

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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

CASE NO: 96-272, c. f

PLACE: Washington, D.C.

DATE: Monday, March 17, 1997

PAGES: 1-58

REVISED

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 METROPOLITAN STEVEDORE COMPANY, :

4 Petitioner :

5 v. : No. 96-272

6 JOHN RAMBO, ET AL. :

7 - - - - - X

8 Washington, D.C.

9 Monday, March 17, 1997

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 ROBERT E. BABCOCK, ESQ., Lake Oswego, Oregon; on behalf of
15 the Petitioner.

16 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the Federal Respondent.

19 THOMAS J. PIERRY, III, ESQ. Wilmington, California; on
20 behalf of the Respondent Rambo.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-272, Metropolitan Stevedore Company v.
5 Rambo.

6 Mr. Babcock.

7 ORAL ARGUMENT OF ROBERT E. BABCOCK

8 ON BEHALF OF THE PETITIONER

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

11 The Ninth Circuit has awarded John Rambo
12 compensation not because he has a disability, but because
13 the panel perceived a possibility that disability would
14 some day occur. It has awarded compensation to a worker
15 not first determined to have a loss of earning capacity.

16 The panel took this action to prevent the
17 running of a time limit on modification. It did so
18 despite this Court's clear direction in the previous
19 opinion involving the same claim that a claimant is not
20 disabled unless and until he proves an incapacity to earn
21 wages.

22 QUESTION: Well, do you take the position that
23 it would be improper for the ALJ to ever make such an
24 award?

25 MR. BABCOCK: To ever make a nominal award?

1 QUESTION: Uh-huh.

2 MR. BABCOCK: Yes, I do.

3 QUESTION: Because certainly the -- I guess the
4 Solicitor General agrees with the respondents that in
5 interpreting the act and the language of the statute that
6 such an award is possible, focusing on the language of
7 section 908(h).

8 MR. BABCOCK: The Solicitor takes the position
9 that if a disability is shown, i.e., if an individual is
10 proven to have in all probability a loss of earning
11 capacity, then such an individual could, in the
12 Solicitor's opinion, properly receive a nominal award.

13 The Ninth Circuit went further than did the
14 Solicitor and said that if it's possible that there will
15 be a loss of earning capacity, hence the Solicitor's
16 request for remand --

17 QUESTION: I don't understand what you're
18 saying. If there is a loss of earning capacity and you
19 insist that it be a present one -- right?

20 MR. BABCOCK: No, I do not.

21 QUESTION: You do not. So you agree with the
22 Solicitor General.

23 MR. BABCOCK: I think there has to be a current
24 determination that there is a loss of earning capacity.
25 The process of determining may certainly look forward into

1 the future.

2 I do not agree with the Solicitor General
3 because they want to substitute -- the Ninth Circuit
4 speculates -- substitutes doubt and speculation for the
5 basic question of whether there is a disability. If there
6 might be, they'd say that there could be a nominal award.

7 The Solicitor says, not quite that far, but
8 instead let's substitute this doubt for something else,
9 and that's the other element that's necessary to prove a
10 compensation award.

11 QUESTION: I'm not sure of what you're saying.
12 You want to explain it to me again?

13 MR. BABCOCK: I'll try.

14 QUESTION: I thought the Solicitor General was
15 saying that if there is a determination that there will in
16 the future be a loss of earning capacity, although there
17 is none now, nominal damages can be awarded.

18 MR. BABCOCK: Yes, the Solicitor says that.

19 QUESTION: And you disagree with that?

20 MR. BABCOCK: Yes, because there's another
21 element required to receive compensation.

22 A disability, an unspecified, unmeasured proof
23 of a loss, the loss has to be measured, and what the --
24 the process would be a claimant would prove in a normal
25 claim proceeding I have a disability and here is evidence

1 that will allow you, administrative law judge, to
2 determine the degree, because without the degree you can't
3 determine the compensation.

4 The numerator is the wage, the denominator is
5 the earning capacity that exists post injury.

6 QUESTION: Well, let's take a case that's not
7 hypothetical so we won't be talking about this in the
8 abstract.

9 Somebody is physically injured, a severe back
10 and leg injury, as in this case, is promoted from the line
11 job that he can no longer do to a manager's office, and
12 the ALJ thinks there's a good chance, better than not
13 chance that this guy just won't make it, and within 2, 3
14 years he'll be out of work.

15 From the answer you've given to Justice O'Connor
16 and Justice Scalia, I take it you would say tough luck.

17 MR. BABCOCK: No. I would say that you may find
18 a disability but you have to have more to give the award
19 of compensation. You have to have evidence that would
20 allow the administrative law judge to fix a figure as
21 section 8(h) requires, fix a figure. The Solicitor --

22 QUESTION: Well, what figure would you fix --
23 this man is earning as a manager twice what he earned in
24 the factory.

25 MR. BABCOCK: Well, in that --

1 QUESTION: So how would you fix a figure?

2 MR. BABCOCK: It would depend upon the evidence
3 presented.

4 The classic case that we deal with with some
5 frequency is, an individual is earning more. The
6 individual comes in and says, but I don't think I'll keep
7 up this pace for long. He brings in a doctor. The doctor
8 says, I don't think he'll keep up the pace. Now he's
9 proved a disability.

10 Next step, though, in order to get an award of
11 compensation, how much is he losing, and the doctor in a
12 very simple example might say, I don't think he'll be able
13 to work for more than 4 days weekly.

14 Now the administrative law judge has a basis for
15 making a figure, for fixing a figure, but until he has
16 that basis in the evidence, he can't --

17 QUESTION: Well, what if the doctor were to say,
18 he can keep going in my view for probably 5 years, but
19 after that he's going to go down?

20 MR. BABCOCK: I think the administrative law
21 judge would need more to fix a figure.

22 QUESTION: What more would he need?

23 MR. BABCOCK: How long the individual is going
24 to live -- excuse me, going to work, what he can go to
25 after that time --

1 QUESTION: But that could all be determined at
2 the present time on the basis of the doctor's opinion.

3 MR. BABCOCK: The doctor says he can only stay
4 in longshoring for 5 years.

5 QUESTION: Yes.

6 MR. BABCOCK: He puts on proof saying after that
7 he can be a security guard. With those two pieces of
8 evidence, the earnings available in longshoring for the
9 remaining 5 years and the earnings available as a security
10 guard, the administrative law judge has a basis for making
11 a figure.

12 QUESTION: So there can never be nominal
13 damages. There can never be nominal damages, is your
14 position.

15 MR. BABCOCK: That is my position, because --

16 QUESTION: I thought you said earlier that you
17 weren't saying categorically there could never be.

18 MR. BABCOCK: Nominal damages are a substitute
19 for a real award. It's an ersatz version for a real award.

20 QUESTION: Well, except that it seems to me it
21 responds to this problem. We might indeed all agree that
22 there is some degree of probability or possibility that
23 the individual in the future is going to suffer in fact an
24 incapacity which right now is subject to so many
25 contingencies that nobody could reasonably estimate it.

1 So we in effect say yes, there is a possibility
2 there, but it's a very tiny one, and we don't know how to
3 give it a more specific figure than that, therefore the
4 appropriate thing to do is to give it a very tiny award.
5 Give it a dollar. That's a nominal award which in fact
6 reflects a nominal possibility, or a nominal probability.
7 Why isn't that consistent with the act?

8 MR. BABCOCK: It may be consistent with what is
9 right, with what is just and what is fair, but it is not
10 consistent --

11 QUESTION: No --

12 MR. BABCOCK: -- with the 1-year time
13 limitation.

14 QUESTION: But the act speaks of disability in
15 the future, and on the hypothesis I was giving there is a
16 very slight chance, there is some chance, more than zero,
17 that there will be a disability in the future, because in
18 fact something the individual used to be able to do to
19 earn his living he can no longer do now, so that there is
20 something more than zero.

21 So on that assumption there is a finding of a
22 possibility, more than zero, of some disability in the
23 future. Consistent with that is to give a nominal award
24 of something more than zero, but not much, to reflect that
25 disability.

1 MR. BABCOCK: Well, the act doesn't define
2 disability as a possible future loss of earning capacity.

3 QUESTION: It defines it as a present one,
4 doesn't it?

5 MR. BABCOCK: It defines it as a loss of earning
6 capacity.

7 QUESTION: Shouldn't I just -- I think probably
8 I should have changed my hypothesis and said, the fact
9 that we can make this probability or possibility judgment
10 about what will eventuate at a future time is reflective
11 of a nominal disability now. Isn't that a) both
12 consistent with the act and, as you say, fair?

13 MR. BABCOCK: No, I think it's not consistent
14 with the act, because I think it ignores the limitation of
15 section 22.

16 QUESTION: All right. Take the hypothesis in
17 which he can become a crane operator, or heavy equipment
18 operator, whatever it was, tomorrow, so that you say
19 there's no disability here. He's earning three times his
20 former wages.

21 Assume that we know, for whatever reason, that
22 that work, at least in the area where he is, is probably
23 going to exist for only about 6 months.

24 I take it on your theory there would be no
25 present disability, because for the immediate -- he has

1 the immediate prospect of earning money even though we
2 know on the hypo that in 6 months he'll be -- he won't be
3 able to earn the heavy equipment money, nor will he be
4 able to go back to his lifting job.

5 MR. BABCOCK: Not at all.

6 QUESTION: Okay.

7 MR. BABCOCK: But we deal with these cyclical
8 types of industries all the time in the shipyards, and you
9 make an assessment of how long he's going to be able to do
10 that work, the judge gets additional evidence of what
11 other types of work there are available on the open labor
12 market, and from that evidence, not from a substitution of
13 speculation or possibilities, from that evidence he
14 determines what that earning capacity is.

15 QUESTION: Okay. So it's a question of degree,
16 then, because that -- in theory that's not different from
17 the earlier example.

18 The earlier example recognizes the possibility
19 of something that may happen in the future, whereas the
20 example of the 6-month heavy equipment job recognizes a
21 near certainty, so I take it the difference is, is simply
22 one of the predictive degree.

23 MR. BABCOCK: No, sir. I think the difference
24 is one of whether you're substituting something, a
25 possibility or a predictive degree for evidence, and this

1 is a system that is built on --

2 QUESTION: Yes, but the evidence in the first
3 case is that he cannot go back to lifting. There are some
4 things that he used to be able to do that in the future he
5 will not be able to do. There's an evidentiary basis for
6 that.

7 MR. BABCOCK: And now he has, presumably with
8 those facts, a disability.

9 QUESTION: Yes.

10 MR. BABCOCK: The question still remains, what
11 is his numerical earning capacity? What is, in dollars
12 and cents --

13 QUESTION: And for the present time the
14 disability is at most of nominal value, so put a nominal
15 value on it.

16 QUESTION: Why do you say he has a disability?
17 I thought he doesn't have a disability until you establish
18 that he has a reduction in earning capacity.

19 MR. BABCOCK: One can look for --

20 QUESTION: I thought it was your case that he
21 did not have a disability.

22 MR. BABCOCK: No, my -- I -- everybody --

23 QUESTION: No, wait. If he can't do heavy
24 lifting any more but he can operate a crane, do you
25 concede that he therefore has a disability?

1 MR. BABCOCK: No.

2 QUESTION: Okay. Well, that's -- I thought you
3 just did.

4 MR. BABCOCK: No. If I did, I sure --

5 QUESTION: But you also concede, I take it, that
6 although he can do the crane operation, it is possible --
7 you would dispute it on these facts, but it is perfectly
8 possible and legally appropriate to find that his present
9 crane-operating capacity is not reasonably reflective of
10 his overall earning capacity.

11 MR. BABCOCK: It's possible on some facts to
12 find that, but the administrative law judge reached the
13 contrary conclusion. The administrative law judge found
14 his wage-earning capacity loss had ended, which is
15 tantamount to saying his current earnings are
16 representative of his future capacity to earn.

17 QUESTION: Well, that may be a reason, then, for
18 saying that this individual -- if the ALJ's finding in
19 that respect is not disturbed, that this individual
20 shouldn't have gotten his nominal damages, but it would
21 still leave the door open for nominal damages had the ALJ
22 said, a) at the present time he can earn three times as
23 much, so that there is not in fact in actuality right at
24 the moment a loss of earnings, but b) this capacity to
25 earn is not reflective of his earning capacity for the

1 long haul, and therefore I want to put a figure on what
2 the capacity is.

3 It's hard to put a figure on it, because there
4 are so many future contingencies, so I'm simply going to
5 say, there is some possibility, and reflect that some
6 possibility in a nominal award. That theoretically would
7 be possible, wouldn't it?

8 MR. BABCOCK: That theoretically is possible,
9 but I think inappropriate, because --

10 QUESTION: Well, Mr. Babcock, what do we do here
11 in this case if we disagree with you and think that in
12 some appropriate case it is possible to determine future
13 economic harm as a disability for someone that would
14 entitle that person to some nominal damages award?

15 Do we have to vacate and remand here so that
16 that can -- the ALJ can at least answer the question?

17 MR. BABCOCK: If you determine that a mere
18 possibility of future economic harm is a sufficient basis
19 for a nominal award, and you conclude that a nominal award
20 is --

21 QUESTION: No, if we determine that it is
22 possible that an administrative law judge could determine
23 in a case that there is future economic harm here --

24 MR. BABCOCK: Yes.

25 QUESTION: -- not at the moment, but from the

1 evidence. The job isn't going to last, and there's future
2 economic harm. Therefore, a nominal award at present is
3 appropriate. What do we do in this case, because you
4 didn't present any alternative argument below. You just
5 wanted all or nothing. You -- never can you have a
6 nominal award.

7 And if we disagree with you and think it is
8 possible, what do we do at the bottom line in this case
9 then?

10 MR. BABCOCK: If you --

11 QUESTION: Don't we have to send it back?

12 MR. BABCOCK: I think you have to send it back
13 to get a determination of the factual issues --

14 QUESTION: Right.

15 MR. BABCOCK: -- as identified by the Solicitor
16 in the brief, whether there is or is not a -- on a more-
17 probable-than-not basis a likelihood of that harm.

18 QUESTION: May I ask a question on the facts of
19 this case?

20 If, in addition to the evidence that was
21 presented at the time you terminated the disability there
22 had been evidence that the higher paying job would only
23 last 6 years, say, and then he would be working as a night
24 watchman, as you say, and therefore you could make certain
25 computations. Would you say that the ALJ should then give

1 an award that reflected -- that would stay in effect
2 indefinitely, or could he give a nominal damage award in
3 that kind of case to be adjusted later?

4 MR. BABCOCK: Well, that's why the nominal award
5 concept is both a shield and a sword --

6 QUESTION: Right.

7 MR. BABCOCK: -- for both claimants and
8 employers. In the purest view of the longshore system he
9 would have to do what they do now, which is make that
10 assessment and give an award which overcompensates during
11 the period that he continues --

12 QUESTION: That's what you think he should do.
13 He should overcompensate temporarily and then perhaps
14 undercompensate later.

15 MR. BABCOCK: I think that's the structure of
16 this system, yes, sir.

17 QUESTION: That's exactly the question I have.
18 I mean, because I want to know what -- obviously, this
19 particular man was earning \$500 a week before he was hurt.
20 Now he's earning \$1,500 a week after he's hurt, so it's --
21 he may not be a person who will end up being benefited by
22 this.

23 But how do you write it? That is to say, I'm
24 interested in the Solicitor General's argument. The
25 Solicitor General is saying that it could happen, that all

1 the doctors say he goes along for 3 years, then it's
2 collapse, right? So prove he is a person who will --
3 prove he will lose a lot of money. Imagine that's our
4 case, but we don't know now.

5 They say, this is a perfectly sensible way to do
6 it. Give him \$1 a week now. If and when he loses all the
7 money, we'll give him more later. They say, it's sensible
8 to do that, and there's nothing in the statute that stops
9 it.

10 You say that's inconsistent with the act.

11 MR. BABCOCK: That's correct.

12 QUESTION: What part of the act is it
13 inconsistent with? What words is it inconsistent with?
14 That's what I cannot find.

15 MR. BABCOCK: It is inconsistent with section 22
16 and its 1-year time limitation.

17 QUESTION: What are the words that make it
18 inconsistent, because I don't see in section 22, that I
19 have here, an inconsistency.

20 MR. BABCOCK: Because -- and with the definition
21 of disability, which is an incapacity to earn wages.

22 QUESTION: He has that.

23 MR. BABCOCK: That's the definition.

24 QUESTION: He is incapacitated to earn wages.
25 He will, in all likelihood, earn his present wage from 3

1 to 8 years, and then boom, he earns nothing. Fourteen
2 doctors testify that that's the situation.

3 MR. BABCOCK: The difficulty is that you are
4 substituting concerns about the future for the requirement
5 of evidence if you give a nominal award.

6 QUESTION: Is there anything in the act, any
7 language in the act that says what you just said?

8 MR. BABCOCK: There is -- within 8(h) it is a
9 two-step process of how you determine earning capacity.

10 If you argue as an individual that the earnings
11 are not representative of your earning capacity, you must
12 prove that fact by a preponderance of substantial
13 evidence.

14 QUESTION: Mr. Babcock --

15 QUESTION: Mr. Babcock, I thought your position
16 was that there's no disability unless there's a reduction
17 of earning capacity, and that if you're speculating that
18 there may be a reduction of earning capacity, all you've
19 established is that there may be a disability, and the act
20 does not allow the award of any damages if there may be a
21 disability, does it? Doesn't it require a probability, at
22 least --

23 MR. BABCOCK: I think so.

24 QUESTION: -- that there is a disability?

25 MR. BABCOCK: That's correct.

1 QUESTION: And my question assumed that there is
2 a probability. My question is assuming it's certain, 98
3 percent certain you go along for 5 years, then you fall
4 over, can't do another day's work, so there's no problem
5 of proof.

6 Then is there something in this act that would
7 prevent what sounds like a reasonable administrative
8 system? We'll give you a dollar a week until you keel
9 over, and if and when you do, we'll up the ante.

10 Now, that's what the SG is arguing we should
11 write an opinion to embody, and I want to know what you
12 think, what language or practice prevents that.

13 MR. BABCOCK: The practice that prevents that is
14 in this 8(h) two-step process to determine an entitlement.

15 First, you must prove, if you're the one
16 alleging that wages are not representative, higher
17 earnings are not representative, you must prove that they
18 are not representative, that something may happen in the
19 future.

20 Second -- or something is probable to happen in
21 the future. Second, you must an alternative figure.

22 QUESTION: Mr. Babcock, if we can't get that
23 from the words themselves, is there support -- for
24 example, has the benefit review board addressed this
25 question of nominal damages? Do we have any opinion at

1 the administrative level or from another court that says
2 the nominal damages theory is no good?

3 MR. BABCOCK: No. As I'm sure we're all aware
4 now, every circuit that has considered the nominal award
5 concept has in varying degrees, ranging from that
6 proffered by the Solicitor to the extreme version adopted
7 by the Ninth Circuit, approved the concept as a reasonable
8 means of assuring protections against possible harm
9 greater than Congress built into --

10 QUESTION: And the benefits review board hasn't
11 rejected the concept?

12 MR. BABCOCK: The benefits review board has
13 historically rejected the concept as an impermissible
14 intrusion upon the 1-year limitation.

15 QUESTION: Well, could you go back to Justice
16 Breyer's question under section 22? What is it in the
17 language of -- let's assume that there's a significant
18 probability that there will be a loss of earnings in the
19 future.

20 He doesn't have the earnings loss now. He's
21 going to be earning higher wages for 5 years. But we want
22 to -- but the ALJ says we should give nominal damages.
23 What in 22 prevents that?

24 MR. BABCOCK: Nothing in 22 prevents that,
25 because the effect of a real award is to achieve that.

1 The problem with the nominal award is that it is not real.
2 It is not supported by the evidence.

3 QUESTION: No, my hypothetical was that there --
4 was that he does give the nominal award under these
5 circumstances. He says, in 5 years you're not going to be
6 having any earnings power. This is significantly likely,
7 and in 5 years I want you to come back and I'll look at it
8 again, so I'll give you a nominal award.

9 What in 22 prevents that?

10 MR. BABCOCK: Nothing in 22 prevents a nominal
11 award, other than it sets the standard for the period of
12 time Congress thought protection against possible harm
13 appropriate.

14 QUESTION: But that period of time is 1 year
15 after the last payment is made, and if a nominal award
16 continues to be paid, then that is satisfied, correct?

17 MR. BABCOCK: No question, a nominal award gives
18 greater protection against the future than Congress
19 provides in section 22.

20 QUESTION: But under your theory, and Justice
21 Kennedy's facts, you say no nominal award could be made
22 but an award of money damages not nominal could be made.

23 MR. BABCOCK: I think not under that
24 hypothetical.

25 QUESTION: Well, there's some situations in

1 which you would agree that even though there's no present
2 loss of earning power on appropriate evidence an award for
3 the future could be made.

4 MR. BABCOCK: There has to be a determined loss
5 of earning capacity, which is in itself forward-looking,
6 so he's not losing now, but the administrative law judge
7 determines that over time he will lose. That is, by
8 definition, the lost --

9 QUESTION: When would that -- suppose he says
10 you've lost nothing now, but in 3 years I find that you
11 will have lost 30 percent on the evidence. When would
12 that award kick in, so to speak?

13 MR. BABCOCK: That would kick in on the date of
14 the decision, and as I indicated earlier, that would be
15 overcompensation under this system during the first 3
16 years and undercompensation thereafter.

17 I would point out, though, that would be a real
18 award that would be subject to modification as time went
19 on.

20 QUESTION: But just to clarify your answer --

21 QUESTION: That would extend the statute
22 indefinitely, too.

23 MR. BABCOCK: Excuse me.

24 QUESTION: That would also extend the period
25 of -- for that modification indefinitely.

1 MR. BABCOCK: A real award does --

2 QUESTION: The only difference is, you'd be
3 overcompensating before you knew the real facts.

4 MR. BABCOCK: I don't quarrel with, in some
5 instances, the wisdom of a nominal award. What I do say
6 is, it's not -- determination about that wisdom is not
7 something that should be for the judiciary. It's
8 something that properly belongs to Congress, and Congress
9 hasn't entered into the act a nominal award.

10 QUESTION: Well, but Mr. Babcock, if you look at
11 section 908(h), the proviso at least tells us that you
12 have to look at what might affect his capacity to earn
13 wages in his disabled condition, including the effect of
14 disability as it may naturally extend into the future, so
15 there is certainly some language in the act that directs
16 one's attention to future earning capacity.

17 Now, the Ninth Circuit here said it was enough
18 if there's a significant possibility of future economic
19 harm. I think other jurisdictions don't apply a
20 possibility but say that you have to have proof that it's
21 more probable than not.

22 Do you have a position on that, and is there a
23 majority position in the circuits?

24 MR. BABCOCK: The -- my position on that would
25 obviously be that we think there need be a substantial

1 probability, and on that point we would support the
2 Solicitor's position.

3 If you look among the circuits, in the Hole case
4 out of the Fifth Circuit the administrative law judge had
5 determined there to be a disability, i.e., that the
6 current earnings were not representative of the earning
7 capacity, and then was faced with the choice, do I pick a
8 big speculative award, or do I pick a small speculative
9 award.

10 He picked a small, nominal alternative, and the
11 Fifth Circuit approved it.

12 QUESTION: Are we doing anything more than
13 arguing about words, because I would suppose, even on your
14 theory, if the judge said, I find that there is a
15 probability that in the future the job market will change,
16 restrict his opportunities, so that that amounts in
17 today's terms to a 1-percent chance of disability and
18 therefore I'm going to give him damages equal to or an
19 award that reflects the 1-percent chance, he could do that
20 on your theory, couldn't he?

21 MR. BABCOCK: That's correct. He would have
22 evidence supportive of it.

23 QUESTION: Thank you, Mr. Babcock.

24 MR. BABCOCK: Thank you.

25 QUESTION: Mr. Stewart, we'll hear from you.

1 ORAL ARGUMENT OF MALCOLM L. STEWART

2 ON BEHALF OF THE FEDERAL RESPONDENT

3 MR. STEWART: Mr. Chief Justice, and may it
4 please the Court:

5 The position of the Director of the Office of
6 Worker's Compensation Programs is that a continuing
7 nominal award is appropriate whenever an injured claimant
8 has no current loss of earnings but is more likely than
9 not to suffer a loss of wages at some point in the future
10 as a result of a covered injury. We believe, however,
11 that the court of appeals erred in this case in ordering a
12 continuing nominal award.

13 Now, with respect to the propriety of continuing
14 nominal awards, I think the heart of our submission is
15 that such an award in appropriate cases is not an
16 extrastatutory device, it's an award given to the claimant
17 who satisfies all of the statutory prerequisites for an
18 award of benefits, and for that proposition we would rely
19 primarily on the language of section 908(h), which is
20 reproduced at page 2 of the Government's brief.

21 QUESTION: Do you think that this is a
22 reasonable award within the meaning of 908(h)? I would
23 think that a reasonable one means you calculate what the
24 reduction of earning is as best you can.

25 MR. STEWART: Well, we think that --

1 QUESTION: One dollar is not as best you can.
2 You're just saying I can't calculate what it is, so I'm
3 just picking a number out of the air.

4 MR. STEWART: Well, we think that in determining
5 an award that is reasonable the administrative law judge
6 should take cognizance of the entirety of the statutory
7 scheme.

8 Now, if there were no provision for a
9 modification of awards, if the award that was originally
10 entered by the ALJ was to be the award for the rest of the
11 claimant's life no matter what condition changed, then the
12 ALJ's only alternative would be to do as you suggest,
13 which is take its best shot at estimating the loss that
14 the claimant would incur over the course of his lifetime
15 and enter an award which was designed to compensate him
16 for that loss even though that would mean overcompensation
17 in the early years and perhaps undercompensation in the
18 future.

19 The great virtue of section 922's modification
20 provision is that it sharply reduces the need for
21 speculation. The ALJ can enter a nominal award, the
22 nominal award will preserve the claimant's right to seek
23 modification down the road, and at the same time it will
24 avoid the risk of overcompensation that would occur if the
25 claimant got --

1 QUESTION: Where did this come from? Is this
2 something the -- I mean, his objection, I think, your
3 opponent's, to this system is it's a kind of gimmick
4 that's been hoked up here in order to create this thing,
5 nominal awards.

6 The statute says do it just the way Justice
7 Scalia comes up with saying, and it will come to the same
8 result in virtually every case, so why are we going
9 through this?

10 The response would be, that's how the board
11 wants to do it, but where does it come from? Is this
12 something that is recent? Have they made up this nominal
13 damages in this way in this case, or is there a history
14 behind it? Where does this all come from, this
15 interpretation?

16 MR. STEWART: It's been around since
17 approximately 1980 or so. The first court of appeals
18 decision that approved the concept was Hole, which was
19 issued in 1981 by the Fifth Circuit, and I'm not sure of
20 the exact date of the ALJ decision, but it would have been
21 approximately 1980, and --

22 QUESTION: Well, I thought that wasn't the
23 board's position.

24 MR. STEWART: For -- during the 1980's, the
25 benefits review board repeatedly issued opinions that

1 disapproved of the practice of continuing nominal awards.
2 However, starting in 1990, the benefits review board,
3 albeit without much explanation, has reversed course,
4 and --

5 QUESTION: Was that just in -- because it felt
6 bound by court of appeals decisions, or on its own?

7 MR. STEWART: I think that was on its own, and
8 the reason I say that is, we cited at page 20, footnote 8
9 of our brief the relevant benefits review board's -- board
10 decisions, and one of those was a case called Morin, M-o-
11 r-i-n, and that case arose out of Maine, and there was no
12 First Circuit decision on point that addressed the
13 question of continuing nominal awards, so I think the fact
14 that the board in Morin evidently regarded the practice of
15 continuing nominal awards as legitimate indicates that it
16 wasn't simply acquiescing in binding circuit court
17 decisions in the relevant circuits.

18 QUESTION: Well, they couldn't adopt one
19 position in some cases and another position in other
20 cases. I mean, just the fact that it announced its
21 acquiescence in a case from the First Circuit doesn't mean
22 it wasn't pushed there by the fact that it was getting all
23 these contrary decisions from other circuits.

24 MR. STEWART: It was certainly influenced by
25 other circuits, but during the 1980's, even when the board

1 was expressing general opposition to continuing nominal
2 awards, when a case would arise in a circuit in which
3 there was binding circuit precedent saying continuing
4 nominal awards are appropriate the board would say,
5 despite our disagreement, we feel obligated to apply the
6 standard announced by the relevant court of appeals and
7 decide the case on that basis.

8 QUESTION: Did the court of appeals in the
9 eighties when the benefits review board was taken -- did
10 they simply direct the award of nominal damages on their
11 own when the benefits review board had said no?

12 MR. STEWART: No. They would typically remand
13 to the ALJ for -- they would --

14 QUESTION: It came from the court of appeals,
15 though. It didn't come from the benefit review board?

16 MR. STEWART: It didn't come from the benefits
17 review board. It came initially, I would say, from an
18 ALJ, because in Hole, the first court of appeals case that
19 approved it, the ALJ had fashioned a nominal award. The
20 benefit -- and the court of appeals approved that
21 practice.

22 But during the period of the 1980's when the
23 courts of appeals were generally approving this practice,
24 it was over the objection of the benefits review board.

25 Now, if --

1 QUESTION: Mr. Stewart, could an employer ever
2 cut this out by saying -- take this case. For 5 years
3 he's continued to work as a crane operator, we now again
4 ask for a changed circumstances ruling, to cut out the
5 nominal damages?

6 MR. STEWART: Yes. I mean, we believe that the
7 standard at any given time is whether it is more likely
8 than not that the claimant will suffer a loss of earnings
9 at some point in the future, and even if a nominal award
10 were entered at one point, if years went by and in fact
11 the claimant showed that he was able to keep his higher
12 paying job, the employer could move for a modification on
13 the ground that it was now no longer more likely or not
14 that the claimant would suffer a loss of earnings at some
15 point in the future.

16 In further response to your question, Justice
17 Breyer, about where these awards came from, historically
18 they came from the ALJ and then were approved by the
19 courts of appeals.

20 I think in terms of where in the statute does
21 the authority reside, there are really two provisions of
22 section 908(h) that we think are relevant.

23 The first is the provision that says the ALJ in
24 determining wage-earning capacity should look to the
25 effect of disability as it may naturally extend into the

1 future, and we think that provision would be meaningless
2 if the ALJ were required to set wage-earning capacity by
3 reference to the wages that the employee was currently
4 capable of earning.

5 And with respect to the question, why can the
6 ALJ award nominal benefits as opposed to taking a shot at
7 estimating likely losses in the future, we think the
8 statute gives the ALJ wide discretion in that it says that
9 the ALJ may, in the interest of justice, fix such wage-
10 earning capacity as shall be reasonable, and we think that
11 encompasses the freedom not only to weigh the facts, but
12 also to consider the totality of a statutory scheme.

13 QUESTION: Mr. Stewart, on the other question,
14 even though you argue that there can be nominal damages
15 you say in this case there's no basis for it and the ALJ
16 simply found that this was a case in which nominal damages
17 were not appropriate. That is your --

18 MR. STEWART: Well --

19 QUESTION: That is apparently not the
20 petitioner's position. As I understood his oral argument,
21 he concedes that if we disagree with him on nominal
22 damages this case should be remanded to the ALJ. You
23 don't think so?

24 MR. STEWART: No, we do think so. We think that
25 the court of appeals erred in entering a nominal award on

1 its own precisely because the resolution of that question
2 would depend on factual findings that the court of appeals
3 was not competent to make.

4 I mean, essentially, as a practical matter we
5 know that Mr. Rambo is not going to earn less than he was
6 earning at the time of his injury for so long as he
7 continues his current job as a crane operator, but since
8 there's been no showing that his physical condition has
9 changed, if he should lose his job as a crane operator and
10 be unable to find similar work, there's every reason to
11 believe that he will be impaired in his ability to obtain
12 alternative longshore employment.

13 QUESTION: So when you say probable, when you
14 talk about the probability judgment, the probability
15 judgment is not a probability judgment that there will be
16 work as a crane operator and he will continue to do it, or
17 be unable to continue to do it, the probability judgment
18 simply is that there is one kind of wage-earning physical
19 activity that he cannot do now, and so long as that
20 probably is shown, the nominal damage award is
21 appropriate. Is that correct?

22 MR. STEWART: No, that's not our position, with
23 respect.

24 QUESTION: No. Then explain that to me again.

25 MR. STEWART: I think in determining whether it

1 is more likely than not that Mr. Rambo will at some point
2 in the future suffer a loss of wages as a result of the
3 injury, in this case really the dispositive question is,
4 how likely is it that he will some day lose his crane
5 operator's job.

6 QUESTION: Or be unable to continue to operate
7 cranes, I suppose.

8 MR. STEWART: Right. That's correct.

9 QUESTION: I see.

10 QUESTION: Hasn't the ALJ found here that it is
11 not likely? I mean, the ALJ says, this demonstrates that
12 claimant's average weekly wages more than tripled from
13 1980 to '90.

14 After taking into consideration the increasing
15 wages due to rate of inflation, blah, blah, it is evident
16 that claimant no longer has a wage-earning capacity loss.
17 Although he testified that he might lose his job at some
18 future time, the evidence shows that claimant would not be
19 at any greater risk of losing his job than anyone else.

20 And it goes on like that. I -- as I read this
21 ALJ determination, it's a finding that there is no
22 probability of future reduction.

23 MR. STEWART: I think the one thing that the ALJ
24 left out is, the ALJ said, he is no more likely to lose
25 his crane operator's job than anyone else, presumably as a

1 result of his injury, but if it were the case that work as
2 a crane operator was inherently unstable, that anyone
3 working in the field could be expected to lose his job at
4 any moment, that could be true, but it might --

5 QUESTION: Well, whose burden is that to
6 establish? I mean, he has to negate every -- the ALJ's
7 order has to negate every possible fact that it's the
8 burden of the plaintiff to establish?

9 MR. STEWART: Well, in this case I think
10 Metropolitan, as the proponent of the order terminating
11 benefits, would bear the burden of proof.

12 Thank you.

13 QUESTION: Thank you, Mr. Stewart.

14 Mr. Pierry, we'll hear from you.

15 ORAL ARGUMENT OF THOMAS J. PIERRY, III

16 ON BEHALF OF THE RESPONDENT RAMBO

17 MR. PIERRY: Mr. Chief Justice, and may it
18 please the Court:

19 Nearly 2 years ago in Rambo I, this Court was
20 presented with the issue of what conditions justified
21 modification of a permanent disability award under section
22 922 of the act.

23 Rambo II presents this Court with very different
24 issues. Despite petitioner's attempts to focus this
25 Court's attentions on and frame the issues around the 1-

1 year limitation in section 922, the primary issue before
2 this Court is whether or not nominal awards are authorized
3 by section 908(h).

4 This is because the act defines disability in
5 terms of loss of wage-earning capacity, and it is section
6 908(h), not section 922, which provides the methods to
7 determine the wage-earning capacity of an injured worker.

8 QUESTION: Mr. Pierry, did the ALJ decline to
9 make an award in this case, nominal or otherwise, because
10 he felt he had no authority to make nominal awards? Is
11 that what he thought?

12 MR. PIERRY: I don't believe so, Your Honor.

13 QUESTION: Yes. I read his opinion as believing
14 he had the authority, but simply finding on these facts no
15 nominal award was justified.

16 MR. PIERRY: The problem is, as we have pointed
17 out, I think the Solicitor has also pointed out, there was
18 a failure to consider, at least a failure to write down in
19 the opinion various factors that have been outlined in
20 section 908(h) as important to consider when determining
21 loss of earning capacity of an injured worker.

22 I don't fault the ALJ so much as I fault the
23 employer, and I agree with the Solicitor --

24 QUESTION: Well, do you think the ALJ has to
25 write down and deal with every single one of those

1 sections under section 908 in making an award?

2 MR. PIERRY: Well, yes, Your Honor. Under the
3 Administrative Procedure Act, administrative law judges
4 are required to make explicit findings on all relevant
5 matters, factors in the determination that he's issuing.

6 QUESTION: And so your view is that the ALJ
7 simply has to use kind of a checklist --

8 MR. PIERRY: Well --

9 QUESTION: -- of every one of these things that
10 are mentioned in 908(h)?

11 MR. PIERRY: I think he has to at least go
12 through most of the factors and indicate that based upon
13 all of the factors which have been considered relevant in
14 the determination of loss of wage-earning capacity he does
15 not find any loss of wage-earning capacity.

16 QUESTION: He could skip some of them, I take
17 it.

18 MR. PIERRY: Well, I would think that he should
19 cover all of them, because --

20 QUESTION: I thought you said most.

21 MR. PIERRY: I did say most, but I think that
22 the Administrative Procedure Act really requires explicit
23 determinations on all relevant factors.

24 QUESTION: Why isn't this enough to show that he
25 hasn't lost any earning capacity?

1 No evidence has been offered to show that
2 claimant's age, education, and vocational training are
3 such that he would be at a greater risk of losing his
4 present job, or in seeking new employment in the event
5 that he should be required to do so.

6 He's saying he's going to be just like every
7 other crane operator in seeking new employment.

8 MR. PIERRY: Yes, Your Honor. The problem is,
9 though, that he didn't adequately deal with specific
10 factors listed in 908(h), such as the nature of the
11 injury, the degree of physical impairment, and whether or
12 not the claimant is capable -- is performing his usual
13 pre-injury employment.

14 QUESTION: And all ALJ orders normally do that,
15 you think?

16 MR. PIERRY: Truthfully, Your Honor, I don't
17 know if all of them do, but they should in this situation.

18 QUESTION: I don't think any of them do it.
19 This seems to me a fully adequate finding. I wouldn't --
20 yes, they have to make findings of fact, but I don't know
21 why on the facts set forth here there's any basis for
22 saying there's been a loss in disability.

23 MR. PIERRY: I disagree, Your Honor, just
24 because under the section 908(h) that we're dealing with
25 here, they specifically list certain factors, qualitative

1 factors, I would admit, such as the nature of the injury,
2 the degree of physical impairment, and whether or not the
3 claimant is capable of doing his usual pre-injury --

4 QUESTION: What if the ALJ simply found --
5 simply made a finding that I've reviewed all of the
6 factors set forth in section 908(h) and find no loss of
7 earning capacity?

8 MR. PIERRY: That would be a very difficult
9 case, Your Honor.

10 QUESTION: Why would it be difficult?

11 MR. PIERRY: Because I believe that the
12 Administrative Procedure Act requires --

13 QUESTION: What provision of the Administrative
14 Procedure Act would require that?

15 MR. PIERRY: Your Honor, I wish I had that
16 before you at my fingertips but --

17 QUESTION: Well, I thought if you were going to
18 argue it you probably would have it before you.

19 MR. PIERRY: Yes. I apologize, Your Honor. I
20 think there is a section, though, that says that an
21 administrative procedure -- an administrative law judge,
22 rather, must make explicit findings on all relevant
23 factors in his determination.

24 QUESTION: But you have no idea what the section
25 is.

1 MR. PIERRY: Your Honor, I have quoted it in my
2 brief, and I forgot it. I'm sorry.

3 QUESTION: But what you're suggesting is it
4 would be a routine thing, and more formal than
5 substantial, if it's just that, I list these things, I've
6 considered every one of them, and that's it.

7 MR. PIERRY: Well, I think as to certain factors
8 that are very important factors, such as the factors that
9 are set out in 908(h), those ones at least should be dealt
10 with in a very substantial manner by the administrative
11 law judge.

12 QUESTION: Well, what do you mean? Two
13 sentences is substantial, or -- let me ask you another
14 question, which I think you answered, but I want to be
15 sure that I have your answer right.

16 The law was less than clear and certain on
17 nominal damages. The benefits review board resisted it
18 for a long time, and the circuits didn't get into it until
19 the eighties.

20 Is it clear that in this very case that issue
21 was focused before the ALJ so that when Mr. Rambo, who was
22 receiving weekly benefits as a disabled person, was
23 threatened with the termination of his benefits, the ALJ
24 knew that that was one of the things he could have done?

25 MR. PIERRY: Well, Your Honor, the record is

1 unclear in that regard. I believe that the main issue
2 that the administrative law judge felt that he was faced
3 with was whether or not to terminate benefits based upon
4 the earnings that Mr. Rambo was experiencing, the higher
5 earnings, so I don't believe there really was an explicit
6 determination of that fact.

7 One thing I would like to point out though that
8 makes this case different and unique from all of the other
9 nominal award cases, different from Hole and LaFaille and
10 Randall, is that all of those cases arose out of an
11 initial claim hearing, where the claimant has the burden
12 of proof of coming forward and proving that he has a
13 disability.

14 This claim arises out of a modification
15 proceeding where the claimant has already established that
16 he has a disability, and --

17 QUESTION: But did his lawyer in that
18 modification proceeding initiated by the employer, did
19 Rambo's lawyer ever say to the ALJ at least give us an
20 award of nominal damages? Did it enter the fray at all?

21 MR. PIERRY: No, I don't think so, Your Honor,
22 and I think as the Ninth Circuit stated Rambo's contesting
23 of termination of his benefits also included his assertion
24 that he's entitled to any lesser amount under --

25 QUESTION: If that's so -- I haven't even

1 thought about -- what's bothering me in the statutory part
2 of this case is that I guess Mr. Babcock says, read that
3 statute.

4 They have some words called wage-earning
5 capacity. That's a word that you can look at anything in
6 the world, past, present, and future, but it ends up with
7 a number, even if it's a guess, and subtract from that
8 existing wage-earnings, or whatever, and divide by two-
9 thirds, all right. Those are two numbers plus a division.

10 Now, this is providing a jumping system, isn't
11 it?

12 MR. PIERRY: Yes, Your Honor.

13 QUESTION: And he says, how do we make that
14 consistent with those words, wage-earning capacity, and at
15 that point, I think maybe the SG's interpretation is
16 within the envelope, but it should be the Secretary of
17 Labor to whom we defer on such matters, that has thought
18 this thing through.

19 Now, you're familiar with the cases, and the
20 background, and the history. It would sometimes help the
21 worker, the one system, sometimes hurt the worker. We
22 don't know. What is the state of the art? Has this
23 matter of what we call the jumping interpretation of the
24 words wage-earning capacity been thought through by the
25 Labor Department, they decide that's the correct

1 interpretation of the statute, and they advance it, in the
2 history of these cases?

3 MR. PIERRY: Your Honor, I guess what I'd point
4 to is really the language of Congress in terms of the
5 state of the art in section 908(h).

6 When they list the qualitative factors, such as
7 consideration of the nature of the injury, the degree of
8 physical impairment, whether or not the claimant can do
9 his usual employment, those are all things where it is
10 difficult to imagine how you could ever get to a
11 particular dollar amount.

12 And I think that when Congress listed that we
13 should consider the effect of his disability as it may
14 naturally extend into the future, they realized that it
15 may be impossible at times to accurately give a particular
16 dollar amount and therefore they envisioned nominal words.

17 In fact, I have quoted the 1983 and '84
18 committee reports which certainly let us know that
19 Congress is aware of the fact that these type of nominal
20 awards were being issued and they did nothing to change
21 the system.

22 And also, what I think is important about those
23 committee reports is that there is a concern expressed, a
24 main concern, I believe, that without these type of awards
25 claimants are going to be coming in and filing yearly

1 requests for modification because they aren't allowed to
2 get a nominal modified award, and that would present an
3 administrative nightmare, and I think that's why
4 Congress -- that's at least a good explanation of why
5 Congress didn't change the system.

6 Your Honor, to follow up on your question, if
7 there is no provision for nominal awards, there is what
8 the circuit courts have termed an onerous burden on the
9 administrative law judge to try to determine what exactly
10 the loss of wage-earning capacity is in a case where there
11 is serious medical disability.

12 As the court of appeals stated in the Randall
13 case, the act requires omniscience of the judge. He has
14 to determine whether the claimant will suffer any work-
15 related reduction in his earning capacity at any time in
16 his lifetime.

17 QUESTION: Well, that's not any different from
18 what happens in a normal civil trial, which I assume is
19 the model.

20 You point out that this is a section -- I assume
21 it's a section 556 proceeding --

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

23 QUESTION: -- under the Administrative Procedure
24 Act that's required to be conducted on the record.

25 MR. PIERRY: That's correct.

1 QUESTION: Well, you know, a regular full dress
2 civil trial is the model for that, and it happens all the
3 time. You take your best guess as to what the damages
4 will be.

5 MR. PIERRY: The difference is section 922,
6 though. There's a provision specifically allowed in this
7 act for modification of awards to account for a wage-
8 earning capacity going up or down over the years.

9 QUESTION: Well, there are some civil actions
10 that allow modifications, too. Divorce decrees can be
11 modified, but I don't know that a judge in a divorce case
12 would be -- would feel that he's entitled not to even take
13 his best shot at figuring out what the actual amounts
14 ought to be. Just say, you know, I'll give you a dollar
15 for now, and come back 5 years from now.

16 MR. PIERRY: That is true, Your Honor. However,
17 this involves workers who -- and the primary issue to be
18 determined is what is their wage-earning capacity, whereas
19 in a divorce case that is not the primary issue. We are
20 trying to determine what an injured worker --

21 QUESTION: Well, in a divorce for child support
22 or alimony certainly one of the primary issues is the
23 earning capacity of each spouse.

24 MR. PIERRY: That's true, Your Honor. However,
25 again, in this law there's a specific provision made for

1 modification because Congress realized that an injured
2 worker's earnings may fluctuate as the time goes on.

3 QUESTION: But typical divorce statutes in
4 States make exactly the same provision.

5 MR. PIERRY: You may be correct about that, Your
6 Honor. I don't know.

7 QUESTION: What you propose is so sensible. It
8 works so well. I can't figure out why the benefits review
9 board would have been opposed to it except that it thought
10 the statute didn't allow it.

11 MR. PIERRY: Yes, I think, Your Honor, you're
12 right. They've always quoted in the eighties opinions
13 that the Solicitor referred to that it was a judicial
14 infringement on the time limitation.

15 My point is, the main point, I think, of the
16 petitioner -- of the respondent, rather, is that section
17 922's time limitation does not even enter into the fray
18 when we're talking about what type of remedy is allowed to
19 be fashioned.

20 Rather, section 908(h) is the section which
21 specifically directs how earning capacity of an injured
22 worker is calculated, and therefore the section 922 1-
23 year limitation on modifications should not be seen as a
24 device that prevents entering any type of award.

25 QUESTION: Mr. Pierry, isn't it how can we drop

1 out 922? Isn't this whole idea driven by the 1-year time
2 limit? If we didn't have the 1-year time limit there
3 would be no need for these nominal damages.

4 MR. PIERRY: That's exactly right. In fact, as
5 the 1983 and '84 legislative history makes clear, the
6 committee suggested limiting both the forward-looking
7 language of section 908(h) and the 1-year time limitation
8 and modification. That would make nominal awards
9 unnecessary and also would reduce the specter of this
10 administrative nightmare of yearly requests of filing
11 requests for modification by workers.

12 However, Congress chose not to do that, and the
13 petit -- the respondent's point, rather, is that the
14 petitioner is trying to get this Court to do what Congress
15 chose not to do, which is to change the act and disallow
16 nominal awards. Congress was aware of these nominal
17 awards and chose not to change the act to forbid them.

18 QUESTION: Do you defend the Ninth Circuit
19 standard of a possibility instead of a probability?

20 MR. PIERRY: Yes, Your Honor. That gets to the
21 question of the burden of proof.

22 QUESTION: That certainly is not what most
23 courts have followed, is it?

24 MR. PIERRY: In this particular case I do defend
25 it, and if I may explain, I think the question of who has

1 the burden of proof and what that burden of proof is
2 depends on at what stage of the proceedings the question
3 is raised.

4 At the initial claim, respondent would agree
5 with the Solicitor that it's the claimant who has the
6 burden of proof, preponderance of the evidence, that he
7 has to prove that it's more likely than not that at some
8 point in the future he will suffer a reduction in
9 earnings. If he does that, then he's established a
10 disability.

11 Rambo did that in this case. He established
12 that he had a disability, and he was not only awarded a
13 disability --

14 QUESTION: Yes, so what's the employer's burden
15 of proof on a modification request?

16 MR. PIERRY: I believe that it's the same
17 preponderance of the evidence standard, that the employer
18 has to prove --

19 You're right, Your Honor. That's correct.
20 That's correct.

21 QUESTION: Well, that's what I asked you. The
22 Ninth Circuit refers to a possibility rather than a
23 probability, and you said you support that.

24 MR. PIERRY: Yes. I support it because what the
25 Ninth Circuit was saying is there was a significant

1 possibility that the claimant would suffer a loss of
2 earnings in the future, therefore the employer had not met
3 its preponderance of the evidence standard.

4 QUESTION: But the Ninth Circuit didn't put it
5 that way, did it?

6 MR. PIERRY: That's true, Your Honor.

7 QUESTION: I mean, you agree that the burden in
8 this case is on the employer, and what the employer has to
9 show is that it's less likely than not that there will be
10 a future impairment.

11 MR. PIERRY: Yes, Your Honor, I do.

12 QUESTION: Maybe I'm repeating a point Justice
13 Scalia has made before, but the burden of the -- in the
14 particular proceeding seeking modification that was had in
15 this case was one in which the employer assumed the burden
16 of proving that there should be a complete termination of
17 benefits, and the ALJ found that that burden of proof had
18 been sustained. If that's true, that would even rule out
19 the nominal award.

20 MR. PIERRY: Your Honor, I believe that what the
21 ALJ -- the Ninth Circuit said about the ALJ's decision was
22 that the ALJ's decision did not take into account certain
23 specified factors, and therefore that his decision was not
24 supported by substantial evidence on the record considered
25 as a whole, and I believe that the Ninth Circuit, when

1 faced with the evidence that was presented, which really
2 was only the increase in earnings, they decided that --

3 QUESTION: Well, it was increase in earnings,
4 and also there was testimony that the man might
5 theoretically lose his job later, and so forth and so on.

6 MR. PIERRY: That's correct. That's correct.
7 But as far as the evidence the employer presented in terms
8 of supporting termination, I think the Ninth Circuit found
9 that there was not substantial evidence to support the
10 ALJ's finding that the employer had basically --

11 QUESTION: You see, part of the problem is that
12 your client at that stage of the proceedings did not argue
13 in the alternative, a) don't make any reduction, and b) if
14 you do make a reduction, don't terminate but allow me to
15 keep the nominal award. He didn't even raise that
16 argument.

17 MR. PIERRY: Your right, Your Honor, and that
18 was because he was relying on years of precedent
19 regarding --

20 QUESTION: Right, and I was very sympathetic to
21 his position, but he lost.

22 MR. PIERRY: That's correct.

23 QUESTION: I take it your answer to that is,
24 send it back so that findings can be made on some of these
25 various factors that the court -- that the ALJ did not

1 specifically address. That was your earlier answer,
2 wasn't it?

3 MR. PIERRY: No, Your Honor. What the
4 respondent's position is, that since the employer was the
5 one that had the burden of proof at the modification
6 proceeding, and the Ninth Circuit found that the ALJ's
7 decision that they sustained that burden of proof was not
8 supported by substantial evidence, that therefore the case
9 should be affirmed, and that if the employer then wishes
10 to go ahead and seek another modification hearing, it can
11 then --

12 QUESTION: Start all over again.

13 MR. PIERRY: Right.

14 QUESTION: Well now, is it a substantial
15 evidence -- I thought earlier your objection to the ALJ's
16 decree was not a substantial evidence one, but that he
17 hadn't made the necessary findings.

18 MR. PIERRY: Your Honor, yes. The ALJ didn't
19 specify the certain factors that I talked about in 908(h).

20 QUESTION: So -- the provision of the
21 Administrative Procedure Act you referred to, by the way,
22 simply requires that the record include a statement of
23 finding and conclusions and the reasons or basis therefore
24 on all the material issues of fact, law, or discretion
25 presented on the record.

1 Now, what had been presented on the record here
2 that wasn't --

3 MR. PIERRY: Well, that's the problem, Your
4 Honor. In this proceeding the employer didn't present
5 evidence which it should have in order to sustain its
6 burden of terminating benefits.

7 It's respondent's position that if they wanted
8 to, the employer should have come in with rehabilitative
9 experts saying that there's no chance that -- or very
10 little chance that Rambo will lose his crane job, or that
11 there are many other jobs out there that he can do, or,
12 alternatively, they also could have come in with medical
13 evidence saying, his condition has improved. There's many
14 other jobs he can do besides crane operator.

15 They chose to bring in none of that evidence,
16 and simply rely on the increased earnings.

17 QUESTION: This is a substantial evidence
18 objection you're making, not a findings objection, it
19 seems to me.

20 MR. PIERRY: Yes, Your Honor.

21 Your Honor, petitioner quotes the Potomac
22 River -- or Potomac Power case for the proposition that
23 the longshore act does not guarantee a completely adequate
24 remedy for all covered disabilities because it's a
25 compromise of competing interests and represents a

1 legislative choice.

2 The problem with that argument is that it fails
3 to address the fact that in section 908(h) the specific
4 legislative choice has been made. There is particular
5 broad, forward-looking language in section 908(h) which
6 represents the legislative choice in this area.

7 The legislative choice is reflected in the
8 philosophy of the courts in Hole, LaFaille, and Randall
9 when they adopt this nominal award so that it can be
10 altered and amended as time proves it to be wrong or
11 correct.

12 QUESTION: But the same language could be
13 honored by simply assigning present value and saying
14 that's good for all time. We may be giving you too much
15 now and too little later on a specific time period basis,
16 but we'll fix a present value just the way juries fix
17 present values in accident cases. That would be
18 consistent with the statute, too, wouldn't it?

19 MR. PIERRY: That is correct, Your Honor.

20 I guess what I -- the respondent's point is,
21 there's nothing in the act that prevents issuance of
22 nominal awards, and since Congress chose not to prevent
23 them, neither should this Court.

24 QUESTION: Is part of the problem that the 1-
25 year time limit works as a one-way street? That is, the

1 employer can always come in and say, we want a
2 modification, and the employee --

3 MR. PIERRY: That's true, Your Honor. It is a
4 difficult situation for the employee, the injured worker.

5 As I said, without nominal awards, the only
6 alternative for the employee is to come in every year and
7 request for modification simply to keep the statute of
8 limitations from running whether or not there's actually
9 grounds for it, and that's a difficult situation, I don't
10 think one that the courts would want to endorse, because
11 it creates, like I said before, an administrative
12 nightmare of all these requests for modification, perhaps
13 groundless, perhaps some of them have grounds, simply
14 filed just to keep the statute of limitations from
15 running.

16 QUESTION: Well, maybe they could simply be
17 treated as nominal requests and knocked down. It wouldn't
18 take much time, and the rights would be preserved.

19 MR. PIERRY: That's true, but it would
20 definitely impede judicial efficiency and economy because
21 of all these requests that would be coming in from
22 claimants that had been denied.

23 Your Honor, petitioner's statement that the
24 longshore act does not guarantee a completely adequate
25 remedy sounds reasonable, or may sound reasonable and

1 applicable on first reading, but further examination shows
2 that it's really inapplicable in this context of nominal
3 awards. That's because disability under the act is
4 defined in terms of wage-earning capacity.

5 As the Randall court stated, under the act, any
6 reduction in wage-earning capacity greater than zero is
7 compensable.

8 QUESTION: Mr. Pierry --

9 MR. PIERRY: There's no question --

10 QUESTION: Mr. Pierry, is it -- isn't it so that
11 anybody who has a physical disability, as Rambo certainly
12 did, anybody who has that, can always get one of these
13 nominal damages award, because there would always be a
14 risk that at some time in the future their disability,
15 physical disability would make it impossible even to do,
16 say, the crane work?

17 MR. PIERRY: I would like that to be the case,
18 but I don't think that is the case under the law.

19 QUESTION: Well, I'd like to see what is the
20 stopping point on your theory.

21 The Government has the more-probable-than-not, but on
22 your theory, isn't there always a risk that the disabling
23 condition will cause a reduction in earning capacity?

24 MR. PIERRY: I don't think there always is.
25 However, what I would point to in this record is that the

1 nature of the injury and the degree of physical impairment
2 everyone concedes have remained the same as when Rambo was
3 first awarded the disability award of 22-1/2 percent.

4 In addition, there is testimony, as was pointed
5 out, that he didn't know how long this higher-paying crane
6 job would last, and --

7 QUESTION: You're relying on the fact that this
8 is a proceeding to alter the original award. I think
9 Justice Ginsburg's question goes to the original award.

10 What is your position as to whether an original
11 nominal award can be made? What do you need to show, a
12 probability that your wages will be lowered in the future?

13 MR. PIERRY: Yes, Your Honors. I do agree with
14 the Solicitor in that sense.

15 QUESTION: Okay.

16 MR. PIERRY: At the initial claim proceeding I
17 believe that the claimant has the burden of proof,
18 preponderance of the evidence standard, that he will more
19 likely than not suffer some type of loss of earning
20 capacity in the future.

21 QUESTION: But don't you say that he meets or
22 can meet that standard simply by proof that among the
23 spectrum of things that he might do to earn a living,
24 there is one thing that he can no longer do as well as he
25 did before, and therefore, given the contingencies of job

1 availability, there are some circumstances in which it is
2 more probable than not that he will not be able to earn
3 what he did before, and that satisfies the burden. Isn't
4 that your position?

5 MR. PIERRY: No, Your Honor. I would say that
6 our position is that since the usual employment is a
7 specific factor that's listed in section 908(h), that
8 really is the key determination, whether or not his injury
9 affects or impairs his ability to perform his usual
10 employment, his usual pre-injury employment, and here
11 there's no argument that it did.

12 QUESTION: No, but that will -- I guess that
13 takes me back to Justice Ginsburg's question. Except for
14 the employee who in fact fully recovers, your theory will
15 always support a nominal award.

16 MR. PIERRY: I don't believe so, Your Honor,
17 because I believe that in this case the usual employment
18 is a broad category term, and he was a longshoreman before
19 this accident.

20 He's still a longshoreman. He happens to be
21 doing lighter duty crane job work, but the great majority
22 of longshore work does require a lot of physical labor,
23 and there's no question that his disability impairs his
24 ability to do the great majority of longshore jobs that do
25 require physical labor.

1 QUESTION: So if he had gotten another job as an
2 accountant, let's say, he got retrained as an accountant,
3 that wouldn't at all affect his entitlement to awards.

4 MR. PIERRY: I guess -- I think it would depend
5 on the evidence, but I would concede --

6 QUESTION: Unless he was an accountant for -- I
7 guess the longshore companies have accountants, don't
8 they?

9 (Laughter.)

10 QUESTION: What don't longshore companies have.

11 MR. PIERRY: There's a wide variety of jobs.

12 QUESTION: There must be something they don't
13 have.

14 MR. PIERRY: But what I would say in that regard
15 is that I can envision circumstances where a claimant has
16 so completely changed industries, become an accountant or
17 a doctor or a lawyer, that in no way would ever require
18 physical labor, and he has also come forward, or someone
19 has come forward with evidence indicating that there is
20 very little chance that he will lose that type of job,
21 that complete termination could be justified. I just
22 don't think it is appropriate in this case.

23 Your Honors, the mechanism of nominal awards
24 fulfills the forward-looking perspective of 908(h) and it
25 lifts the onerous burden from the ALJ. It lifts the

1 burden inherent in any attempt to pick a disability figure
2 out of thin air, as the circuit courts have stated, rather
3 than simply assigning a nominal value and allowing it to
4 be changed at a later date.

5 QUESTION: Just out of curiosity, do -- is it
6 your perception that employers generally like it this way,
7 or generally would rather have the ALJ guess as to what
8 the future will be?

9 MR. PIERRY: That's an interesting question --

10 QUESTION: Yes.

11 MR. PIERRY: -- and I can't give you an answer
12 to that. All I know is they're --

13 QUESTION: This doesn't split out necessarily on
14 the basis of plaintiffs' versus defendants' preference.

15 MR. PIERRY: I think employers generally don't
16 like to have nominal awards because they have to keep
17 their cases open, and they have to keep looking at cases,
18 rather than closing them.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pierry.

20 MR. PIERRY: Thank you very much.

21 CHIEF JUSTICE REHNQUIST: The case is submitted.

22 (Whereupon, at 11:03 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

CERTIFICATION

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METROPOLITAN STEVEDORE COMPANY, Petitioner v. JOHN RAMBO, ET AL.
CASE NO: 96-272

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BY Don Mari Federico-----

(REPORTER)