man was in -- incarcerated for murder for life. And in that case, the employer sought to -- to modify. And they were held that he was not allowed to modify because there was no change in conditions.

Clearly, under the Director's view, if -- the same situation -- only now the convict modifies and says that I have had a decrease in earnings. And I think that points out the questions that one of the Justices asked that -- about what -- under what circumstances other factors will be considered?

And the Director, if I may, in her main brief, on page 28, states: "The Director's construction will not overburden the agency and courts with modification requests because, as discussed above, a change in wage-earning capacity necessary to support modification must be a change in an employee's capacity to earn wages because of injury."

The vice of the -- the Director's position is she leaves out the causation issue, and she jumps right to the wage-earning capacity. Whereas the McCormick bright

line test starts with, "Has there been a change in physical condition?"

Then, if that condition precedent is met, then you've got your foot in the door. Then you go back in before the ALJ or the -- the Benefits Review Board, and then all of the other factors can be considered in determining whether or not there has been a change that would necessitate modifying the award.

If there are no other questions, I have nothing further.

QUESTION: Thank you, Mr. Pierry.

Mr. Babcock, you have four minutes remaining.

REBUTTAL ARGUMENT OF ROBERT E. BABCOCK

ON BEHALF OF PETITIONER

MR. BABCOCK: Well, first, we cannot see within the Act or its structure -- structure justice when an individual who no longer has an economic loss continuing to receive benefits --

QUESTION: Well, I'll presume that. But isn't it true that this whole statutory scheme is a replacement of the tort liability scheme in which, if they'd been injured, you got a recovery, and later on, when he recovers completely, he still keeps whatever he got in the tort case?

MR. BABCOCK: No, I don't think that's a fair

characterization of a workers' compensation scheme. It was the characterization followed in -- I'll mispronounce it too -- but the Golubiewski case that dealt with the imprisonment. The idea that really what we're doing here is having periodic payments of a lump sum award. That was the concept that the judge followed there. And so he felt that you wouldn't cut it off at any later time because it's been secure and determined.

The longshore system is designed to be flexible. It's designed to replace only economic loss. This isn't just a replacement for a tort system; it has a variety of rehabilitation purposes. It has the compensation purpose in itself. It's got a medical insurance program that goes along with it.

I don't think you can characterize the bargain that was struck with Congress in the middle and the employers and employees on both sides as simply a replacement for a tort system.

QUESTION: Well, it did -- did away with having to prove fault. You had strict liability. And you get lesser damages, but you're sure what they're going to be. It certainly is a substitute for --

MR. BABCOCK: I think it's a substitute. I don't think it was designed simply to supplant -- workers' comp in general is to avoid that kind of litigation, but

it carries with it other benefits, and with those other considerations that go along --

QUESTION: Because we're only talking about nonscheduled awards, aren't we, in this case?

MR. BABCOCK: That's correct.

QUESTION: The scheduled awards go on whatever happens?

MR. BABCOCK: Well, I think -- in theory, you would say that a scheduled award, because its focus is solely for impairment of the worker -- 20 percent lost function of an arm -- if somehow that improved and the award had not been fully paid out by the time this all occurred, that you would seek modification based on change of physical condition.

QUESTION: But in the non -- what I'm saying -- in the non -- in the scheduled award, it would have to be a change of physical condition; you would agree with that?

MR. BABCOCK: Yes, because that's the basis for the award.

I think a couple of points about them and how long and why there isn't an overburden -- and you can go back to '81, and the -- and the 5th Circuit's opinion, Hole v. Miami Shipyard, where Fleetwood is presaged, by saying we're going to give a 1 percent de minimis, as many of the judges did and the 5th Circuit approved, in order

to avoid the running of what was seen as a sometimes harsh statute of limitations.

And they provided this 1 percent award because the economic effects might materialize later on. So we have maybe 15 years of experience with it. And the averages -- I just checked -- the number of cases -- new cases -- filed under the Longshore Act dropped from 4,500 in 1984, when Fleetwood came out, to the average of 3,500 to 3,700 in the intervening decade.

There has been, and I think that padding shows, that there will not be any torrent of increased litigation as a result of --

QUESTION: Is any of that possibly the result of the declining oil business in the Gulf or things like that -- any of that decrease during that period of time?

MR. BABCOCK: I think the shipyards have gone down some. That's certainly an effect. Earnings have gone up some, and that lessens the likelihood of claims because there is a low inflationary adjustment for partial disability as time moves along.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Babcock. The case is submitted.

(Whereupon, at 1:39 p.m., the case in the above-entitled matter was submitted.)

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CASE NO. :94-820

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BY Ann Marie Federico

(REPORTER)