

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HARBOR TUG AND BARGE COMPANY, Petitioner v.
JOHN PAPAI, ET UX

CASE NO: 95-1621

PLACE: Washington, D.C.

DATE: Monday, January 13, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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HARBOR TUG AND BARGE COMPANY, :

Petitioner :

v. : No. 95-1621

JOHN PAPAI, ET UX :

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Washington, D.C.

Monday, January 13, 1997

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:05 a.m.

APPEARANCES:

ERIC DANOFF, ESQ., San Francisco, California; on behalf of
the Petitioner.

THOMAS J. BOYLE, ESQ., San Francisco, California; on
behalf of the Respondents.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Respondents.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1621, Harbor Tug & Barge Company v. John
5 Papai.

6 Mr. Danoff.

7 ORAL ARGUMENT OF ERIC DANOFF

8 ON BEHALF OF THE PETITIONER

9 MR. DANOFF: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents two distinct legal issues.
12 The first is whether an injured maritime worker who has
13 received LHWCA, Longshore and Harbor Workers Compensation
14 Act benefits pursuant to an award by an administrative law
15 judge can thereafter seek seaman's remedies or whether
16 that person is precluded.

17 The second issue is whether an injured maritime
18 worker's status as a seaman or not is dependent upon his
19 job assignment at the time when he is injured or can be
20 dependent upon his prior work history for other employers
21 or for the same employer.

22 QUESTION: Mr. Danoff, as a preliminary
23 question, if the Court were to address the second question
24 and conclude that we do not look at the prior relationship
25 with other tug owner employers but confine the fleet

1 principle to the same owner of the vessels being worked
2 on, if we were to do that, do we have to reach the first
3 question, or would that become advisory? I mean, what
4 would happen if we were to decide the second issue in your
5 favor?

6 MR. DANOFF: The case could be decided on either
7 one of the two questions in our favor and that could end
8 the case.

9 QUESTION: And should it end the case? I mean,
10 do we have any business offering alternative holdings, or
11 not?

12 MR. DANOFF: I think in this case yes, and the
13 reason is that there is a significant and clear split in
14 the circuits on both issues.

15 QUESTION: Well, there's a split on both, but
16 answering both might make something advisory, it seems to
17 me.

18 MR. DANOFF: I think it would not be -- if the
19 decision were made on both issues, as I think it should
20 be, it would eliminate the problems we have raised in the
21 brief with duplicative litigation in the case of each
22 issue, and it would resolve the split in the circuits in
23 each issue.

24 The case could be decided on narrow grounds, but
25 I don't think it has to be decided on narrow grounds.

1 QUESTION: Which of the two is the more
2 important issue --

3 MR. DANOFF: I --

4 QUESTION: -- to those who are in the field?

5 MR. DANOFF: Well, it's actually somewhat
6 different fields.

7 I think people who are in purely deep water, or
8 seaman issues, the second issue would be more important.
9 To those who are involved in administration of LHWCA and
10 paying benefits under the LHWCA, the first issue is more
11 important.

12 I think they're equally important to different
13 segments of the industry, and to some extent to a group
14 that it overlaps for, so I do think it is important to
15 resolve both issues.

16 The preclusion issue, the first issue involving
17 the benefits under the Longshore and Harbor Workers
18 Compensation Act, I wanted to underscore the difference
19 between this case and the Gizoni case which was argued
20 strenuously by the other side.

21 In the Gizoni case, the worker who had been
22 injured had not received any sort of compensation order,
23 whether by an administrative law judge or by a section
24 8(i) settlement or by the district director. He was
25 simply receiving benefits essentially voluntarily, at the

1 same time seeking seaman status.

2 The difference between that case and this one is
3 that in this case there is a compensation order, and that
4 triggers section 905(a), which talks of -- of the
5 Longshore and Harbor Workers Compensation Act, which talks
6 about the employer's liability is exclusive under the act,
7 and the issue is what makes the employer liable? In the
8 case of the LHWCA, it's a compensation order, whether it's
9 by settlement by the administrative law judges in this
10 case.

11 In this case, there --

12 QUESTION: Mr. Danoff, would you explain to
13 me -- I know you have a literal interpretation of 905(a),
14 but standing back from that, you mentioned the Gizoni
15 case. That says the employer who pays voluntarily under
16 the Longshore Act would be amenable to a later Jones Act
17 case.

18 On the other hand, if the employer says, not a
19 penny until you drag me before some forum, they go into
20 the Workers Compensation, the Longshore mold because it's
21 the fastest, and in that case you would say there can't be
22 any Jones Act, but in the other case where the employer
23 was much more solicitous of the employee there could be?
24 What sense would that make?

25 MR. DANOFF: Well, the employer would not always

1 get protection if it voluntarily paid, that's true. On
2 the other hand, from the employer's point of view they
3 have -- if they feel that the Jones Act suit is
4 inappropriate, that status needs to be determined, they
5 would have to object because the worker is seeking seaman
6 status in the Department of Labor forum, and at that point
7 get an adjudication of status.

8 Sooner or later there has to be an adjudication
9 of status. It may be some employer --

10 QUESTION: Yes, but you know, the big problem as
11 I see it here is that provision in title 33 section
12 903(e). Now, I guess that's in the Longshoreman and
13 Harbor Workers Act.

14 MR. DANOFF: Yes, it is.

15 QUESTION: And it says, notwithstanding any
16 other provision of law any amounts paid to an employee for
17 the same injury, disability, or death for which benefits
18 are claimed under this chapter, the longshoreman workers
19 case, pursuant to the Jones Act, seaman act case, shall be
20 credited against any liability imposed by this chapter.

21 Now, this Court expressed some reliance on that
22 section in Gizoni, and presumably it's a section to which
23 we have to give some effect, and I don't know how it would
24 apply under your proposed rule. What would be the purpose
25 of this section?

1 MR. DANOFF: The section to which you refer --

2 QUESTION: Yes.

3 MR. DANOFF: -- talked about not the case we
4 have here where there's an LHWCA finding of status and
5 then a Jones Act case, but the reverse, and the -- to
6 construe --

7 QUESTION: Well, I don't know if it's the
8 reverse. It says, any amounts paid to an employee for the
9 same injury.

10 MR. DANOFF: Pursuant to the Jones Act or State
11 Workers Compensation.

12 QUESTION: Uh-huh.

13 MR. DANOFF: As opposed to --

14 QUESTION: So you would confine that section
15 only to the voluntary payment of benefits?

16 MR. DANOFF: To the voluntary payment of a Jones
17 Act settlement or to payments of State Workers
18 Compensation.

19 I think it would be very -- a very strained
20 reading to take 903(e), which doesn't say anything about
21 exclusive liability of the employer, who has been
22 adjudicated to have to pay under the LHWCA, and say 903(e)
23 retracted that immunity without any statement in 903(e)
24 that it is intending to retract that immunity and without
25 any legislative history --

1 QUESTION: But what --

2 MR. DANOFF: -- saying that.

3 QUESTION: What about the court's reliance on
4 the section in Gizoni?

5 MR. DANOFF: Well, in Gizoni again there was no
6 adjudication yet of the individual's status and therefore
7 section 905(a) never came into play.

8 QUESTION: Well, you think that whatever remedy
9 is first obtained by a final court judgment is the one
10 that governs?

11 MR. DANOFF: Yes.

12 QUESTION: Is it a race to the courthouse for a
13 judgment kind of thing?

14 MR. DANOFF: Well, it's really in the control of
15 the injured worker.

16 QUESTION: Yes.

17 MR. DANOFF: Because he has the right to decide
18 which forum --

19 QUESTION: How can you say that based on --

20 QUESTION: Here, the injured worker presumably
21 went to a Longshoreman and Harbor Workers administrative
22 judge and asserted that he was in fact a Longshoreman and
23 Harbor Workers worker and wanted benefits, got that order,
24 and it was not appealed. It has become final.

25 But in the interim the injured worker also went

1 to court under the Jones Act and said, contrary to the
2 claim in the longshoreman administrative proceeding, that
3 he was in fact a seaman and entitled to recover. Is that
4 the situation we have here?

5 MR. DANOFF: Almost. He actually had the
6 district court judge try the status first and then went
7 and had status --

8 QUESTION: It was on appeal, though.

9 MR. DANOFF: Well, it wasn't on appeal. The
10 case had not been concluded because he still had a 905(b)
11 action. It was an interlocutory decision. The trial of
12 the 905(b) action had not taken place, and was about to
13 take place when the ALJ made his decision.

14 QUESTION: But when you say it's the worker's
15 choice, this worker chose the Jones Act route, and it was
16 only when the district judge said, I'm sorry you don't fit
17 under the Jones Act that he then went to the Workers
18 Compensation tribunal.

19 MR. DANOFF: That's really not entirely
20 accurate, either.

21 QUESTION: Well, which claim did he file first?

22 MR. DANOFF: I'm sorry.

23 QUESTION: Did he file first in the district
24 court or first before the longshore?

25 MR. DANOFF: Under the Longshore Act the

1 claimant doesn't actually have to file something. It's
2 the employer's obligation to file when an injury is
3 reported, and in this case --

4 QUESTION: Yes, but when did he pursue -- when
5 did he pursue benefits, in what order? Didn't he first
6 pursue the Jones Act remedy?

7 MR. DANOFF: The employer was voluntarily paying
8 and he was receiving longshore benefits, and then pursued
9 the Jones Act litigation for a status finding first.

10 QUESTION: And did he -- he did not invoke the
11 Longshore and Harbor Workers Act until the district court
12 had ruled against him in the Jones Act case.

13 MR. DANOFF: I don't mean to quibble with the
14 word invoked. The employer has the obligation to make
15 payments without --

16 QUESTION: You said that it's the employee's
17 choice which route he wants to go, so is it not the case
18 that this employee chose the Jones Act first?

19 MR. DANOFF: He chose to have his status decided
20 first by the district court in the Jones Act case, and
21 actually --

22 QUESTION: And then he was stuck because it
23 wasn't a final judgment. He couldn't appeal, and then he
24 asked for the adjudication under the longshore workers.
25 Isn't that just --

1 MR. DANOFF: Yes.

2 QUESTION: -- a history of the case --

3 MR. DANOFF: Yes.

4 QUESTION: And that's not debatable that his
5 first choice was the district court?

6 MR. DANOFF: Yes. He wanted to have his seaman
7 status determined in the district court.

8 QUESTION: Well, that could have remained his
9 first choice, couldn't it?

10 MR. DANOFF: I'm sorry, I didn't hear you.

11 QUESTION: Why could that not have remained his
12 first choice? Is there some -- was he under some
13 compulsion to come back under the Harbor Workers Act and
14 ask for adjudication there?

15 MR. DANOFF: No, he was not. He could have
16 waited --

17 QUESTION: He could have pursued the appeal.

18 MR. DANOFF: He could have pursued the appeal.

19 QUESTION: Without pressing the harbor workers
20 claim, so it was within his power to maintain his first
21 choice.

22 MR. DANOFF: Yes.

23 QUESTION: He couldn't appeal. He tried to get
24 a 1292(b) and he was turned down by the court of appeals,
25 right?

1 MR. DANOFF: That's right.

2 QUESTION: So he was stuck for a long time.

3 QUESTION: He could have ultimately appealed,
4 though, if the decision were adverse to him in the
5 district court.

6 MR. DANOFF: Yes. As soon as the 905(b) trial
7 was over he could have appealed not only the findings of
8 that trial but his status.

9 QUESTION: In the meantime, he has to live.

10 MR. DANOFF: That's true.

11 QUESTION: Could he have found --

12 MR. DANOFF: He was in the same position as any
13 other seaman who claims he's a seaman.

14 QUESTION: Yes, but could he have found himself
15 in the position, pending an appeal in the Jones Act case
16 in which the employer ceased the voluntary payments --

17 MR. DANOFF: That --

18 QUESTION: -- and did he hedge against that, was
19 a reasonable hedge against that by bringing the harbor
20 workers claim?

21 MR. DANOFF: Well, if the employer had ceased
22 payments, then he could have said no, I am entitled to the
23 payments, and sought an adjudication.

24 QUESTION: He --

25 QUESTION: But he wouldn't have gotten anything

1 until the administrative adjudication was final. In other
2 words, I assume there's no provision in there that the
3 mere filing of a claim under the harbor workers act
4 obligates the employer to start making payments pending an
5 ultimate adjudication of liability.

6 MR. DANOFF: If the employer controverts the
7 duty to pay, he is not obligated --

8 QUESTION: Yes.

9 MR. DANOFF: -- to pay pending the adjudication.
10 There are penalties if he is wrong, but yes, there could
11 be a period where the worker is not receiving longshore
12 benefits, but if, in fact, he is a seaman, that just puts
13 him in the same position as all other seamen and all other
14 tort victims.

15 QUESTION: If it had gone the other way before
16 the ALJ -- suppose the ALJ said, I find this person's a
17 sailor, would that be issue preclusive in the district
18 court litigation?

19 MR. DANOFF: I believe it would be. I think
20 it's not you know, in question necessarily in this case,
21 but I think as a matter of logic it would be.

22 QUESTION: Even though -- in this very scenario,
23 where they went to the district court first, the district
24 court said, you're not a sailor, then goes to the
25 longshore route and gets a determination there, you are a

1 sailor, and doesn't contest that, comes back to the
2 district court and says, see, now I've got a final
3 adjudication that I'm not entitled to longshore benefits
4 because I'm a sailor, and you say the district court then,
5 despite the district court's earlier ruling, would -- that
6 it would be issue preclusive --

7 MR. DANOFF: Because it was an interlocutory
8 ruling and the first final ruling on status is the one
9 that should govern.

10 QUESTION: Do the administrative law judges
11 routinely say, you are a sailor, or do they just say that
12 you are or you are not a longshore worker?

13 MR. DANOFF: Technically it's the latter, but if
14 the only issue is, are you a seaman or are you a longshore
15 worker, ALJ's will from time to time say we find he is not
16 a longshore worker he is a seaman.

17 QUESTION: Well, there could be some instances,
18 or could they, correct me if I'm wrong, where you're
19 neither?

20 MR. DANOFF: Where you're neither? Yes,
21 definitely.

22 QUESTION: All right. So what the --

23 QUESTION: What are those? What are those? I
24 wasn't aware that there were --

25 MR. DANOFF: Well, you could be too inland to

1 be --

2 QUESTION: Well, like me. I'm neither one,
3 right? I could bring a lawsuit and be found to be neither
4 one.

5 (Laughter.)

6 QUESTION: It has to be possible.

7 MR. DANOFF: Somebody has to be a maritime
8 worker and there's a long and involved situs and status
9 determination --

10 QUESTION: So you mean somebody who might be
11 under State Workers Compensation --

12 MR. DANOFF: Right, exactly. Those are the
13 three categories.

14 QUESTION: I --

15 QUESTION: The big problem comes up with these
16 people who may be sailors and may be longshore workers.
17 How big is the problem? I didn't have a sense of it.

18 MR. DANOFF: There are hundreds and hundreds of
19 cases every year in which seaman's status is debated.
20 This isn't even outside the record. It was quoted in our
21 petition for certiorari. There are many, many cases where
22 the status issue is a very difficult issue, and where it
23 is litigated, and if this case is allowed to stand will be
24 litigated twice.

25 QUESTION: But Mr. Danoff, I understood you to

1 say a moment ago that the only exact issue in the
2 administrative proceeding is whether one is a longshore
3 worker or not, and you say, you know, as a practical
4 matter if everybody agrees there are only two choices the
5 adjudication is frequently made in the form of saying,
6 you're a sailor, but the only issue that technically
7 arises under the act is longshore worker or not longshore
8 worker.

9 MR. DANOFF: Correct.

10 QUESTION: Okay. If that is the only thing that
11 the court is technically empowered to decide, if that is
12 the only issue under that statute, then why is there a
13 preclusive effect if the court goes the further step and
14 says not only you're not a longshore worker, but by the
15 way, you are a sailor? Why should that frolic be
16 preclusive?

17 QUESTION: Well, I guess this Court has
18 addressed that very question, has it not, in a sense, and
19 has said the acts are intended to be one or the other, not
20 both.

21 QUESTION: Yes, but there could be -- yes, but
22 that means there can't be both, but it's also
23 consistent --

24 QUESTION: It could be neither.

25 QUESTION: -- with being neither, exactly, and

1 the usual rules of preclusion I think operate only with
2 respect to what is necessary for the judgment in the first
3 action, and a determination that he is a seaman as you
4 have explained it to us is not necessary for the judgment
5 in the first action and therefore, under the normal
6 preclusion rules, I suppose it would not raise an
7 estoppel.

8 MR. DANOFF: And that will be a question I'm
9 sure some day the Court will have to address. Namely,
10 when the Court has said repeatedly that the two acts are
11 mutually exclusive, if somebody gets an award under the
12 Jones Act, for instance, first, is that mutually exclusive
13 of the Longshore Act.

14 In the case of this case, where the first action
15 is under the Longshore Act, the statute itself says the
16 employer's liability is exclusive in law or at admiralty.
17 I don't know what that could mean, other than there's no
18 Jones Act remedy allowed to follow.

19 QUESTION: Well, Justice Souter is not
20 contradicting that. He's just saying that you're never
21 going to have the assurance of only one determination
22 either under the Longshoreman Act or in the district
23 court, because to be sure, if you are found in the first
24 action to be either a seaman or a longshore worker, the
25 other one is precluded and the case is over, but if in the

1 first action you are found not to be a harbor worker, or
2 not to be a seaman, you're still going to have a second
3 action.

4 MR. DANOFF: That may be --

5 QUESTION: It doesn't affect your case.

6 MR. DANOFF: Right.

7 QUESTION: Once you're found to be a harbor
8 worker.

9 QUESTION: But what you have here is an
10 adjudication that this person was in fact --

11 QUESTION: Yes.

12 QUESTION: -- a longshoreman, as I understand
13 it.

14 MR. DANOFF: Right.

15 QUESTION: Yes.

16 QUESTION: Yes.

17 MR. DANOFF: The --

18 QUESTION: If you prevail and we adopt the rule
19 of issue preclusion where there is a finding in the agency
20 as to longshore status, would the district court in a
21 Jones Act suit be correct in acting within its discretion
22 to defer proceedings until the administrative hearings
23 were concluded?

24 MR. DANOFF: That is a possibility if there are
25 two pending proceedings, that one or the other tribunal

1 would stay its action pending the resolution --

2 QUESTION: The district court would say there is
3 a possibility that this issue will be resolved
4 conclusively in favor of longshore status, so I'll just
5 wait.

6 MR. DANOFF: And some States, including
7 California, where some of these cases are filed in State
8 court, the Jones Act cases have rules of their own which
9 say which action gets precedence first. The first filed
10 action often gets precedence. Some States don't have that
11 rule, and then the district court would have to make a
12 discretionary decision whether to await the ALJ's finding
13 or to make its own finding, and if the case is over, then
14 the ALJ would be bound by it.

15 QUESTION: I believe you said that there were
16 provisional remedies for the employee who was in this
17 situation. This is the employee's dilemma. I want the
18 Jones Act because I think I can prove negligence and I
19 want the pain and suffering, but I certainly want
20 something, and my employer is not being cooperative. What
21 does an -- what does someone do who's in that dilemma, who
22 thinks he's got a good Jones Act claim, but needs the
23 interim maintenance?

24 MR. DANOFF: At that -- both tribunals, both the
25 courts and the ALJ, in the case of hardship, have the

1 procedural tools to make an early status decision. The
2 claimant should go to whichever tribunal he wants to
3 decide the issue and say, this is a hardship case, I need
4 a quick decision. That issue can be severed -- it's
5 simply the status question, not the liability or the
6 merits. It's often a one-day proceeding -- and get an
7 early status decision.

8 QUESTION: But the problem is that that's
9 essentially what happened here but then there was no
10 immediate appeal because he also had the claim against the
11 employer as shipowner.

12 MR. DANOFF: But when it was -- of course, he
13 was receiving in this case the compensation benefits
14 throughout, and when the district judge --

15 QUESTION: Only for the knee. Not for the
16 further injury, right? Didn't --

17 MR. DANOFF: Right, but that -- actually the
18 amount he would have obtained is the same. The back, the
19 second injury, the back injury had more to do with his
20 final, total, permanent disability than his interim
21 benefits. His interim benefits would be the same.

22 So he did receive benefits throughout, and --

23 QUESTION: And I guess there's even a third
24 cause of action, is there, for the employee against the
25 owner of the vessel, and that's not affected by any of

1 this discussion.

2 MR. DANOFF: It's part of the package that the
3 injured worker has under the Longshore and Harbor Workers
4 Compensation Act. He not only --

5 QUESTION: But you agree that can go forward.

6 MR. DANOFF: Oh, yes, and -- it can go forward.

7 QUESTION: And is it going forward?

8 MR. DANOFF: It went forward to the district
9 court to a trial.

10 QUESTION: Yes. Yes.

11 MR. DANOFF: And there was a trial of that
12 issue.

13 QUESTION: Right.

14 MR. DANOFF: He had a negligence action --

15 QUESTION: Right.

16 MR. DANOFF: -- which he pursued to conclusion.

17 The --

18 QUESTION: May I ask you a -- I don't want to --
19 I want to ask a question about the other issue, but are
20 you finished? Is this a good time?

21 MR. DANOFF: I'd be happy to answer your
22 question --

23 QUESTION: All right.

24 MR. DANOFF: -- about the other issue.

25 QUESTION: If the -- Joe Smith is a carpenter on

1 a boat tied up at the dock and hurts himself, but this is
2 his -- he's had 10 trips on the same boat, ship, as a
3 sailor, he's a sailor, right?

4 MR. DANOFF: If he has --

5 QUESTION: He just happened to be hammering some
6 nails and so forth. He's worked for, however, the same
7 employer, 10 trips, this is the 11th one, and I take it
8 we'd call him a sailor under our cases, even though the
9 only thing that changed is he happens to have been hurt
10 when he was painting, or --

11 MR. DANOFF: Yes. If he had a long-term
12 assignment --

13 QUESTION: Yes.

14 MR. DANOFF: -- that was a seaman's job --

15 QUESTION: Yes.

16 MR. DANOFF: -- the fact that he is doing
17 something while the ship's tied to the dock --

18 QUESTION: And now, in fact, the situation is
19 the same, except the earlier trips were on different ships
20 owned by the same person.

21 MR. DANOFF: No, it really --

22 QUESTION: Same result?

23 MR. DANOFF: It really is different, because if
24 each job assignment is a different job assignment he could
25 be assigned one time to a ship for a voyage and --

1 QUESTION: What I'm really trying to get at, and
2 I'll be more frank about it, is if in fact we have a
3 person who is a sailor because he has worked 10 times for
4 different ships of the same company in sailing capacity,
5 why does it make any difference if those 10 previous trips
6 were for different companies but hired out of the same
7 union hiring hall?

8 MR. DANOFF: It's because the status of an
9 individual has -- first of all of that individual has
10 never been by precedent judged by other than his current
11 assignment, whether it's with one or more vessels or with
12 a single employer, and the reason for that is, he would
13 make every worker who was a seaman in the past potentially
14 a seaman now. The Court --

15 QUESTION: Well, I guess we addressed -- the
16 closest case might be Chandris.

17 MR. DANOFF: Indeed.

18 QUESTION: Where this Court acknowledged with
19 respect to an employer a fleet doctrine could be
20 applicable, but that was in a situation where the
21 employee's job had not changed. In fact, dealing with an
22 employee who had been hired as a seaman to go on voyages
23 as the chief engineer or the communications expert or
24 something and to work in that capacity.

25 Did the Court acknowledge that an assignment

1 could change?

2 MR. DANOFF: Indeed.

3 QUESTION: And that if the assignment, indeed,
4 changed and the worker was then going to just be asked to
5 come on board to paint when the vessel was tied to the
6 dock to do repairs on a daily basis, that would be a
7 change of assignment.

8 MR. DANOFF: I --

9 QUESTION: Even if it were the same employer,
10 much less a different one.

11 MR. DANOFF: The Chandris case had, I think, a
12 beautiful example illustrating this, which is a seaman who
13 is transferred to the office.

14 QUESTION: What I'm driving at -- yes -- is that
15 if, in fact -- there are so many variables, but hold them
16 all constant, and if he's a seaman because of the fleet
17 doctrine should it suddenly make a difference if
18 everything else is the same but it isn't this employer's
19 fleet, it's the union hiring hall. That's what I'm trying
20 to get at.

21 Does the simple fact -- if everything else would
22 make him a seaman but for the fact that he's hired out of
23 the union hiring hall and works on the ships of different
24 employers in the past, that's the only difference, why
25 does that make a legal difference? Why should it make a

1 legal difference?

2 MR. DANOFF: It's not his being hired out of the
3 union hiring hall that makes a difference. That makes no
4 difference. It's the work for other employers, because
5 clearly his job will have changed. His job assignment
6 will have changed when he changes employers and works on
7 different vessels. He has a new job.

8 QUESTION: Then why do we speak in terms of
9 status rather than in terms of a continuing employment
10 relationship as a seaman with a given fleet employer? Why
11 does it help to talk about status, on your view, because
12 status apparently is something that has no reference, can
13 have no reference except with respect to the relationship
14 between the employer and a given -- employee and a given
15 employer?

16 MR. DANOFF: Because you need the status of
17 seaman to have the seaman remedy.

18 QUESTION: Well, that's right. That's what
19 we've said. But why does it make sense to talk in terms
20 of status? Why did it make sense for Congress, why does
21 it make sense for us, if all we're really concerned with
22 is the duration or repetition of a relationship between
23 the worker and a particular employer?

24 MR. DANOFF: I'm not sure I'm following the
25 question.

1 QUESTION: Well, hasn't this Court said it's
2 determined on the basis of the status of the employee?
3 Haven't we made that the rule under the statutes, or
4 haven't we interpreted the statutes as making that the
5 rule?

6 MR. DANOFF: Yes. The seaman's remedies are
7 only allowed to people with seaman status.

8 QUESTION: And is someone who is hired
9 temporarily to go paint a tug while it's at the dock ever
10 going to be a seaman by virtue of that employ, no matter
11 how many days he goes and paints?

12 MR. DANOFF: Not -- no, he would not be in
13 our --

14 QUESTION: But if we -- if he is in fact
15 acting -- if there is a question as to whether he is in a
16 given case acting as a seaman, and it is appropriate to
17 look to his prior kinds of jobs, why do we look to his
18 prior kinds of jobs only if they are for a given employer
19 rather than his prior kinds of jobs for like employers if
20 our concern is with status rather than the details of the
21 employment relationship between a given employer and a
22 given employee?

23 MR. DANOFF: It's because the relationship that
24 has always been considered determinative of status is with
25 the given employee, because it has always been considered

1 that the current job assignment governs in the case of --

2 QUESTION: But why should that make a difference
3 if status is the issue?

4 MR. DANOFF: Because it would -- the seaman
5 remedies cover seamen in being, not former seamen who are
6 now not seamen. Seamen remedies are limited to people who
7 are subject to the perils of the sea, who have --

8 QUESTION: Then why do we look -- if you carry
9 your logic to its extreme, why do we ever look to a prior
10 job assignment at all?

11 MR. DANOFF: I don't think we should unless it's
12 part of a continuing employment.

13 QUESTION: Well, I thought we did for purposes
14 of determining the substantiality of the satisfaction of
15 the two criteria for seamen status.

16 QUESTION: Well, I suppose we did, did we, when
17 the person is hired generally to be like the engineer on
18 whatever vessel is at sea by the employer, but then one
19 time while the vessel was parked in the harbor the
20 employer said, by the way, go paint the deck, and we
21 looked to the overall job with the employer, I assume --

22 MR. DANOFF: Yes. If there --

23 QUESTION: -- to determine whether he was a
24 seaman, not just whether at that moment --

25 MR. DANOFF: If there is a long-term employment,

1 then you can look at the entirety of that long-term
2 employment.

3 QUESTION: Is there any long-term employment in
4 this setup? The Solicitor General said that these -- this
5 operation has no permanent crews, so it's not like a
6 vessel that goes off with a crew and then -- that has a
7 long-term relationship. Tell me, what is the fact? Is it
8 true that this tug has no permanent crew, and that even
9 when it's at sea, these are pickup workers from the hiring
10 hall?

11 MR. DANOFF: They do pick up workers from the
12 hiring hall to do a voyage basis for a specific time-
13 limited basis. It could be 1 day, it could be a week on
14 that particular tug.

15 QUESTION: So all their employees are picked
16 from this hiring hall for a per-job, on a per-job basis.

17 MR. DANOFF: Yes. Although the job may be more
18 than 1 day, yes.

19 QUESTION: Thank you, Mr. Danoff.

20 Mr. Boyle, we'll hear from you.

21 ORAL ARGUMENT OF THOMAS J. BOYLE

22 ON BEHALF OF THE RESPONDENTS

23 MR. BOYLE: Mr. Chief Justice, and may it please
24 the Court:

25 As was stated previously, this Court has already

1 held that voluntary payment of longshore benefits does not
2 preclude a Jones Act award. Neither should it -- neither
3 should the formal award that was made in this case
4 preclude this Jones Act suit.

5 Before I get into that, though, one thing I have
6 to make clear is that this scenario never occurs except in
7 one very, very specific instance. That's when the
8 employer owns the ship. The employer must own the ship to
9 have this problem.

10 And when the motion for summary judgment was
11 made as against the Jones Act complaint here, defendant
12 also -- petitioner also made a motion for summary judgment
13 that this plaintiff did not have a 905(b) action for
14 negligence, and when the judge decided there was no Jones
15 Act case, the judge also decided that there was a 905(b)
16 case, thereby deciding that this man was a longshoreman,
17 so the judge, the district judge decided that this man was
18 in the Longshore Act before he ever went over to the ALJ.

19 QUESTION: That's simply a denial of summary
20 judgment. That's not a determination of fact by the
21 district court.

22 MR. BOYLE: Well, Your Honor, the district judge
23 determined that because of the circumstance of this man's
24 employment he could proceed with a 905(b) action.

25 QUESTION: What order did the district court

1 enter, denial of a motion for summary judgment?

2 MR. BOYLE: A partial -- a partial denial of the
3 motion for summary judgment.

4 QUESTION: On the 905(b)?

5 MR. BOYLE: Right.

6 QUESTION: That simply means there's enough
7 evidence to go to trial. It doesn't mean that the
8 district court is making a factual finding one way or the
9 other. In fact, district courts don't make factual
10 findings on summary judgment.

11 MR. BOYLE: No. But Your Honor, in order to
12 even maintain a 905(b) action one has to be a
13 longshoreman. One may not be a seaman. Because the
14 Longshore Act provides a lien as against the 905(b)
15 action, and that was already determined in the district
16 court. It was not determined by the ALJ. The ALJ
17 mistakenly redetermined it. The district judge had
18 already determined it.

19 QUESTION: Excuse me. Would the district judge
20 have to find that he is surely a seaman and probably has a
21 valid cause of action under 905(b), or does he only have
22 to determine that he is at least arguably a seaman and
23 arguably has a cause of action?

24 MR. BOYLE: You mean arguably a longshoreman.

25 QUESTION: Arguably a longshoreman and arguably

1 has --

2 MR. BOYLE: Well, I think the court -- the case
3 is dismissable. Defendant -- petitioner argued that the
4 man had no 905(b) action along with no Jones Act cause of
5 action, and the judge decided that in view of the
6 circumstances that he was a longshoreman within the
7 Longshore Act --

8 QUESTION: He arguably had a 905 -- it didn't
9 say he had a 905(b), that he arguably did, which means
10 he's arguably a longshoreman.

11 MR. BOYLE: Your Honor, there is no
12 determination by the finder of fact that a 905(b) action
13 as to whether or not the worker is a longshoreman is given
14 that he is a longshoreman. No finder of fact decides
15 longshore status in a 905(b) case.

16 QUESTION: Is that right?

17 MR. BOYLE: Yes, Your Honor.

18 QUESTION: What do you mean, it's given? Who
19 gives --

20 QUESTION: Who gives it?

21 MR. BOYLE: Well, it's just like -- it's in the
22 nature of in a diversity action you allege that you're a
23 citizen of State A, and you allege defendant is a citizen
24 of State B.

25 QUESTION: And that can't be controverted?

1 MR. BOYLE: Yes, it can, and the defendant did
2 controvert it in this case. They said --

3 QUESTION: Mr. Boyle, I'm not following your
4 argument --

5 QUESTION: Well --

6 QUESTION: -- because we never got to the 905(b)
7 case until the district case first threw out the Jones Act
8 case. The district judge did say, you're not a sailor.

9 MR. BOYLE: Yes, Your Honor.

10 QUESTION: And then said, because you're not a
11 sailor, and that's -- although it was interlocutory that
12 was out of the case, and then they went over to the 905(b)
13 case.

14 MR. BOYLE: And as part of the 905(b) case went
15 to the ALJ at the Department of Labor to get the lien
16 established. That's why he went to the Department of
17 Labor, not to get benefits but to get the lien
18 established. It was part of the 905(b) process. It was a
19 ticket to be punched in the 905(b) action.

20 QUESTION: Then how do we get the adjudication
21 of benefits by the ALJ?

22 MR. BOYLE: Because the ALJ didn't recognize
23 that he was already precluded from making another
24 determination about status by virtue of the district
25 judge's decision and undertook to make a new

1 determination, and then made a new determination, which he
2 should not have made.

3 QUESTION: I don't follow --

4 QUESTION: Are you getting into this as an
5 alternative basis for affirmance of the Ninth Circuit?
6 The Ninth Circuit said the question before us is whether
7 the plaintiff's receipt of compensation benefits under the
8 LHWCA precludes him from also recovering as a seaman under
9 the Jones, but he took it as a given that that had
10 happened, and they don't go into this thing you're talking
11 about at all. We ordinarily take the Ninth Circuit's
12 findings as we receive them.

13 MR. BOYLE: Yes, Mr. Chief Justice. The only
14 reason I got into this is because there was a lot of
15 colloquy during Mr. Danoff's argument about people being
16 seamen, being longshoreman, and being neither, and that's
17 the only reason why I brought this up. That's all.

18 QUESTION: Can I ask about the main collateral
19 estoppel issue, something that's bothering me that I don't
20 see answered. Maybe there's an obvious answer to it. But
21 in your opinion, if the injured employee goes to the
22 longshoreman people first and they say you're a
23 longshoreman, then the person should be able to sue under
24 the Jones Act and say, no, I'm a seaman, and that doesn't
25 bind me. Right?

1 MR. BOYLE: Yes.

2 QUESTION: Okay. What happens in your opinion
3 if the first -- if what happens is that he wants to -- is
4 the employer bound similarly, or not bound similarly?

5 In other words, what happens if they say in the
6 first proceeding you're not a longshoreman, you're a
7 seaman, and then the injured person goes into court and
8 the employer who just won says, oh, no, you're not a
9 seaman, you're a longshoreman, and then the man ends up
10 with nothing?

11 MR. BOYLE: Well --

12 QUESTION: Because the court says he's a
13 longshoreman and the ALJ said he's a seaman, and there he
14 is, not a penny. So how is this supposed to work, or is
15 it possible that the employer would be bound but the
16 employee wouldn't? That doesn't seem very fair. How does
17 this whole thing work out?

18 MR. BOYLE: Well, the way it works out is that
19 if the employer went before -- in front of the ALJ and
20 vigorously argued that the worker was a seaman, regardless
21 of what the ALJ decided, the arguments, the conduct
22 advanced by that litigant in front of the ALJ, principles
23 of equitable estoppel would prevent the employer from
24 going in front of the district judge and taking an
25 opposite position.

1 QUESTION: Well then, why wouldn't it equally
2 bind the employee?

3 MR. BOYLE: Well, because in this case and in
4 all of these cases you never have an employee go in and
5 vigorously argue that they're a longshoreman.

6 QUESTION: Will we measure the vigor of the
7 argument in determining collateral estoppel?

8 MR. BOYLE: Well, to the extent that one of the
9 guidelines of the Astoria Savings case versus Solimino is
10 the incentive to vigorously or aggressively pursue a
11 position.

12 Now, there are five things about this ALJ
13 determination and ALJ awards of longshore benefits that
14 indicate that they are not entitled to administrative
15 collateral estoppel, and the first of those was mentioned
16 in Mr. Danoff's argument, is in the statute itself, the
17 longshore statute, 903(e) that talks about credit for
18 Jones Act payments in making longshore awards. If it goes
19 in that direction one way, it should go the other
20 direction also.

21 The second one is 913(c).

22 QUESTION: Excuse me, I don't understand that.

23 MR. BOYLE: Well, in this Court's opinion in
24 Gizoni, on 502 U.S. page 91, the Court stated that one of
25 the reasons why receipt of longshore benefits should not

1 preclude pursuit of Jones Act benefits was that section
2 903(e) of the Longshore Act says that any payments by
3 reason -- payments made under the Jones Act would be a
4 credit to any liability imposed upon the employer under
5 the Longshore Act, and in a footnote in that opinion it
6 was mentioned that because of that there is no detrimental
7 reliance upon any position that the employee takes because
8 the employer gets credit for having paid moneys out under
9 the Jones Act.

10 That being the situation, then the opposite of
11 that should also be true, and it is true that the employer
12 gets credit for any moneys paid under the Longshore Act in
13 the pursuit of a Jones Act remedy. It's one of the parts
14 of the statute that indicates the coexistence of the
15 Longshore Act and the Jones Act, but one. There are four
16 others. The second one is --

17 QUESTION: Of course, that could just -- what
18 your opponent says here is that that could just handle the
19 situation in which there has been a Jones Act
20 determination without collateral estoppel effect, or the
21 situation in which Jones Act damages are partly different
22 but not entirely different from harbor worker damages.

23 MR. BOYLE: It could, but what we're trying to
24 determine here is whether Congress, when it enacted the
25 various iterations of the Longshore Act, meant for an ALJ

1 award to be preclusive or not. This is just one of five
2 circumstances in the act that indicates they didn't
3 mean --

4 QUESTION: Your view is it's preclusive if the
5 employer wins, but it's not preclusive if the employee
6 wins?

7 MR. BOYLE: No. It's not preclusive in either
8 one.

9 QUESTION: So then how are we going to deal with
10 this worker, if it's not preclusive in either case? You
11 either have to on the one hand give a system of law where
12 the worst that would happen to the worker is that
13 sometimes he would not get quite as much money, or we take
14 your system, and sometimes workers will get both with
15 credit but sometimes they'll get nothing, and I have to
16 admit that that last possibility, which seems a real one
17 under your system, is something that I find difficult to
18 square with what I think Congress had in mind.

19 MR. BOYLE: Well, longshore benefits are paid
20 voluntarily by employers. Jones Act benefits are not paid
21 voluntarily by employers. You have to file a suit under
22 the Jones Act. You have to take the position you're a
23 Jones Act seaman.

24 If you take the position you're a Jones Act
25 seaman, you're entitled to a trial by jury if you present

1 a prima facie case that you're a Jones Act seaman. I
2 believe that that's what this plaintiff did here, and the
3 judge got into factual circumstances beyond the prima
4 facie case and granted summary judgment.

5 QUESTION: But isn't it also true, just to throw
6 this in, there are situations in which the plaintiff will
7 recover under neither scheme, because if he is in fact a
8 seaman he can't recover as a longshoreman, and he may not
9 be able to prove negligence, in which event he won't
10 recover under the Jones Act either.

11 MR. BOYLE: That's right, and that's the choice
12 the litigant takes.

13 QUESTION: Well, if he's neither, maybe he's
14 entitled to State Worker's Comp.

15 MR. BOYLE: Definitely not, because he's injured
16 on board a vessel, and the situs of his injury would not
17 entitle him to State Comp under any circumstances.

18 I want to get --

19 QUESTION: Just one point. If he's a seaman but
20 there's no negligence, he still gets something because the
21 vessel is unseaworthy?

22 MR. BOYLE: Nothing.

23 QUESTION: Or maintenance in cure?

24 MR. BOYLE: Maintenance in cure has nothing to
25 do with unseaworthy. It has to do --

1 QUESTION: But he does get that --
2 MR. BOYLE: Yes.
3 QUESTION: -- as a seaman.
4 MR. BOYLE: Yes, as long as he's temporarily
5 disabled. As soon as he becomes permanently disabled, he
6 gets nothing.
7 QUESTION: That's \$22 a week?
8 QUESTION: What about a claim the vessel's
9 unseaworthy?
10 MR. BOYLE: It has nothing to do with -- no, it
11 isn't, it's \$22 a day in this --
12 QUESTION: And why is it it has nothing to do
13 with it, because --
14 MR. BOYLE: Because that -- it has -- that's a
15 tort remedy. That's part of the seaman's tort,
16 unseaworthiness and negligence. You have to prove a case
17 of unseaworthiness.
18 QUESTION: In other words, that's comprised
19 within the Jones Act claim of no negligence?
20 MR. BOYLE: Yes. Unseaworthiness is absolute
21 liability, like products liability.
22 QUESTION: That's why I'm asking. Why
23 doesn't -- Justice Stevens put to you the case, isn't it
24 possible that you can be a seaman but there's no
25 negligence. So then I say, don't you still have a cause

1 of action for unseaworthiness --

2 MR. BOYLE: Oh, yes, you do.

3 QUESTION: -- and you say it has nothing to do
4 with it.

5 MR. BOYLE: Oh, no. Yes, you have a cause of
6 action for unseaworthiness. That's also proving a case.

7 QUESTION: All right.

8 MR. BOYLE: Just under a lesser standard.

9 QUESTION: But that doesn't mean that he gets
10 nothing then, because he has a cause of action for
11 unseaworthiness.

12 MR. BOYLE: Unless he -- if he can't prove
13 negligence, the chances are that he -- it's somewhat
14 unlikely. Well, usually it goes the other way around.
15 It's easier to prove unseaworthiness than it is to prove
16 negligence, but under negligence you get causation no
17 matter how slight, so that if you prove negligence the
18 causal connection between the accident and the injury has
19 to be a lot -- can be a lot thinner than it is under
20 negligence.

21 QUESTION: Well, if he can't prove either
22 unseaworthiness or negligence, perhaps he doesn't deserve
23 to get anything.

24 MR. BOYLE: I think that's correct. That's
25 true.

1 QUESTION: But that's nothing to do with -- the
2 longshore -- Worker's Compensation is a no fault --
3 unseaworthiness is still a form of liability. You have to
4 prove the ship was in an unseaworthy state. It's not, I
5 injured my knee so I collect.

6 MR. BOYLE: Absolutely.

7 QUESTION: So -- but the usual tradeoff isn't to
8 show -- the employer pays Worker's Compensation and then
9 is not at risk in a tort suit.

10 MR. BOYLE: That's correct.

11 QUESTION: And yet you're saying that's not what
12 works here. The employer was subject to a compensation
13 award, and then -- but you say what flows from that
14 doesn't follow here. That is, the employer, despite
15 having paid compensation, is still at risk in a negligence
16 action.

17 MR. BOYLE: Well, that's true in Gizoni anyway.
18 That's already been established, that the employer paying
19 compensation does not cut off the Jones Act case. What
20 we're talking about here is the employer -- the employee
21 obtaining a formal award, and whether that formal award is
22 entitled to administrative collateral estoppel.

23 QUESTION: And you said there are five reasons
24 why he cannot.

25 MR. BOYLE: Yes.

1 QUESTION: And you've told us one of them. I'm
2 curious to hear the other four.

3 MR. BOYLE: The second one is that under 913(d)
4 of the Longshore Act the statute of limitations for filing
5 a claim under the Jones Act is tolled while the employee
6 pursues the Jones Act, and until such time as he's found
7 to be not a seaman by the court, then he's relegated to
8 the Longshore Act. But up until that point the statute
9 is -- of limitations is tolled.

10 The third one is under 922 of the Longshore Act
11 any formal award is -- can be modified within a year after
12 its making, which makes it different from other formal
13 awards and other adjudications by the ALJ's, which is the
14 third reason why this --

15 QUESTION: Can it be modified with respect to
16 the determination of longshoreman status?

17 MR. BOYLE: I believe so. I don't think it's
18 ever happened, but theoretically it can be, yes.

19 QUESTION: What makes you believe so if it's
20 never happened?

21 MR. BOYLE: Because the language of the statute
22 says any aspect of any order entered by the deputy
23 commissioner can be modified up to 1 year, and that means
24 any.

25 The fourth reason is in the purpose of the

1 Longshore Act itself. If you do, as was mentioned by
2 Justice Ginsburg during Mr. Danoff's argument, if you make
3 a formal award preclusive and you remove any incentive
4 there is for an employer to make voluntary payment --
5 because this Court has already ruled that making of
6 voluntary payments is not preclusive. If you make a
7 formal award preclusive, that's contrary to the purpose of
8 the Longshore Act, which is to foster prompt payment of
9 compensation and medical benefits to injured workers.

10 QUESTION: But that wouldn't be entirely out of
11 accord with the whole purpose of these schemes, not just
12 the Longshore Act but also State Workman's Compensation
13 schemes. They are intended to give the employee assurance
14 and promptness at the expense of maybe waiving greater
15 damages that he could have gotten. That's --

16 MR. BOYLE: Well --

17 QUESTION: That's how those schemes are set up.
18 That's the deal.

19 MR. BOYLE: This isn't --

20 QUESTION: You get it fast, you get it for sure,
21 and in exchange for that you're giving up a shot at tort
22 remedies that might get you a lot more bucks.

23 Now, the fact that this should happen in the
24 minicontext of this procedural dilemma doesn't trouble me
25 very much, because that's part of the big deal as well.

1 MR. BOYLE: Well, the problem with that is that
2 back in 1920 there were no Worker's Compensation laws, and
3 back in 1927, in 1920 when the Jones Act was enacted, it
4 was designed to give itinerant seamen a cause of action to
5 be tried by a jury against their employer.

6 QUESTION: Well, there were certainly lots of
7 Workman's Compensation laws in 1920, State Worker's
8 Compensation.

9 MR. BOYLE: But the Congress decided that seamen
10 would not be covered by State Worker's Comp.

11 QUESTION: Well, that may be one thing, but I
12 thought you said there weren't any Workman's Compensation
13 laws in 1920. That simply is factually inaccurate.

14 MR. BOYLE: Well, there was no Federal Worker's
15 Compensation law in 1920, and what I was getting at is the
16 purpose of the Jones Act, and this is the fifth reason, is
17 to afford seamen a trial by jury -- crew members, really,
18 is what seamen are -- a trial by jury of the issue not
19 only of negligence but of their status.

20 And in that trial by jury, after you have a
21 prima facie case established, which I believe we did in
22 this case under Chandris v. Latsis, which was that the
23 worker had contributed to the function and mission of the
24 vessel, and that he had a connection with the vessel which
25 was substantial in both duration and in nature, then that

1 goes to the jury, and the jury considers things like
2 perils of the sea, or the jury considers whether you ate,
3 slept, or lived on the vessel. A jury considers whether
4 or not this is a day-by-day assignment.

5 But the prima facie case is made, and it's for
6 the jury to consider all the circumstances. An ALJ is not
7 equipped to do that.

8 Now, there's four things about this particular
9 ALJ determination that in itself makes it nonpreclusive,
10 and the second one of that is the laches that this
11 defendant, this petitioner, after believing that Sharp
12 governed this case, after believing that it would be
13 preclusive, did not bring it to the attention of the
14 district judge, but waited until we got to the court of
15 appeals. That's laches. That prevents preclusion.

16 And the fourth one is, if this Court decides to
17 follow Sharp, this is a change in the law from back in
18 197 -- 1992.

19 QUESTION: Thank you, Mr. Boyle.

20 Mr. Frederick, we'll hear from you.

21 ORAL ARGUMENT OF DAVID C. FREDERICK

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

23 SUPPORTING THE RESPONDENTS

24 MR. FREDERICK: Thank you, Mr. Chief Justice,

25 and may it please the Court:

1 In Gizoni this Court recognized the unique
2 interplay between the Longshore Act and the Jones Act. In
3 that case, the Court said that the Longshore Act "clearly
4 does not comprehend such a preclusive effect" because it
5 specifically provides that any amounts paid to an employee
6 for the same injury under the Jones Act "shall be credited
7 against any liability imposed --

8 QUESTION: So is it your --

9 MR. FREDERICK: -- by the Longshore Act.

10 QUESTION: Is it your view -- this is the one
11 thing that is bothering me, the same question. I mean, do
12 you remember the question?

13 MR. FREDERICK: The hardship question. The --

14 QUESTION: No. Well, the question basically is,
15 is your rule, is the Government's rule which says that the
16 proceeding, first proceeding does not bind the employee
17 also applicable to the employer? Yes or no.

18 MR. FREDERICK: In the Longshore Act proceeding
19 the finding would not be binding. Whether it --

20 QUESTION: Why --

21 MR. FREDERICK: -- is in the Jones Act would
22 then be binding on the Longshore Act is a different
23 question --

QUESTION: No, but --

24 MR. FREDERICK: -- which would --

25 QUESTION: There are a possibility of 16 boxes

1 in a matrix, as I've worked out. You can have all kinds
2 of permutations and combinations.

3 I am confining myself for this question to the
4 instance where the longshoreman proceeding comes first,
5 and here, one side could win or the other. The Jones Act
6 comes second, and I want to be certain it is the position
7 of the Government that the first proceeding does not bind
8 the seaman. That's what you've argued in your brief --
9 the employee. Right?

10 MR. FREDERICK: Yes.

11 QUESTION: That's your brief. And I take it it
12 is also your position that it does not bind the employer.

13 MR. FREDERICK: Justice Breyer, the answer to
14 your question is that the Government's position is that an
15 ALJ determination in a longshore award is not binding and
16 does not have preclusive effect on a subsequent Jones Act
17 suit brought by the employee. There are --

18 QUESTION: For either party.

19 MR. FREDERICK: For -- whether --

20 QUESTION: You won't say for either party, so
21 now I'm getting worried.

22 MR. FREDERICK: If --

23 QUESTION: What.

24 MR. FREDERICK: The answer to your question is,
25 did Congress intend for administrative estoppel to apply?

1 Our position is that Congress did not.

2 QUESTION: It did not --

3 MR. FREDERICK: It did not.

4 QUESTION: -- intend it on either party?

5 MR. FREDERICK: That's correct.

6 QUESTION: Thank you.

7 MR. FREDERICK: Now, the second part of my
8 answer to your question is, would principles of equitable
9 estoppel apply? That's a different issue as to whether or
10 not the employer, who has not suffered detrimental
11 reliance, as this Court said in footnote 5 --

12 QUESTION: And here I don't know, because I
13 thought collateral estoppel was -- I didn't know there was
14 a difference.

15 MR. FREDERICK: No, there's a difference between
16 collateral estoppel and --

17 QUESTION: If we called it issue preclusion
18 there wouldn't be such confusion, right?

19 MR. FREDERICK: Thank you.

20 QUESTION: I took civil procedure years ago and
21 we just used to say res judicata, and it had two parts,
22 and I can't even remember it that well.

23 MR. FREDERICK: Thank you.

24 QUESTION: Then I'm not --

25 (Laughter.)

1 QUESTION: All I know is, if I were an employer,
2 I would want to know -- I'm an employee, and now I was
3 called a longshoreman, so now I bring my case, and the
4 employee -- er comes in and says, hey, this guy was called
5 a longshoreman. That's the end of this matter, and you
6 say, no it isn't, right.

7 Now I want to know, the opposite happens. The
8 person was called a seaman, and the employer comes in and
9 says, hey -- you understand the opposite.

10 MR. FREDERICK: Yes, and if I can --

11 QUESTION: Okay. Now, I want to know if it
12 reaches exactly the same result.

13 MR. FREDERICK: The same result, and let me
14 answer the question about hardship. If the ALJ decides
15 that the worker is a member of the crew, and the district
16 court decides that the person is not a member of the crew,
17 the remedy is in 922, which calls for modification of
18 awards.

19 In that instance, the person can go back to the
20 longshore proceeding and say, I was unfairly rejected of
21 my longshore benefits, and I would like --

22 QUESTION: After a year? Can he do it after a
23 year?

24 MR. FREDERICK: He can do it within a year, but
25 he can apply --

1 QUESTION: I didn't ask whether he can do it
2 within a year. I asked if he can do it after a year.

3 MR. FREDERICK: If within a year he files a
4 notice with the Department of Labor that says --

5 QUESTION: If it is not within a year, he cannot
6 do it?

7 MR. FREDERICK: If he -- oh, yes, Justice --

8 QUESTION: Is that correct? If he hasn't filed
9 something within a year --

10 MR. FREDERICK: I would like to -- Justice
11 Scalia, the answer is all he has to do is file to seek a
12 stay. It would prolong the period of limitations.

13 QUESTION: He must do that within the year.

14 MR. FREDERICK: Yes.

15 QUESTION: And if he has not filed that paper
16 within the year, it's over.

17 MR. FREDERICK: That's correct.

18 QUESTION: Okay.

19 MR. FREDERICK: But Justice Scalia, if --

20 QUESTION: That's all I wanted to know. It took
21 a long time to get it, though, I must say.

22 MR. FREDERICK: Justice Scalia, all -- if the
23 district court action is proceeding, all he has to do is
24 to file a notice with the Labor Department to say, I have
25 this action proceeding in district court. Please don't

1 make my 1-year period toll. That's all that he's got to
2 do to keep open his modification of award.

3 QUESTION: It's automatic?

4 MR. FREDERICK: The district director has --

5 QUESTION: Has discretion to do it or not to do
6 it, is that right?

7 MR. FREDERICK: That's correct.

8 QUESTION: So it is not automatic. So that is
9 not all he has to do. He has to do that and get somebody
10 to graciously give him that extension.

11 MR. FREDERICK: That's correct, but the -- but
12 this Court's decisions --

13 QUESTION: Let's be precise about what his
14 rights are here and not --

15 MR. FREDERICK: His rights are to file for a
16 modification of an award. That's clear. And that's also
17 clear, Justice Scalia, that the Congress did not intend
18 for these ALJ proceedings to have a preclusive effect on
19 subsequent Jones Act suits.

20 QUESTION: Does the opposite hold true, that --
21 is it your view that the Jones Act suit is decided first?
22 It does have preclusive effects in the Longshoreman Act
23 case?

24 MR. FREDERICK: It's -- yes, it is likely that
25 that will be the case, but not always, and the reason is

1 that you would be applying principles of judicial
2 collateral estoppel rather than administrative collateral
3 estoppel.

4 In the most likely scenario, the district court
5 proceeding under the Jones Act will have preclusive effect
6 because those principles of judicial collateral estoppel
7 apply.

8 QUESTION: Are you saying simply that
9 administrative adjudications do not have as heavy an
10 issue-preclusive effect as judicial proceedings?

11 MR. FREDERICK: That's correct.

12 QUESTION: And that's hornbook law.

13 MR. FREDERICK: That's correct, Justice
14 Ginsburg.

15 QUESTION: Well, what -- what, then, invokes the
16 intent of Congress? That's -- I take it that's just a
17 general principle of procedure. You said -- you were
18 arguing that Congress had a specific intent here.

19 MR. FREDERICK: Right. There are two
20 principles, two provisions that we would point to, the
21 crediting provision, which makes clear that Congress
22 anticipated these parallel proceedings would occur, and
23 the second --

24 QUESTION: Well, maybe Congress just anticipated
25 the normal rules of civil procedure, in which in one

1 direction there wouldn't be a preclusion. That would make
2 sense of the congressional credit scheme.

3 MR. FREDERICK: I don't -- respectfully, I
4 think, Justice Souter, the way the credit provision is
5 worded by saying liability imposed, if you accepted
6 petitioner's position, there would be no point in having
7 the crediting provision, because the first tribunal to
8 decide it would have preclusive effect. There wouldn't be
9 nothing -- there would be nothing to credit.

10 QUESTION: You're saying 905(e) affected -- or
11 explain why it isn't the case, but that interpretation of
12 905(e) effectively repeals 905(a).

13 MR. FREDERICK: No, Justice Scalia. 903(e), the
14 crediting provision --

15 QUESTION: The crediting provision, right.

16 MR. FREDERICK: Is -- simply says 905(a) means
17 exclusivity means no double recovery in the Jones Act
18 suit. With respect to State tort remedies, exclusivity --

19 QUESTION: But that's not what (a) says. (a)
20 says that this liability under the Harbor Worker's Act is
21 exclusive, and you can't get any other recovery.

22 MR. FREDERICK: As this Court pointed out in
23 footnote 3 of Gizoni, that means if the person is covered
24 by the Longshore Act. It doesn't say who decides that,
25 and our position is that the district court jury in the

1 Jones Act suit would have the opportunity to decide
2 whether the worker is a member of the crew.

3 QUESTION: I'm still confused. I know you're at
4 the end of the time, but I've had no opportunity to ask
5 about it, to clarify, please, the point you tried to
6 address previously for Justice Breyer.

7 Apparently you think that an employer could be
8 equitably estopped for asserting contrary positions in one
9 or the other forum -- fora, but the employee never would
10 be equitably estopped and can take inconsistent positions.

11 MR. FREDERICK: The question is one --

12 QUESTION: Is that -- I mean --

13 MR. FREDERICK: Yes.

14 QUESTION: Can't that be answered yes or no?

15 MR. FREDERICK: Yes, it can, and the answer is
16 yes because of detrimental reliance.

17 QUESTION: Well, then it's -- doesn't that give
18 you just the opposite answer that I -- I mean, I was
19 interested in the practicalities of this. I just wanted
20 to be sure that there was parallel treatment here, and so
21 is it that there is going to be real parallel treatment,
22 or that there isn't? I'm trying to think in general terms
23 about the case.

24 MR. FREDERICK: Let me -- maybe if I'm concrete
25 it would be helpful to the answer. If this were brought

1 in district court where the worker said, count 1, I'm a
2 Jones Act seaman, or count 2, I'm a longshore worker,
3 there wouldn't be any problem. The jury could decide what
4 the status is.

5 QUESTION: But this real live case is, the
6 employee says in the district court, I was a seaman when I
7 was injured.

8 MR. FREDERICK: That's correct.

9 QUESTION: And the employer says, no you
10 weren't. You were, if anything, a longshoreman.

11 MR. FREDERICK: And what has happened here,
12 Justice O'Connor, is that instead of paying maintenance
13 and cure, which under the boatman's agreement for deck
14 hands in this case, the petitioner here did not pay
15 maintenance and cure, which would be the traditional
16 seaman's remedy, and now under petitioner's theory would
17 have the leverage to say, I'm not going to pay you
18 voluntary benefits under the Longshore Act either, and so
19 the question of hardship really does arise for the injured
20 worker.

21 QUESTION: Well, but it is voluntary, after all.
22 The employer does not have to pay under Longshoreman and
23 Harbor Worker's Act predetermination benefits.

24 MR. FREDERICK: May I answer the question,
25 Mr. Chief Justice?

1 Our position is that Congress did not intend for
2 injured maritime workers to be left without any interim
3 remedy while they pursued the status to which they are
4 justly -- should be awarded.

5 CHIEF JUSTICE REHNQUIST: Thank you,
6 Mr. Frederick. The case is submitted.

7 (Whereupon, at 12:06 p.m., the case in the
8 above-entitled matter was submitted.)

CERTIFICATION

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HARBOR TUG AND BARGE COMPANY, Petitioner v. JOHN PAPAI, ET UX
CASE NO. 95-1621

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BY Donna Mari Federico

(REPORTER)