ORIGINAL

In the

Supreme Court of the United States

SUN SHIP, INC.,

APPELLANT

V.

PENNSYLVANIA, ET AL.,

APPELLEES

No. 79-343

Washington, D. C.
April 14, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

SUN SHIP, INC.,

Appellant

v. No. 79-343

PENNSYLVANIA, ET AL.,

Appellees

Washington, D. C.

Monday, April 14, 1980

The above-entitled matter came on for oral argument at 2:02 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JEFFERY C. HAYES, ESQ., Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pennsylvania 19109; on behalf of the Appellant

JOSEPH LURIE, ESQ., Galfand, Berger, Senesky, Lurie and March, 1737 Chestnut Street, 12th Floor, Philadelphia, Pennsylvania 19103; on behalf of the Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Sun Ship Company against Pennsylvania.

Mr. Hayes, you may proceed whenever you are ready.

ORAL ARGUMENT OF JEFFERY C. HAYES,

ON BEHALF OF THE APPELLANT

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

This case involves an appeal from a final judgment, the Commonwealth Court of Pennsylvania, which affirmed awards to claimant appellees for facial disfigurement under the Pennsylvania Workmen's Compensation Act.

The question presented to this Court today is whether Pennsylvania may constitutionally award benefits under its State Workmen's Compensation law for injuries to maritime workers covered by the Longshoremen's Act as amended in 1972.

The central facts necessary to the resolution of the question are not in dispute in this Court. Sun Ship is an employer within the meaning of the Longshoremen's Act. It is engaged in shipbuilding and ship repair activities at its facilities adjoining the Delaware River, a navigable water of the United States.

Each of the claimants at the time of his injury was employed by Sun Ship and was engaged in maritime employment, either shipbuilding or ship repair and is an employee within the

meaning of the Longshoremen's Act.

In addition, each of the appellees were injured upon the navigable waters of the United States as that term has been defined in both Sections 3(a) of the amended Longshoremen's Act, its coverage provisions; in Section 2(4) which defines employer.

It is further undisputed that the injuries involved here fall within the coverage of the Longshoremen's Act. Every administrative tribunal below and the court below so found and it has never been in question here and, indeed, it is conceded by appellees in this court.

We submit that the judgment of the Court below must be reversed because, upon analysis of the amendment Longshoremen's Act, the legislative history to the 1972 amendments and consideration of the State's purposes and objectives, it is evident that the Congress intended to preempt the application of State workmen's compensation laws when it enacted the 1972 amendment to the Longshoremen's Act as those laws might apply to maritime workers injured upon the navigable waters of the United States.

In addition, to the extent that a review of the Longshoremen's Act and the Pennsylvania Workmen's Compensation Act reveals both a general and the very instance of this case specific conflicts with the regulatory scheme determined to apply by Congress the Pennsylvania Act must yield.

QUESTION: You told us that in this case it is conceded that the respondents were within the coverage of the Federal statute?

MR. HAYES: Yes, sir.

QUESTION: Because of the location of their injuries, as well as their status.

There might be questions in some situations, might there not, as to whether or not the Federal statute would cover?

MR. HAYES: Yes, sir. Mt. Justice Stewart, there is no question that there are questions about the jurisdiction --

QUESTION: And therefore whatever the line may be there is going to be a twilight zone, I suppose, isn't there?

MR. HAYES: Well, Your Honor, it is certainly possible, the concept that there is going to be an edge in the Federal jurisdiction and there may be cases which fall close to that line which may give occasion to courts to consider which side of the line and a Davis kind of resolution of those conflicts might result.

QUESTION: Right.

MR. HAYES: But of course in the course of amending the Longshoremen's Act Congress substantially removed those problems, at least in the context of shipbuilding and ship repair operations, because it moved the line away from the water's edge which had been the most troublesome line of all.

QUESTION: There still is a line?

MR. HAYES: Yes, sir, there is still a line. There is no question.

QUESTION: And it is not -- it won't always be a clear line.

MR. HAYES: It will not always be a clear line.

QUESTION: And therefore if you should be correct and if an injured workman or the survivors of a deceased workman who is killed honestly believe that they are under the coverage of the Federal statute. And if we decide this case in your favor and say the Federal statute is exclusive, and then the Federal administrative agency, upheld by the Court, said, sorry, you are not covered, will the statute of limitations have run so far as the State workmen's compensation goes?

MR. HAYES: Your Honor, I think that that is a question that would have to be addressed to the States, many of which have equitable principles that operate in other contexts --

QUESTION: And then again I gather some don't.

MR. HAYES: Some may not, Your Honor.

QUESTION: By the nature of your answer.

MR. HAYES: And I think that the statutes may well be told or ought to be told under any number of principles because plainly the purpose to be served by a statute of

limitations would not be met because the employer of course would be on notice of the claim --

QUESTION: Yes.

MR. HAYES: -- and would realize it is a jurisdictional dispute. And indeed there is no reason to think the States would adopt any other rule than what the Benefits Review Board has adopted for the Federal courts and what the Courts of Appeals have adopted as an application of the statue of limitations principles under the Longshoremen's act.

QUESTION: Do all the maritime States purport to extend coverage that is clearly within the admiralty jurisdiction?

MR. HAYES: No, Your Honor. In fact I think it is clear from some of the decisions that are cited in various briefs that Florida, for example, is a State that plainly does not purport to extend its remedy to claims under the Longshoremen's Act.

QUESTION: Pennsylvania does?

MR. HAYES: The Pennsylvania statute is a statute of general application applying to all employers injured within the Commonwealth.

QUESTION: Isn't that the general rule?

MR. HAYES: Well, Your Honor --

QUESTION: I mean isn't that the general situation,

not the rule.

MR. HAYES: Well, I think Florida, as I have already indicated expressly limits the Longshoremen's Act as a limited statute and it doesn't apply where the Longshoremen's Act does apply and there are other such statutes in other maritime States which work in a similar way. Pennsylvania's does not.

QUESTION: The Constitution continues I suppose to impose a limit upon the exertion of State power over accidents or deaths that occur at sea?

MR. HAYES: Yes, sir, I believe it does.

QUESTION: Over navigable waters.

MR. HAYES: I think the --

QUESTION: The case has not been overruled, ever.

MR. HAYES: No, I don't believe it has, Your Honor. I mean expressly it has not been overruled and I think that in addition you have operating not only the pure admiralty principle which Johnson -- Jensen represents, uniformity, but you have a kind of supremacy notion, if you will, that operates in tandem with the admiralty clause where those cases recognizing uniformity principle have always found that where Congress moves into the admiralty area uniformity is the rule and, in addition, the supremacy clauses analysis itself compels the result that if Congress has occupied the field that the States are not free --

QUESTION: Whether or not Congress has moved in, the

States, there is a constitutional limit upon the exercise of State jurisdiction over navigable waters, isn't there?

MR. HAYES: Yes, sir, there is. And I think that that is why the problem of the line that you raised with me initially is important here, because a system of concurrent jurisdiction necessarily creates two lines. It creates the constitutional line, the Jensen line, if you will, over which the State remedy cannot extend.

QUESTION: Yes.

MR. HAYES: And secondly, you have the edge of Federal coverage somewhere to the landward side of the sea line.

QUESTION: Sea line.

MR. HAYES: And I think that there you have two kinds of jurisdictional disputes that you might have to answer, perhaps not in any individual case but certainly over the course of the whole series of cases that are presented to the Court.

QUESTION: Mr. Hayes, the Pennsylvania statute I suppose purports to extend three miles out from shore, doesn't it? So it is any place within the Commonwealth.

MR. HAYES: Yes, Your Honor. And it purports, indeed, to extend to injuries that might arise out of contracts of hire entered into in Pennsylvania. It is a McCarton-type statute, if you will.

It is the post-1972 Longshoremen's Act which is the central focus of the analysis, of course. And there is really little reason to be overly concerned with the decisions of this Court and other Federal courts which struggle with the very difficult questions presented by Congress when it enacted the 1927 Act and the meaning of the phrases which were read variously to extend or limit Federal or State jurisdiction.

First of all, it is clear from the totality of circumstances shown by the language of the statute and the legislative history that Congress has totally occupied the field of compensation to maritime workers and expressly so to the exclusion of State law.

QUESTION: Now, there is some suggestion that in some cases there will be a twilight zone or a gray zone. There is no question in this case about Federal coverage, is there?

MR. HAYES: No, Your Honor, there is no question. This is not a twilight zone or borderline case.

QUESTION: Well, you are really here because of the financial aspects of the case, wholly apart from all the theory if the Pennsylvania compensation was less than the Federal you wouldn't be here?

MR. HAYES: Your Honor, in this specific case the statement is correct that the State remedy would have made it possible for these claimants to receive more money than

they could under the Pennsylvania Act. However, that standard does not extend to other provisions of the Act. The Pennsylvania Act in other respects and perhaps in the respect the Congress was most concerned about in 1972, namely the problem presented by permanently disabled maritime workers, the Pennsylvania remedy is less. That point is established when one realizes that the Federal maximum level set by the Director of the Office of Workmen's Compensation Program is $426 whereas under Pennsylvania it is $234.

QUESTION: You don't believe you can live with concurrency?

MR. HAYES: Your Honor, --

QUESTION: I take it you feel your client can't live with concurrency?

MR. HAYES: That is correct.

It introduces a level of uncertainty into the administration of a shipbuilding type of operation which is what Sun Ship has. The certainty of application of the Federal Act is going to operate in such a way here as to benefit not only Sun Ship but to benefit claimants because it is going to put both claimants and Sun Ship in the position of having an interest in resolving the disputes under the informal mechanism provided under the Longshoremen's Act which are not necessarily available under the Pennsylvania Act. Whereas, if we are -- if Sun Ship in particular is going to be in the situation of

always having to concern itself with the availability of a second remedy we would be much less inclined to resolve those disputes until a jurisdictional issue is resolved specifically and clearly,because it is clear, I believe, under prior decisions of this Court and the lower Federal courts that if the Federal Act applies section 5 by its terms makes that remedy exclusive.

QUESTION: So if there were a claim for permanent disability under the Federal Act and it was denied, if there was concurrency he could try it over again in the State system?

MR. HAYES: He might, yes, Your Honor. I suppose that is true, although he might be able to try it again in the State system if the State had a totaling kind of principle for its statute of limitations recognizing if the Federal decision --

QUESTION: He might file in both places at the same time?

MR. HAYES: He might file in both places --

QUESTION: If he loses in the higher level jurisdiction, he tries it out in the other.

MR. HAYES: He may, Your Honor, although I think that that introduces a whole set of difficult problems also.

QUESTION: Well, I understand that.

MR. HAYES: If you assume that --

QUESTION: That would follow from concurrency, wouldn't it?

MR. HAYES: That would follow from concurrency and it would follow the problems would be introduced in any situation where the decision by the Federal tribunal that there was no Federal jurisdiction, if a denial of a claim was based on anything other than a lack of jurisdiction, you had difficult problems of res ajudicada and collateral estoppel introduced into the State system at that point, just as you do in the Federal system which the case has already pointed to.

In 1972 the Longshoremen's Act was no longer a gap-filler. It became an affirmative exercise of jurisdiction. Both in admiralty tort jurisdiction, which was tied to the situs and to admiralty contract jurisdiction, because Congress expressly brought within its coverage new categories of employees and with it their employment relationship with an employer covered by the Act whose business effects traditional maritime matters. And this exercise comes in an area imbued with a dominant Federal interest and where uniformity of the Federal maritime law is the normal rule. That has never been seriously disputed in this case.

Congress' attempt to preempt State law in the area of compensation to maritime workers is clearly stated in the Act. We have already had reference to Section 5 which when combined with Section 4, which makes the employer's obligation

to pay compensation and secure payment of compensation mandatory, plainly indicates that the Federal scheme operates exclusively, that is to say in place of any other.

In contrast, the Act contains no language which indicates an intention to permit State law to operate and thus the situation posed here is directly opposite to that presented to the Court in Askew. Indeed --

QUESTION: Hasn't our rule been generally that it requires an affirmative showing by Congress to preempt State actions rather than just lack of a negative showing?

MR. HAYES: Justice Rehnquist, I don't think that has been the test and I think the Court specifically in City of Burbank v. Lockheed made it clear that there is not a requirement that there be an express statement of congressional intent to preempt. And in any event we we --

QUESTION: There doesn't have to be some affirmative statement?

MR. HAYES: There does not have to be an affirmative statement that the States are ousted, that is correct.

QUESTION: But just the general existence of a Federal law doesn't preempt the State law in the same area, does it?

MR. HAYES: Well, Your Honor, that is --

QUESTION: That is a conflict or a frustration of a Federal --

MR. HAYES: In the admiralty area there may well be an absolute preemption of the States where Congress comes in as it has done here with a comprehensive and complete remedy.

QUESTION: What congressional authority did Congress purport to be exercising in the '72 amendments?

MR. HAYES: Its authority -- I think the legislative history, Mr. Justice White, is unclear. I think it can be read either as the commerce power or as its admiralty power, both comprising --

QUESTION: Well, under the commerce power you don't have any automatic preemption.

MR. HAYES: No, but you you may -- but under the commerce power as you do in the case of the Federal Employer's Liability Act, if pursuant to an exercise of the commerce power Congress moves into an area and defines a complete remedy and provides a solution to a problem which is completely total in and of itself as it did in the case of the Federal Employer's Liability Act and there is no express preemption there and there is no statement that that Act is exclusive. Nonetheless, this Court held that State efforts to provide a remedy for injured railway workers is preempted by the fact that Congress had acted affirmatively under the FELA.

QUESTION: They found an attempt to preempt the field.

MR. HAYES: That is correct. And I think that that

attempt --

QUESTION: That just does not automatically follow from the passage of a law.

MR. HAYES: No, sir, it does not automatically follow, that is correct.

QUESTION: Where do you find that kind of intent here?

MR. HAYES: I think, Your Honor, we find that the Act has changed substantially in 1972 where you have Congress exercising its full admiralty powers in both maritime and in contract. You find that evidence because what Congress has done is it has not limited the remedy as it had been limited prior to 1972 to injuries occurring upon the navigable waters of the United States. That is a situs-oriented test.

In addition, Congress in Section 5 said both before and after 1972 the remedy is exclusive and significantly in 1972 Congress eliminated the only language that had ever existed in the Longshoremen's Act that seemed to permit the States to operate.

QUESTION: Well, Gilmore and Black used the elimination of that language just to prove exactly the opposite.

MR. HAYES: Yes, sir, I understand that they do and I understand that the proviso, however, I think, and I believe the United States reads it differently in this case as well. The proposition though, I think, is equally consistent -- the

elimination of the proviso is equally consistent with the notion that Congress intended to preempt State law because if the proviso remains --

QUESTION: Well, that is a considerable retreat from saying that it proves it.

MR. HAYES: Yes, sir, I am simply responding to the point that you ascribe to Professors Gilmore and Black and would simply say that I think that it is more likely and is a better reading of the elimination of the proviso to say that what that indicates is that Congress is now coming on land with the longshoremen's remedy in 1972. And if it leaves the proviso in place it is coming on land with a remedy where the States under this Court's decision in Nacirema and in many decisions before had been viewed as competent to operate. So if it comes on land with a proviso I think it is plainly creating a concurrent remedy. But it doesn't come on land with a proviso, it eliminates the proviso. And at the same time it expands the coverage of the Act in such a way to indicate that it is exercising both its admiralty power in tort and in contract and it is doing it in an area where uniformity is the law. And I think that the congressional intent to preempt the field is demonstrated by the statutory language alone.

QUESTION: Well, if Congress intended that can you suggest any reason why they didn't say it more clearly or say

it at all?

MR. HAYES: Well, Your Honor, I think that they were probably relying upon the decisions of this Court which had previously held Section 5 to be exclusive in a situation where the remedy applies and it acts against that background just as the Court found in Parker that Congress in enacting the statute in 1927 was acting against the background of the Jensen Line without examining the validity of the Jensen line as such.

Similarly here, even in Davis which is the very case upon which appellees rely to create the doctrine of concurrent jurisdiction, you have this Court saying that of course if Federal coverage were clear the Federal remedy would be exclusive. And I think that in that context Section 5 and the elimination of the State law provides that along with the affirmative expansion of jurisdiction which this Court has already recognized in both Northeast Terminals and in Pfeiffer manifests a congressional intent to occupy the field.

QUESTION: The reasoning in Davis, that if Federal jurisdiction were clear the remedy would be exclusive, did that rely on the notion as in Jensen where you have got admiralty jurisdiction it has got to be a Federal remedy or did it rely on the notion that Congress intended it to be exclusive?

MR. HAYES: Your Honor, it is not clear. They simply cite the section 5 but I think either --

QUESTION: After the Calbeck decision you certainly have Section 5 still reading -- then reading as it still reads and it was then assumed there was an area of overlap.

MR. HAYES: Well, Your Honor, I don't think -- I agree that it was assumed that there was but I don't think either Calbeck or Davis compel that result. First of all, Calbeck by its own terms says it wasn't addressing the question of Section 5. It had no need to, because you were having a claiming of the Federal remedy.

Secondly, Calbeck to the extent that it is read as creating concurrent jurisdiction depends upon the proviso and the continued viability of the maritime exception which prior to Calbeck had been read as being embodied within the proviso. In 1972, the proviso goes and I submit with it any notion that Calbeck supports concurrent jurisdiction.

In addition, Calbeck was modified in another way in 1972 because the holding in Calbeck was that if you are injured upon the navigable waters of the United States that you have a Federal remedy. In 1972 Congress I think has made a claim that that even is not necessarily true because you have to also be engaged in maritime activity or meet the status test. And I appreciate that at some point you may run into the kind of situation where the States are ousted and if it is not maritime activity that this Court may have to resolve that question. But it is surely not presented here. So Calbeck

itself was substantially modified in 1972, both as to its affirmative ground and as to the questions that it must answer.

We think that the totality of the circumstances evidenced in the language of the statute in addition to the legislative history manifests congressional intent to adopt a uniform system which a system of concurrent jurisdiction simply is not and cannot be. Indeed a system of concurrent jurisdiction creates the very kind of problem that Congress addressed here, because as we have already noted there is some limit to the ability of the States to provide the remedy. Thus, if we take a shipbuilder who spends part of his time in the shops, upon the way, upon the land if you will at Sun Ship, and part of his day working in a drydock or in a vessel floating in the navigable waters of the United States, if he is injured seaward of the Jensen line concurrent jurisdiction is plainly not available to him. Only the employee injured on land has two remedies. We submit that there was no concurrent jurisdiction really before 1972 and thus in order to say that the shipbuilder or the ship repairman who moves both onto and off of the navigable waters if by fortuitous circumstances he is injured on land now has two remedies, that that also runs counter to the congressional intent providing uniform remedy because it provides a disparate remedy and there is absolutely no indication in the legislative history or the statute that Congress intended to leave the employee injured upon land in

a better situation than the maritime worker injured upon the water.

In addition, the other anomaly that might result if this Court to were hold that a system of concurrent jurisdiction exists is that a worker who received an award under a State statute which makes a State remedy exclusive of every other remedy, for example Texas which is the statute that this Court dealt with in Magnolia Power, may be barred by operation of a full faith and credit clause of 28 U.S.C. 1738 from recovering his longshoremen's remedy. And if the Texas remedy, as Justice Keith so plainly pointed out in his dissent in the Johnson case is a remedy that is a lesser remedy, it does not provide the claimant with the kind of recovery that Congress provided under the Longshoremen's Act, that result is plainly anomalous and contrary to congressional purpose.

There can be no doubt that the congressional remedy is complete, it covers every aspect of the relationship between the employer and the employee once an injury triggers its application.

The terms embody a legislative judgment concerning the rights and liabilities of employers and it was that judgment which Congress has made and the States under the circumstances are not free to modify or interfere with, even complement or adjust the congressional judgment as to those rights and liabilities.

This actually makes a great deal of sense when you think about the problems that the two legislatures, the Pennsylvania legisature and the Congress, are facing. Pennsylvania's Act was a statute of general application and applies to all employment situations in the Commonwealth, while the Longshoremen's Act is a special statute dealing with special occupations and embodying Congress' judgment about how such injuries should be compensated. And this is an area in which Congress has been found particularly competent to operate and where it does affirmatively operate, uniform effect is given to its statutory enactment.

Pennsylvania, on the other hand, its interest here in compensating maritime workers is no different than its interest in compensating employees generally. It has no special interest in this case and, indeed, the Workmen's Compensation Appeal Board advised this Court through its clerk when asked whether it wanted to submit a motion to affirm or dismiss under Rule 16 that Pennsylvania had no interest adverse to that of the appellant, no interest adverse to that of Sun Ship.

So this is not a situation where you have a State here claiming some special interest or right which again distinguishes the situation from Askew.

Finally, the Acts when put together and as you look at them from provision to provision there are plain conflicts.

Because the workmen's compensation statute is and represents an entire balancing of the rights and remedies and liabilities and obligations of the parties you cannot really effectively start to look only at a specific conflict and say, well, because of that specific conflict Pennsylvania is ousted here but the rest of its remedy is available provided there is no specific conflict. There is a specific conflict right here in the disfigurements that are at issue here. Pennsylvania applies different standards for recovery. Pennsylvania provides a remedy for disfigurement to different parts of the body.

Now, admittedly Pennsylvania's Act might have provided a higher recovery. None of the claimants here of course received more than the remedy provided under the Federal statute which has but a single standard for recovery and moreover the Pennsylvania awards here were reduced by counsel fees. That is not how the Longshoremen's Act worked, in contested cases the counsel fee is an add-on, an additional payment by the employer.

So in summary, we have a total occupation of the field and we think an express intent that that Federal remedy will operate exclusively. It is a complete remedy and it actually conflicts in many respects not just in the area of disfigurement but actually in compensation, treatment of occupational disease, definitions of injury, scheduled losses,

limitation periods, notice of injury provisions, they are all different.

And in that situation we think that the Court should give full effect to the congressional mandate and the congressional remedy by holding that Pennsylvania may not provide a remedy to injured maritime workers whose claims fall under the Longshoremen's Act.

MR. CHIEF JUSTICE BURGER: Mr. Lurie.

ORAL ARGUMENT OF JOSEPH LURIE, ESQ.,

ON BEHALF OF THE APPELLEES

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

The Workmen's Compensation Act is not administered by any State, it is not administered by the Federal Government, the longshoremen harbor workers compensation. Every State's workmen's compensation Act, perhaps except Ohio which they have a State system, as well as the Longshoremen Harbor Workers Act is administered by the employer. The person is hurt, the employer has a duty to file notice of injury under Pennsylvania, under the Federal law and starts to make payments. It is the employer at the outset who makes that election.

A fraction -- I think the National Safety Council and the U.S. Department of Labor Bureau of Labor Standards reports there are some 2 million time loss accident cases reported each year in the United States. And a fraction of

them result in contested workmen's compensation claims. Most of the claims are paid as a matter of course because the employer recognizes their injury and they are paid. Very few are in dispute.

The significance of this of course is that the injured worker makes -- unless he consults a lawyer, unless something happens to his claim, unless he doesn't get compensation, unless compensation payments stop, does not consult a lawyer and therefore he himself exercise no choice.

This case as a matter of fact where Sun Ship comes in and tells us what a beneficent employer they are, when these five men were injured Sun Ship never reported this as a work-related injury. They say that under Federal law these men are covered. But Sun Ship never reported any of these five cases to the Deputy Commissioner's office so the Deputy Commissioner could advise people of their rights and start the Federal law working.

The men in this case consulted an attorney in our office and we filed claims under the State law, we filed claims under the State law because (1) State law in Pennsylvania on a disfigurement case takes about 6 to 8 weeks for an adjudication. Under Federal, it is between 18 months and two years because we go through the informal proceedings before the Deputy Commissioner determines the case is settled and if it is not settled it then goes to an administrative law

judge and we wait for the full hearing and findings of fact and conclusions of law and the testimony is taken and the average has been somewhere between 18 months and 2 years for a hearing. And of course in these cases the awards were somewhere between $500 and maybe $1,500 per man but conceptually, because Pennsylvania has a higher limit in disfigurement cases, a smaller type of disfigurement is going to warrant more money than under Federal law where you have $3,500 as a maximum.

Now, it seems to me that this Court is bound by Davis, it is bound by Calbeck. In Davis the exact issue was presented. Davis was a person who was conceivably working on a barge in a navigable water in the State of Washington. As a result of an industrial injury, he fell into the river, the navigable water and died. when he applied for benefits under the State of Washington law the defense of the Federal Act was raised and there the Court in Davis recognizing the strong policy argument -- and the strong policy argument said, no, it is concurrent and overlapping jurisdiction. And the strong policy arguments there, which are the strong policy arguments in Calbeck and the strong policy arguments here, is that the Act is to be construed liberally to protect injured workers. And unless you have concurrent jurisdiction you are going to have the injured worker being adversely affected by uncertainty as to where he should go, you are going to have him adversely being affected by a long delay in getting his benefits, and

are you are going to have him adversely be affected by the expense in long court proceedings to determine what law applies. And I say this because of the fact that if we make either State law exclusive or Federal law exclusive what that means is that when a case suggests exclusivisity of either State law or Federal law the employer is going to raise that as a defense. And this is extremely crucial, especially in view of the '72 amendment which expanded coverage of the Longshoremen Harbor Workers Act. So we are going to have tangential situations where State courts of the maritime States, and I guess Mississippi Valley States and the States which effect navigable waters are going to be deciding Federal coverage of the Longshoremen Harbor Workers Act, because if the question of exclusivity -- if the Federal law holds that the Federal law is exclusive, then a State claim would be barred. The way it stands under concurrent jurisdiction, the States rule on their law, the Federal Government rules on its law. If a claimant decides to go both ways, which is of course a remote situation, but assuming a claimant decides, takes a Federal benefit, feels a State benefit is better for him, or vice versa, takes a State benefit and then comes in to the Federal court --

QUESTION: In this particular case, if he had come to you where would you have gone?

MR. LURIE: State.

QUESTION: So they probably didn't come to a lawyer.

MR. LURIE: No, they did come to a lawyer.

QUESTION: They didn't come to you.

MR. LURIE: They sure did.

Which one? The five plaintiffs came to me.

QUESTION: They came to you after, didn't they?

MR. LURIE: No, sir. What happened -- let me explain.

When these men were injured Sun Ship figured that because they had a facial scar and were unaware of the law that they would never file claims and that it would stay and it would go away. Therefore, Sun Ship, which was the administrator of the Longshoremen Harbor Workers Act as far as the claimants are concerned, were silent. They did not file the notice of compensation payable or the notice of injury with the Deputy Commissioner's office.

Now, just to back track a little, what happens is an employer is duty bound under the Act to file notice of injury with the Deputy Commissioner's office who is charged with Congress to administer the Longshoremen Harbor Workers Act, when they file that notice then the Deputy Commissioner's office sends a letter to the injured person telling them that they have a right under the Longshoremen Harbor Workers Act and contact us, establish relationship with our office and we will tell you how to get your rights.

Now, that didn't happen in this case, Sun Ship did

not file this notice. Later when these men had these scars they contacted our office and said, can I get paid for this facial disfigurement. As a lawyer I felt they could get paid under the Federal Act or the State Act since there was concurrent overlapping jurisdiction. And we proceeded under the State law because it was easier to get the benefits.

Absolutely no proceeding has ever been instituted by the shipyard in the Federal court to pay them -- in the Federal administration -- to pay them benefits.

QUESTION: They didn't get any benefits?

MR. LURIE: They got absolutely not one cent as a result of their injury from this employer.

QUESTION: Until today.

MR. LURIE: Even as of today we haven't. So that is why we are here, because what Sun Ship is saying -- it is not money, quite frankly, I think the -- Justice --

QUESTION: If it is not money, what is it?

MR. LURIE: Well, I think what we are talking about is -- in a short range it is money but in the long range it is rather the principle that there is going to be substantial delays and uncertainty if jurisdiction is exclusive. The Workmen's Compensation Act does not apply. For example, they raise the McCarton doctrine of full and complete concurrent jurisdiction. Now, that is not involved in my case, because in this case here these men have not accepted any benefits under

Federal law.

But most certainly workmen's compensation law is not a final judgment. For example, if an order is made by an administrative law judge in a Federal workmen's compensation case, that judgment could be modified under Section 22 or that order could be modified up to a year later.

QUESTION: But until it is, under Magnolia it is a final judgment, isn't it?

MR. LURIE: I don't really think it should work like that, because for example conversely the modification order under Pennsylvania could come ten years after the decision.

QUESTION: Under the Federal Act the modification could come only within one year, you say Pennsylvania could allow it to continue.

MR. LURIE: Right, that is the compensation benefits might be suspended and no benefits are paid. But the man has ten years in which to reopen the claim, so he could come in with new facts, etc. to review anywhere from 3 to 10 years after the judgment is final.

QUESTION: Well, that would be a flat overruling of Magnolia Petroleum, wouldn't it?

MR. LURIE: Well, I don't think -- what we are talking about is the way -- that may very well be but that is the way the workmen's compensation law works. We are not talking about final judgment, we are talking about the day to day workings

of the State and Federal workmen's compensation law.

QUESTION: But Magnolia Petroleum held that a workmen's compensation judgment was a final judgment for purposes of --

MR. LURIE: Well, I think in Calbeck the Court just ignored it. For example, if you read the last page of Calbeck --

QUESTION: What page are you referring to?

MR. LURIE: Page 131, they are talking about binding elections, they cite with approval at the bottom of page 131 and 132, or the Court cites their approval of three Federal Circuit Court cases which held that full faith and credit does not apply to orders of the workmen's compensation --

QUESTION: But Magnolia is a case from this Court, not from a Court of Appeals.

MR. LURIE: I am suggesting by inference, sir, that in Calbeck this Court has sort of ignored Magnolia and said, we don't think -- for example, one of the people in Calbeck did receive State benefits under an order. So consequently what this Court has done is cited with approval the three Circuit Court cases which appear there where the Circuit Courts ruled that obtaining a State order does not bar Federal coverage.

QUESTION: Do you think you could proceed under both Acts for the same injury at the same time?

MR. LURIE: Well, --

QUESTION: Could you get an award here in Pennsylvania and get attorney's fees under the Federal Act?

MR. LURIE: I think as a practical matter I agree that you can and I agree that you should. I think a claimant if there is a more liberal Act -- this man has given up his health and his life for his employer and he should be able to take advantage of the most liberal Act.

QUESTION: So that --

MR. LURIE: And as long as there are set-offs I think he should go whichever way he goes and that he shouldn't be hooked with the uncertainty there of going to a lawyer who did advise him of what were the correct benefits or choosing himself to proceed on benefits without having competent counsel. So I think --

QUESTION: Suppose he applies under the Pennsylvania law and is paid.

MR. LURIE: Right.

QUESTION: And he finds out when he is getting paid that his attorney's fees come out. Now, can he file under the Federal Act and just --

MR. LURIE: No, he couldn't get it.

QUESTION: Why not; why not?

MR. LURIE: Because under the Federal law the cases have held that attorney's fees could not be paid for issues of law which simply involve attorney's fees. The Benefits

Review Board has held that if the only issue is an attorney's fee, we are not going to pay attorney's fees if that is the only issue.

I think, for example, I see nothing wrong if this man made $1,000 a week, for example, and was stuck with -- and Pennsylvania or some other State pays less than the $300-some-odd which is the State maximum, for example Pennsylvania pays $242, and then realize that if he went to Federal he could get $376 I think is the maximum or somewhere thereabout, and then was indeed covered under Calbeck and Davis, then I think that most certainly he should be entitled to collect under Federal and also perhaps collect counsel fees in that case, yes.

QUESTION: But only from one?

MR. LURIE: Well, he only gets paid from one person anyway, i.e. his employer. If the Federal Government does not pay benefits, the State of Pennsylvania doesn't pay benefits. So he gets the benefits from his employer and he is not getting paid twice.

QUESTION: But the employer has to litigate twice?

MR. LURIE: Well, not usually, because -- what I am saying is that if this Court comes down in its decision the way we hope it will, the employer will certainly get the message that since there is full concurrent jurisdiction and since he has been paid under State, they put him voluntarily under State,

and if there is full concurrent jurisdiction, then the employer isn't going to litigate twice, he is going to say, well, since there -- or an honest and intelligent employer is going to say since there is full concurrent jurisdiction my injured worker should get the maximum benefit under whichever jurisdiction applies, because otherwise you are going to have the employer saying well, I will put this guy under Pennsylvania because the maximum is less than the Federal. I think everyone would agree that the Workmen's Compensation Acts are indeed administered by the employer. There can't be any other way when you have 2 million people sustaining time lost injuries in the United States every year.

I would just like to address myself to a couple of points.

Sun Ship argues change of the -- by the 1972 law and the only change that we could find of any significance is the deletion in Section 3(a) of that provision that said if recovery may not validly be provided by State law. And the five States or so which have considered this issue plus the Fourth Circuit have agreed with the interpretation that this Court in Calbeck in eliminating that language. And by eliminating that language, perhaps it wasn't as clear what the Court meant. The dissenting opinion said that Calbeck eliminated this problem of exclusivicity because what it did is say that there is an area, there is a solid wall here and

if the State law applies then you can't have a Federal right. And what Calbeck did is it just had the overlap concept out of Davis, and said well, if there is a Federal law, if there is a State law, then we have concurrent jurisdiction. Now, the Congress did what Calbeck did, it eliminated it. And I don't see how the appellee could argue -- the appellant could argue that by eliminating this it made jurisdiction exclusive. Because the only area in the law where we could or would deal with this question of jurisdiction is under the situs provision of Section 3(a). And in that what they did was Congress agreed with Calbeck. Now, Mr. Hayes said, well, the Court didn't say what they really said in Calbeck. Well, sometimes it is hard to read opinions of the Supreme Court. But most certainly the dissent said that it did it, it took it out. Larsen said it took it out. Gilmore-Black said it took it out.

So to the extent that the congressmen may not have read the actual decision, they read what others said about it and what others said about it was that we have full concurrent jurisdiction because we have eliminated the State and Federal barrier. And that is what I think happened.

They argue that Section 5 is exclusive and therefore precludes a workmen's compensation remedy other than the Federal remedy. Well, all States have this Section 5. And Section 5 was the price the injured worker paid for workmen's compensation, is that he gave up his common law action against

his employer to receive benefits. As a matter of fact these five men could have brought common law actions against Sun Ship if they wanted to, because if we read the exclusivicity part of Section 5(a) it says it is exclusive HLS but they say except if an employer fails to secure payment of compensation as required by this chapter, which Sun Ship did in this case, an injured employee or his legal representative in case death results from the injury may elect to claim compensation under this chapter or what are they giving us, what are they giving the injured worker they took away or to maintain an action in law or admiralty for damages on account of such injury or death.

So that is what Congress has taken away by exclusivity. It is that right to maintain that action in law or the action in admiralty. They made no thought nor mention of State workmen's compensation law and that is why in Davis the Court said it doesn't apply, 5(a) doesn't apply; and, indeed, it does not apply.

The issue is framed by the appellant in its brief as it appears on page 6. It is a very simple issue which this Court amply answered in the Askew case. Askew was a unanimous opinion by the Court and starting on page 37 and continuing is an extremely eloquent and intelligent discussion deciding the issue in this case.

And Sun Ship says the issue is whether the

Pennsylvania Workmen's Compensation Act is repugnant to the supremacy clause of the admiralty clause when it is applied to permit the exercise of jurisdiction by Pennsylvania over an area within coverage of the Longshoremen Harbor Workers Compensation Act.

And this was the exact issue in Askew. In Askew the issue was whether a State constitutionally may exercise its -- and I am reading from page 337 -- may exercise its police power respecting maritime activities concurrently with the Federal Government.

And there is a resounding answer, yes, it may.

And I pray that you will answer the question the same way.

QUESTION: Of course, compensation for injury wasn't involved there, was it?

MR. LURIE: The same exact issues were involved, whether --

QUESTION: How do you distinguish this case from -- how would you argue -- why is this different from employer's liability cases on covering the railroads? Workmen's compensation laws don't apply to railroad workers.

MR. LURIE: Well, this is a different Act entirely.

QUESTION: Well, of course it is a different Act but what is in it that is different from this. All the Court said was that was a comprehensive scheme to cover railroad

injuries.

MR. LURIE: Exactly.

QUESTION: Well?

MR. LURIE: Well, they are not saying that here.

QUESTION: That is the question here.

MR. LURIE: Well, what they did, they --

QUESTION: Is that what Congress intended to do? They certainly didn't say much different here than they did in the Employers Liability Act.

MR. LURIE: Well, I think they did. They said, for example, that you have -- here is your right, your remedy. At that time there was no -- workmen's compensation was unheard of and they wanted to --

QUESTION: At that time -- when? Employer's Liability?

MR. LURIE: Yes. At the time of the 19 --

QUESTION: Well, it had to get up here to get settled, in the Windfield case.

MR. LURIE: Well, that may very well be but what the Court did there is say you are going to -- the Legislative said you are going to apply Federal law, we don't care if you go to the State courts or the Federal courts. I think the law seemed to indicate and the Court's interpretation is that we are talking only about Federal law.

QUESTION: Well, that is right. They said a congressional statute providing a comprehensive scheme for

compensating work related injuries was covered by the Federal law, that is the exclusive remedy.

MR. LURIE: Right. Well, I don't think this Court has said that nor is there congressional intent that the same applies in this case.

QUESTION: I know that is your position, but that is the question here, whether -- you still haven't indicated to me why any evidence or reason to distinguish this case from the Windfield case.

MR. LURIE: Well, I would suggest that the history of Section 3(a) under the 1972 Act which I just mentioned is -- you could get no other interpretation that Congress in 1972 realized what Davis said, what Calbeck said and therefore eliminated from the Act language that would give State courts exclusive remedy where you have an injury which occurred within the twilight zone.

QUESTION: The Longshoremen's Act was originally just a gap-filler, wasn't it?

MR. LURIE: Well, I don't think -- the word -- it was supposed to cover injuries which occurred --

QUESTION: It is supposed to cover injuries that State compensation systems couldn't reach.

MR. LURIE: Exactly.

QUESTION: Well, certainly there was more of an intent than that in this case. I mean this statute wasn't motivated

solely by any such an intent, it couldn't have been.

MR. LURIE: The intent was the quid pro quo was to give up the common law action in return for which the jurisdictional limits of the Act were to be open.

QUESTION: In '72 they departed for the first time from the notion that the Longshoremen's Act applies only when a State Act may not.

MR. LURIE: They -- who, the Congress?

QUESTION: Yes.

MR. LURIE: Well, I would suggest that in 1962 this Court came down with Calbeck and Congress took no action from 1962 to 1972 to say, wait a minute, Supreme Court, you were wrong in Calbeck.

And certainly since 1972 State Supreme Courts have been coming down since 1976 interpreting Calbeck and the '72 amendments to mean what the appellees say they mean in this case, and Congress has again remained silent.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hayes? You have just one minute left.

REBUTTAL ARGUMENT OF JEFFERY C. HAYES, ESQ.,

ON BEHALF OF THE APPELLANT

MR. HAYES: Again, I would just like to respond very briefly to what I think are irrelevant facts but nonetheless wholly inaccurately stated by counsel for appellee. The fact

of the matter is three of the claimants in this case, Messrs. Fields, Januzciewicz and Moore filed claims for compensation under the Longshoremen's Act. In point of facts the records of the U.S. Department of Labor will reveal that Sun Ship, then Sun Shipbuilding & Drydock Company, filed first reports of injury in the case of Mr. Fields and in the case of Mr. Moore and in the case of Mr. Moore long before he filed his Federal claim. And all of the Federal claims --

QUESTION: Is that in this record?

MR. HAYES: No, Your Honor, I am sorry it is inot in this record but I don't think the facts are relevant and in either event, I could not let the statements go uncorrected.

Secondly, with respect to the elimination of the proviso, whatever Calbeck meant or didn't mean Congress was absolutely clear in 1972, because it adverted specifically to the deletion of the proviso and whatever and whatever it thought it meant. And that is in the section by section review of the bill amendments.

Thank you.

QUESTION: Mr. Lurie stated that your client had failed to secure payments of compensation as required by the Federal law and that therefore his clients could have at their option pursued you at common law or at admiralty law. Is that correct, factually?

MR. HAYES: Securing a payment simply means making

provision for payment of award if compensation is payable. No compensation was payable under this Act, either voluntarily or pursuant to an award. Sun Ship has secured payment for all compensation claims through its self-insurance system and that is what the Section 5 reference means.

QUESTION: I see.

MR. CHIEF JUSTICE WARREN: Thank you, gentlemen. The case is submitted.

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