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Longshoremen and Harbor Workers' Compensation Act: Mutually Exclusive Remedies for Permanent Partial Disability - Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs, United States Department of Labor, et al._____U.S._____101 S,Ct. 509, 66 L.Ed.2d 446 (1980)

Stephen F. White

LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT: MUTUALLY EXCLUSIVE REMEDIES FOR PERMANENT PARTIAL DISABILITY

Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs, United States Department of Labor, et al., ___ U.S. ___, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980)

In this case,[1] brought under the Longshoremen and Harbor Workers' Compensation Act (LHWCA),[2] as extended to the District of Columbia by the District of Columbia Workmen's Compensation Act,[3] the Supreme Court finally settled the issue of whether a claimant with a permanent partial disability must be satisfied with the specific compensation scheduled for his injury, or may elect to seek a greater award based upon his lost wage-earning capacity under the provision established for "all other cases."[4] The decision in

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1. Potomac Elec. Pwr. Co. v. Dir., Off. of Wkrs' Comp. Progs., United States Dept. of Labor, *et al.*, ___ U.S. ___, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980). Decided December 15, 1980, by an eight to one vote. Opinion by Justice Stevens, dissenting opinion by Justice Blackmun.

2. 33 U.S.C. § 901–50 (1927), *as amended by* Act of Oct. 27, 1972, Pub. L. No. 92–576, 86 Stat. 1251, *et. seq.* (1972).

3. D.C. CODE ANN. § 36–501 to 36–504 (1973) applies the LHWCA to the District of Columbia. *See* Cardillo v. Liberty Mutual Co., 330 U.S. 469, 471 (1947).

4. Longshoremen and Harbor Workers' Compensation Act § 8, *as amended*, 33 U.S.C. § 908, sets forth four separate categories of disability, each with its own distinct formula for computing the amount of the award.

Compensation for permanent partial disability is provided for by scheduled awards under parts (1)–(20) of § § 8(c) and the provision for "all other cases," § § 8(c)(21). LHWCA Section 8 provides, in part, as follows:

> Compensation for disability shall be paid to the employee as follows:
>
> (a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.
>
> (b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or

this case signals the end of a recent trend[5] by the Benefits Review Board (BRB)[6] and United States Court of Appeals for the District of Columbia Circuit,[7] by which a permanent partially disabled claimant is allowed to seek a greater award based on lost wage-earning capacity under the provision for "all other cases,"[8] when the compensation specified in the schedule of awards[9] is proven inadequate to fairly compensate him for his future economic losses. By reversing the lower court's allowance of such an election of remedies, the Court reasserted Congress' intention to limit compensation to the stated award for injuries listed in the schedule.

I. THE FACTS

Respondent, Terry M. Cross, Jr., was working within the scope of his employment as a cable splicer for the Potomac Electric Power Company (PEPCO), on December 7, 1974, when he injured his left knee. Medical

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subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

. . .

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

. . .

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon . . . application of any party in interest.

. . .

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five year.

. . .

5. *See infra* note 62.

6. The Benefits Review Board is a three member commission created by Section 21 of the LHWCA, 33 U.S.C. § 921, to review decisions of the Administrative Law Judge in cases arising under the Act. Decisions by the Board are final unless appealed within sixty days of a final decision to the United States Court of Appeals for the circuit in which the injury occurred.

7. PEPCO v. Dir. Off. of Wkrs. Comp. Prog., 606 F.2d 1324 (D.C. Cir. 1979).

8. LHWCA § § 8(c)(21) *supra* note 4, establishes compensation awards on the basis of post-injury loss of wage-earning capacity.

9. LHWCA § § 8(c)(1)–(20) *supra* note 4.

testimony established that he had sustained a five to twenty percent permanent partial loss of the use of his leg.[10] Prior to the injury, Cross' annual earnings amounted to $21,959.38 including overtime pay of $8,543.30.[11] After his return to work on a light-duty status, Cross found that he was not allowed to work overtime, and was not granted the routine in-grade raises afforded to other cable-splicers. These developments resulted in a forty percent impairment of his earning capacity.[12]

Throughout the case, the Petitioner (PEPCO) argued that compensation due to Cross was limited by statute to that amount payable under Subsections 8(c)(2) and (19) of the LHWCA.[13] Under those sections of the Act, Petitioner would be strictly liable to award Cross amounts equal to two-thirds of his average weekly pre-injury wages for a maximum of 288 weeks, the exact duration to be proportionate to the percentage of loss of use of his leg.[14]

Respondent Cross asserted that an award provided under schedule Subsections 8(c)(2) and (19) would be disproportionately low to accomplish the remedial and humanitarian objectives of the Act.[15] Since he could prove a loss in wage-earning capacity resulting in economic damage far in excess of a schedule award,[16] Cross argued that he had the right to elect either the

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10. 101 S.Ct. at 511; *see also* 606 F.2d at 1326.

11. *Id.*

12. Cross' 1975 earnings amounted to $12,86.48. 101 S.Ct. at 511 n.2. After returning to work, Cross was unable to climb ladders or perform other strenuous chores normal to a cable-splicer's job, due to his injury. *See* 606 F.2d at 1325. While PEPCO continued to list Cross as a Class A cable splicer, he was given light work such as caring for warehouse equipment and inspecting trucks. *See* Cross v. PEPCO, 7 BRBS 10, 11 (1977).

13. *See supra* note 4.

14. Subsection 8(c)(2) provides maximum benefits of two-thirds the average weekly pre-injury wages for total loss of a leg, payable each week for 288 weeks. Subsection 8(c)(19) provides that the number of weeks' benefits payable for partial loss of a leg shall be proportionate to the percentage loss of the leg. Thus, Cross is entitled to receive two-thirds of his average weekly pre-injury wages for that portion of 288 weeks which is proportionate to the percentage loss of use of his leg. Since the case was decided below under § § 8(c)(21), the percentage of loss was not conclusively established, but medical testimony estimated it as being between five and twenty percent. *See* 101 S.Ct. at 511 n. 4.

15. *See* Cross v. PEPCO, 7 BRBS 10, 12 (1977).

16. Cross' average weekly wage was determined by the ALJ to be $332.48 per week. Utilizing § § 8(c)(2), (19) and the maximum loss of twenty percent, under the schedule Cross could receive at most, benefits of $332.48 x ⅔ x 288 x 20% = $12,767.23; the least he could receive under the schedule would be $332.48 x ⅔ x 288 x 5% = $3,191.81. 101 S.Ct. at 519 n. 2, 3 (Blackmun, J., dissenting). The ALJ below determined Cross' lost wage-earning capacity to be $130.13 per week. Benefits calcu-

scheduled award under Subsections 8(c)(2) and (19), or benefits under Subsection 8(c)(21), by which he could receive an amount equal to two-thirds of his lost wage-earning capacity,[17] each week, for the rest of his working life.[18]

The Administrative Law Judge (ALJ) adopted claimant's argument, determined his lost wage-earning capacity to amount to $130 per week,[19] and awarded Cross two-thirds of that amount, payable each week, for the remainder of his working life.[20] On subsequent appeals taken by PEPCO, the Benefits Review Board and Court of Appeals for the District of Columbia Circuit affirmed the decision of the ALJ,[21] whereupon, the Supreme Court granted PEPCO's Writ of Certiorari.[22]

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lated under § § 8(c)(21) amounted to $130.13 x ⅔ = $86.76 per week, or about $4,500 per year for the rest of his working life. 101 S.Ct. at 518–19 (Blackmun, J., dissenting).

In summation, Cross could expect to receive a total award of approximately $3,200 to $12,800 under the schedule, or $86.76 per week for the rest of his working life under the provision for "all other cases," which could easily exceed a total recovery of $100,000. 101 S.Ct. at 517 n. 25. Respondent Cross had much to gain by preserving his award under § § 8(c)(21).

17. "Wage-earning capacity" for purposes of § § 8(c)(21) is determined by § 8(h) of the Act. This amount is not necessarily based upon a claimant's actual post-injury earnings, but may be fixed at a reasonable amount, in the interest of justice, where the employee has no actual post-injury earnings, or the earnings are unreasonably high — not fairly representing his actual impaired wage-earning capacity. 33 U.S.C. § 908(h); *see also* 101 S.Ct. at 511 n. 5.

18. *See supra* note 16.

19. 101 S.Ct. at 512.

This figure was arrived at by determining the amount of the base pay increases that Cross was denied after the injury and the amount of overtime pay lost due to the injury. The latter amount was based on the ratio of overtime to base earnings for 1972, 1973 and 1974.

606 F.2d at 1326 n. 4.

20. Adopting the theory of election of remedies under § 8(c) and awarding benefits in accordance with § 8(c)(21).

21. 7 BRBS 10 (1977); 606 F.2d 1324 (D.C. Cir. 1979). Both the BRB and Court of Appeals for the D.C. Circuit determined that Cross had a right to seek benefits based on lost wage-earning capacity under § 8(c)(21). In both appeals, the reveiwing bodies gave deference to § 21(b) of the Act, 33 U.S.C. § 921(b), which provides, "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." Based upon this standard of review and a finding of an election of remedies between the schedule awards and § § 8(c)(21), the BRB and Court of Appeals both affirmed after finding the decision of the ALJ was supported by "substantial evidence." *See* 606 F.2d at 1326; 7 BRBS at 11. Therefore, a determination of Cross' actual precentage loss of use of his leg was unnecessary to compute damages. 101 S.Ct. at 511 n. 4.

22. No. 79–816, *cert. granted*, 48 U.S.L.W. 3535 (Feb. 19, 1980).

II. RESPONDENT'S ARGUMENT

Before the Supreme Court, Respondent rested his contention that Subsection 8(c)(21) provided an alternate remedial avenue to the scheduled awards upon three major premises. First, Respondent argued that under circumstances where the claimant can prove greater economic injury through lost wage-earning capacity than the amount he could recover under the scheduled benefits, limitation to the schedule as the exclusive formula for compensation is inconsistent with the humanitarian and remedial purposes for which the Act was adopted.[23] Such limitation does not follow the judicial mandate that such laws "are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, [sic] so as to avoid incongruous or harsh results."[24] In his dissenting opinion, Justice Blackmun elaborated on the harshness of a scheduled award which could yield Cross a total award of between $3,200 and $12,800,[25] compared to the award under Subsection 8(c)(21) of approximately $4,500 per year for as long as Cross continues to work.[26]

Respondent's second argument was that Subsection 2(10) of the Act[27] and the decision in *American Mutual Life Insurance Co. v. Jones*,[28] describe

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23. 101 S.Ct. at 512, *citing*, 606 F.2d at 1327–28.

24. 101 S.Ct. at 516 n. 22; 606 F.2d at 1327, *Citing* Voris v. Eikel, 346 U.S. 328, 333 (1953); Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. 408, 414 (1932). *See also* 101 S.Ct. at 518 (Blackmun, J., dissenting).

25. The actual amount depending upon the final determination of percentage of lost use of Cross' leg between five and twenty percent. *See supra* note 14.

26. *See supra* note 16. Justice Blackmun also indicated that limitation of remedy for permanent partial disability to the schedule award would lead to the anomalous result that Cross could collect greater benefits for a *temporary* partial disability under § 8(e) which would have provided two-thirds of his lost wage-earning capacity each week for a maximum of five years ($86 per week for five years), totalling $22,400 in benefits, vice the maximum scheduled benefits of $12,800. 101 S.Ct. at 521 n. 9.

27. LHWCA Section 2(10) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10).

28. American Mutual Life Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). *Jones* involved a claim by a sixty-three year old laborer, "barely above a moron" in intelligence, who lost the use of his right hand. The Court found he was not limited to a scheduled award for permanent partial disability after it determined that "disability" is an economic rather than a medical concept, requiring factors such as the claimant's age, his industrial history, and the availability of the type work he could perform to be taken into consideration. After weighing these facts, the court elevated his disability from permanent partial to permanent total disability, and awarded him compensation based on lost wage-earning capacity under § 8(a) of the Act.

The Court correctly distinguished *Jones* and any effect it may have on an election of remedies under § 8(c) by indicating the separate schemes provided for com-

"disability" as an economic, rather than a medical concept, thus tying the claimant's disability directly to his loss in wage-earning capacity.[29] This interpretation was central to Respondent's presumption that while Congress has conclusively established the existence of lost wage-earning capacity and mandated specific minimum awards under Subsections 8(c)(1)-(20),[30] claimants who elect to bear the burden of proving actual lost wage-earning capacity in excess of the scheduled awards, should be allowed to seek greater permanent partial disability compensation under the "all other cases" language of Subsection 8(c)(21).[31] To support this contention, Respondent cited what he saw as a consistent concurring interpretation by the Benefits Review Board.[32]

Finally, Respondent asserted that the recent trend in workman's compensation law is "away from the idea of exclusivity of scheduled benefits,"[33] and that a limitation to scheduled benefits would create a work disincentive. Permanent partially disabled workers who are unable to return to their jobs may be disinclined to accept lower-paying jobs in other employment, because such action would limit them to scheduled benefits. By remaining unemployed, they may seek higher compensation by pressing for a determination of permanent *total* disability which would pay them two-thirds of their average weekly wages for the rest of their lives.[34]

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puting benefits under each type of disability, thereby making the § 8(c) schedule irrelevant to a case taken out of § 8(c) and decided under § 8(a). *See* 101 S.Ct. at 514 n. 17; *see also* 606 F.2d at 1340 (MacKinnon, J., dissenting).

29. *See* 101 S. Ct. at 514 n. 17; 606 F.2d at 1328.

30. *See* Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 143–44 (2nd Cir.), *cert. denied*, 350 U.S. 913 (1955).

31. *See supra* note 4.

32. *See infra* note 62.

33. 101 S.Ct. at 515; 606 F.2d at 1328–29, *citing* 2 A. Larson, THE LAW OF WORKMEN'S COMPENSATION, § 58.20 at 10–212 to 10–214 (1976). The trend alluded to by Professor Larson in his treatise is based upon a study of state cases brought under divergent statutes. "[I]t can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive . . . " *Id.*

34. *See* LHWCA § 8(a) *supra* note 4. *See* 101 S.Ct. at 521 n. 9 (Blackmun, J., dissenting).

In Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357, 365 (1975), the BRB determined that a permanent partially disabled longshoreman, who was unable to return to his job because of his injury, but who made a meager living by selling watermelons and fish as a street vendor, should receive a seventy-five percent permanent partial disability as awarded by the ALJ under Section 8(c)(21), in lieu of a scheduled award. The Board found that to limit Mason to a scheduled award would be unjust

III. THE MERITS

In rejecting Respondent's arguments, and reversing in favor of PEPCO and an exclusive remedy under the scheduled awards, the Supreme Court relied on four bases of support. First, the construction of statutory remedies under the LHWCA does not support a separate remedy for permanent partial disability under Subsection 8(c)(21).[35] The Court emphasized that the "all other cases" language of Subsection 8(c)(21) refers only to those injuries causing permanent partial disability for which the schedule does not provide a specific award.[36] The plain meaning was that the subsection was to act as a catch-all for the numerous conceivable injuries that Congress could not foresee, and not to provide alternative relief for claimants who are disenchanted with the scheduled awards.[37] The Court noted that in the prefatory language to Section 8, Congress dictated that "Compensation for disability *shall* be paid to the employee as follows . . . [emphasis supplied]."[38] The Court did not read this mandate and the "all *other* cases" language of Subsection 8(c)(21) as authorizing an election of remedies.[39]

Secondly, the Court found support for its ruling in the legislative history of the LHWCA.[40] The main thrust of the Court's finding was based upon the holding of *Sokolowski v. Bank of America,*[41] which interpreted the same controversial provision in the New York Workman's Compensation Act of 1922, upon which the LHWCA was patterned.[42] In *Sokolowski,* the New York

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because "Were it not for the claimant's unaided efforts he could well be considered permanently totally disabled," and limitation to a scheduled award "would have the effect of dissuading efforts on the part of an injured claimant to rehabilitate himself," encouraging him instead, to remain unemployed and pursue greater compensation through a claim for permanent *total* disability. *See also Brandt, infra* note 62, at 701–02.

35. *See* 101 S.Ct. at 512–13.

36. In his dissenting opinion below, Judge MacKinnon noted that the schedule is concerned primarily with common industrial injuries to arms, hands, legs, etc. Other conceivable injuries were left by Congress to be compensated under the Section 8(c)(21) catch-all provision for "all *other* cases." Such injuries include mental disorders, hernias, heart attacks, and back injuries. "[T]he existence of two avenues of compensation does not necessarily mean that claimants have a choice between the two." 606 F.2d at 1332.

37. *See* Williams v. Donovan, *infra* note 58 at 138.

38. *See supra* note 4.

39. The Court noted that the "other cases" language appears twice in § § 8(c)(21). 101 S.Ct. at 512.

40. *See* 101 S.Ct. at 513 (Part II).

41. Sokolowski v. Bank of America, 261 N.Y. 57, 184 N.E. 492 (1933).

42. N.Y. SESS. LAWS 1922, c. 615, § 15(3).

"The schedule adopted by Congress in the LHWCA was substantially identical to the New York schedule of 1922. Congress selected the New York statute as the

Court of Appeals found the statute clear on its face, that "the phrase 'in all other cases' signifies that the provisions of the paragraph [Subsection 8(c)(21)] shall apply only in cases where the injuries received are not confined to a specific member or specific members."[43] In its reference to legislative history, the Court placed all its emphasis on the interpretation of the similar New York statute and literally disgarded a wealth of enlightening Congressional legislative history concerning the adoption and revision of the LHWCA itself. This history, which was discussed at length by Judge MacKinnon in his dissenting opinion of the circuit court's decision below,[44] exposed Congress' intention, through its construction of Section 8(c), to avoid costly and time-consuming determinations of injury awards in cases involving the most common industrial injuries. By scheduling awards in Subsections 8(c)(1)–(20), Congress created a conclusive presumption of the amount of benefits due,[45] while fitting "all *other* cases" in the conceivable realm of injuries, into the catch-all provision, Subsection 8(c)(21), by which awards would be determined on the basis of lost wage-earning capacity.[46] While the Court agreed that "the legislative history supported the view that the schedule and 'all other cases' categories were intended to be mutually exclusive," it relegated this strong support to notice in a single footnote.[47]

The Court also passed summarily over the support offered by Congressional debate of the proposed 1972 Amendments to the LHWCA.[48] The

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model for the LHWCA because that statute was considered one of the best workman's compensation laws of its time." 101 S.Ct. at 513 n. 13.

43. 261 N.Y. 57, 62, 184 N. E. 492, 494.

44. *See* 606 F.2d at 1329–40.

45. *See* Travelers Ins. Co. v. Cardillo, *supra* note 30, at 144.

46. *See supra* note 4.

47. 101 S.Ct. at 513 n. 11.

Although no "clear answer" could be found in the legislative history examined by Judge MacKinnon, it seems that legislative history rarely does give on-point answers to disputed issues over statutory construction. The Court does agree with Judge MacKinnon's finding that to the extent any conclusion can be drawn, the legislative history of the LHWCA "exhibits Congress' understanding that the 'other cases' provision is confined to disabilities based on injuries not mentioned in the schedule." 606 F.2d at 1341. It is questionable why the Court did not place more reliance upon these conclusions drawn from the legislative history which is usually the best means of retrospectively ascertaining Congressional intent.

48. The proposed amendment is discussed at length by both Judge MacKinnon in his dissent below, 606 F.2d at 1334–35, and by Chairman Smith in his lengthy dissent to the BRB's decision in Collins v. Todd Shipyards Corp., 9 BRBS 1015, 1026–36 (1979). The proposed amendment would have added the following paragraph to § § 8(c):

(23) With respect to any period after payments under paragraph (c) (1) through (c) (20) have terminated, compensation shall be paid as provided in subsections (a)

proposed amendments would have recognized the exclusivity of the scheduled provisions and Subsection 8(c)(21), but would have allowed claimants to seek additional compensation based upon lost wage-earning capacity at the conclusion of benefits under a scheduled award.[49] Such an amendment to the LHWCA would have been similar in scope and effect to amendments adopted by Congress to the Federal Employees' Compensation Act (FECA) in 1966.[50] The latter amendment provided for "compensation based on lost wage-earning capacity after the scheduled award had been paid out."[51] While this change was adopted by Congress for FECA in 1966, its passage was refused for the LHWCA in 1972. As a non-federal worker, Respondent Cross was limited to the scheduled awards of the LHWCA.[52] Once again, in a single footnote, the Court dismissed the import of the proposed 1972 amendment as having only "marginal relevance," since it would have authorized cumula-

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and (b) of this section if the disability is total, or, if the disability is partial, 66⅔ per centum of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment.

S. 2318 and H.R. 12006, 92d CONG., 2d SESS. § 7 (1972). During Senate Hearings, one commentator stated:

> Section 8(c)(21) of the Act, commonly referred to as the "other cases" provision, provides for benefit payments at two thirds of the employee's average weekly wage prior to the occurrence, but not in excess of the maximum rate, for disability which does not come within the schedule provisions of the Act (Section 8(c)(1) through 8(c)(20)), but which impairs an employee's earning capacity. The intent of the proposed amendment is to apply this concept to all schedule award cases after the expiration of any such award.

Proposed Amendments to the LHWCA: Hearings on S. 2318 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d CONG., 2d SESS. 183–84 (1972) (statement of Ralph Hartman).

49. *Id.*

50. 5 U.S.C. § 8101 *et. seq.* (1916), *as amended by* Act of Sept. 6, 1966, Pub. L. No. 89–554, 80 Stat. 536.

5 U.S.C. § 8107 provides a schedule of awards similar to that of 33 U.S.C. § 908(c)(1)–(20). 5 U.S.C. § 8106 provides a continuance of benefits for permanent partial disability beyond the scheduled period, based upon lost wage-earning capacity.

The FECA employs a schedule of awards which "conform to the one contained in the Longshoreman's Act." 606 F.2d at 1334, *citing* 95 CONG. REC. 13607 (1949) (remarks of Sen. Douglas). *Compare,* 5 U.S.C. § 8107 with LHWCA § § 8(c)(1)–(20). The FECA is likewise supervised by the same Senate and House Committees that have jurisdiction over the LHWCA. 606 F.2d at 1335, *citing* S. REP. NO. 1285, 89th CONG., 2d SESS. 3 (1966). The 1966 FECA amendment, like the proposed 1972 LHWCA amendment, recognized that a permanent partially disabled worker "receives no further compensation after his scheduled award is exhausted." *Id.*

51. 606 F.2d at 1336.

52. *Id.*

tive, rather than alternative remedies.[53] This reasoning, however, ingnored the discussion of the commentators in Senate Hearings.[54] and the language of the House Report,[55] which recognized the exclusivity of the scheduled benefits and those for "all other cases," and which implied Congressional adoption of a similar interpretation.[56] Satisfied with resting its major support by the legislative history on the parallel between *Sokolowski's* interpretation of the New York statute and Section 8(c) of the LHWCA, the Court allowed strong arguments based on federal legislative history to die impotently in two footnotes.[57]

The third prong of the Court's support lay in the weight of judicial authority. This weight came in the form of a single case, *Williams v. Donovan;*[58] a case on "all fours" factually with the present case.[59] In *Williams,* a permanent partially disabled claimant with a knee injury, who sought benefits based on lost wage-earning capacity, was limited to a scheduled award, because the "form and language of the Act dictate that the wage-earning capacity test be applied only in those 'other cases' not listed in

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53. 101 S.Ct. at 513 n. 14. That the proposed amendment would have offered a cumulative rather than alternative remedy is actually immaterial. It was the understanding by the legislature that the existing statute did not provide an election of remedies, as evidenced by the debate over the proposed amendment, which was of importance.

54. *See* Hearings on S.2318, *supra* note 48 and *Collins, supra* note 48, at 1028–31.

55. *See* 606 F.2d at 1334 (MacKinnon, J., dissenting), *citing,* H.R. REP. NO. 92–1441, 92d CONG., 2d SESS. 18 (1972), U.S. CODE CONG. & ADMIN. NEWS 1972, pp. 4698, 4715.

56. *See Collins supra* note 48, at 1033 (Smith, chairman, dissenting in part).

57. *See supra* notes 47, 53.

58. Williams v. Donovan, 234 F.Supp. 135 (E.D.La. 1964); *aff'd* (one paragraph *per curium),* 367 F.2d 825 (5th Cir. 1966), *cert. denied,* 386 U.S. 977 (1967).

A second case in which the court impliedly recognized the mutual exclusivity of scheduled awards, and those for "all other cases" is Flamm v. Hughes, 329 F.2d 378 (2nd Cir. 1964). *Flamm* involved a challenge to the constitutionality of the statutory scheme of § 8(c) of the LHWCA on grounds of "unconstitutional distinctions among various types of injuries." *Id* at 380. It was argued that Section 8(c) discriminated against those workers with scheduled injuries who were limited to scheduled awards, while those with unscheduled injuries often received disproportionate awards under the §§ 8(c)(21) provision for "all other cases," based on lost wage-earning capacity. While the court found the separate compensatory schemes of § 8(c) constitutional, the "unarticulated predicate" for its decision was that the two schemes were mutually exclusive as between each other; otherwise the issue would never have been raised." 606 F.2d at 1337; *see also* 101 S.Ct. at 514 n. 16.

59. 606 F.2d at 1336 (MacKinnon, J., dissenting). In reaching its finding of an election of remedies, the majority below rejected the reasoning of *Williams,* which found no election of remedies under § 8(c) without discussing why. *Id.*

the schedule."[60] In the instant case, the Supreme Court endorsed the *Williams* view, and stated the irony of the notion that the LHWCA could stand for over fifty years before the Court of Appeals below decided that it doesn't mean what it says.[61] Respondent attempted to discredit the *Williams* decision by citing several cases decided by the Benefits Review Board since 1975, which reject Williams and favor an election of remedies for permanent partial disability.[62] The Court aptly distinguished three of these cases,[63] but rather than continuing with a thorough analysis of the facts of the remainder of the cases, which certainly would have revealed their distinguishing characteristics,[64] the Court simply discontinued any further analysis of the

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60. 234 F.Supp. at 139.

61. 101 S.Ct. at 515; *see also* 606 F.2d at 1329, 1336.

62. *See* Collins v. Todd Shipyard Corp., 9 BRBS 1015 (1979); Brandt v. Avondale Shipyards, 8 BRBS 698 (1978); Dugger v. Jacksonville Shipyards, 8 BRBS 552 (1978); Richardson v. Perna & Cantrell, Inc., 6 BRBS 588 (1977); Longo v. Universal Terminal & Stevedoring Corp., 2 BRBS 357 (1975); Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357 (1975).

63. The Court correctly distinguished *Mason, supra* notes 34, 62; the first case in which the Benefits Review Board approved an election of remedies under § 8(c), and which is cited as authority for later decisions finding a similar election. *Mason* rejected the *Williams* decision, and wrongly based its finding on American Mutual Ins. Co. v. Jones, *supra* note 28, which did not address the issue of election of remedies under Section 8(c), but merely allowed a claimant with a scheduled permanent partial disability to remove his recovery from a scheduled award under §§ 8(c)(1), to an award based on lost wage-earning capacity for a permanent *total* disability under Section 8(a), by taking factors such as his age, skills, and availability of employment opportunities into consideration. The finding in *Jones* was not in any way inconsistent with the *Williams* holding of exclusivity of remedies under Section 8(c). 101 S.Ct. at 514 n. 17, *citing* Jacksonville Shipyards, Inc. v. Dugger, 587 F.2d 197, 198 (5th Cir. 1979).

The Court distinguished *Longo* and *Dugger, supra* note 62, as cases involving permanent *total* disability, thus rendering their comments regarding the election of remedies under § 8(c) dicta. 101 S.Ct. at 514 n. 18.

64. In *Richardson, supra* note 62, the BRB affirmed a decision by the ALJ which awarded the claimant compensation based on lost wage-earning capacity under §§ 8(c)(21) for permanent partial loss of claimant's arm. The appeal to the BRB challenged only the sufficiency of the evidence, and the claimant's limitation to scheduled benefits was not argued, nor did the Board express any reason in its opinion for allowing a recovery under §§ 8(c)(21). Presumably, the Board in *Richardson* followed the flawed reasoning of *Mason, supra* notes 34, 63, and accordingly should be limited to its own facts, or distinguished.

In *Brandt, supra* note 62, the BRB upheld an award under §§ 8(c)(21) for the claimant's knee injury which otherwise rated only a scheduled award. The Board rested its finding of an election of remedies on *Longo, Dugger, Richardson* and *Mason,* all of which have been shown to be distinguishable. *See supra* notes 62–64. In his dissent, Chairman Smith expressed his opinion that *Brandt* should have been limited to a scheduled award, noting that "All of the cases cited by the majority are disting-

cited cases by stating that "It should be noted that the Benefits Review Board is not a policy-making agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts."[65] While this notion has been previously articulated in the lower courts,[66] such an original statement by the Supreme Court is one that should not be made lightly in view of the potential value of the well-reasoned and scholarly opinions of the Benefits Review Board.[67] As long as the Court could have reached its conclusion by distinguishing the BRB cases cited by the Respondent, such an unnecessarily blanket statement may adversely affect future cases brought under the Act. In fact, among the federal circuit courts of appeals which have addressed the degree of deference to be accorded to BRB opinion on statutory interpretation, the circuits favoring deference equal those which have found the BRB to be a non-policymaking agency undeserving of deference.[68] This conflict

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uishable." 8 BRBS at 705. A further anomaly of the *Brandt* case was that the claimant actually earned more *after* his injury than before. In awarding compensation based on lost wage-earning capacity under § § 8(c)(21), the Board had to remand the case for an artificial determination of the claimant's lost wage-earning capacity "as it *may* extend into the future" under § 8(h). *See supra* note 17.

The Board's allowance of a remedy under § § 8(c)(21) in *Collins, supra* note 62, for an otherwise scheduled injury, was likewise based upon the distinguishable precedent of *Mason* and *Brandt*. In his dissent to *Collins*, Chairman Smith engaged in a lengthy examination of legislative history, the *Williams* holding, and distinguishable precedent to reach his opinion that Congress did not intend an election of remedies under § 8(c). *See supra* note 48.

65. 101 S.Ct. at 514 n. 18.

66. The Court found support in Hastings v. Earth Satellite Corp., 628 F.2d 85 (D.C. Cir.), *cert. denied*, ___ U.S. ___ (1980); and Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752 (7th Cir. 1979); both of which cite as authority Judge Friendly's opinion in Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48–49 (2nd Cir. 1976), *aff'd sub. nom.*, Northeast Marine Term. Co. v. Caputo, 432 U.S. 249 (1977).

67. The decision of the Court not to afford the BRB *any* deference, apparently overrules any apparent deference afforded to the Deputy Commissioner's (predecessor to the BRB) interpretation of LHWCA Section 20, concerning jurisdiction, in Cardillo v. Liberty Mutual Co., 330 U.S. 469, 474 (1947). "[T]he Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. [citation omitted]. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record." *Id.*

68. The First, Second, Third and Seventh Circuits are in accord with the findings of the Supreme Court as to the lack of deference to be accorded BRB decisions. *See* Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 269–70 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); 628 F.2d at 94 (emphasis supplied). The District of Columbia Circuit, therefore acknowledges deference to BRB statutory interpretations except as to the issue of retroactivity.

In Nacirema Operating Co. v. Oosting, 456 F.2d 956, 960 (4th Cir. 1972), the Fourth Circuit paid deference to the interpretation of LHWCA Section 33(e) by the Bureau of Employees' Compensation (predecessor to the BRB) and stated that "under

among the circuits, and especially the policy of the District of Columbia Circuit,[69] should have been carefully examined before the Court proclaimed its unnecessary conclusion on the issue of deference to BRB decisions. By statute,[70] the Board occupies a position similar to that of the federal district courts. Unless directly appealed to the appropriate circuit court of appeals, the Board's decisions are final.[71] By disregarding the opinions of the BRB,[72] the Court acted prematurely, terminating a valuable source of statutory interpretation by those most familiar with the administration of the LHWCA.[73]

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settled principles of law, we cannot lightly put aside the agency's consistent interpretation of the Act." *Id.* In his dissenting opinion to I.T.O. Corp. of Baltimore v. B.R.B., etc., 529 F.2d 1080, 1091–92 (4th Cir. 1975), *modified en banc,* 542 F.2d 903 (1976), *cert. denied,* 433 U.S. 908 (1977) (decided on other grounds), Judge Craven restated this standard of deference to statutory interpretation by the BRB.

The Fifth Circuit rejected the analysis of *Pittston, supra* note 166, and afforded deference to the BRB in Alabama Dry Dock and Shipbuilding Co. v. Kininess, 554 F.2d 176, 177 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977), stating that "While the issues of statutory construction presented on this appeal do not fall within the presumption of the Act, 33 U.S.C.A. § 920(a), [citation omitted], the resolution of those issues by the [BRB] is to be affirmed if a reasonable legal basis supports the Board's conclusions. *Id.*

Finally, the Ninth Circuit paid deference to the BRB's interpretation of 33 U.S.C. § 910(c). "And in reviewing rulings of the BRB, which affirmed the ALJ here, this court generally must defer to the Board both in its fact-finding capacity [citations omitted] and in its role as interpreter of the Act." Nat. Steel and Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1292 (9th Cir. 1979).

It should, therefore, be obvious that the deference afforded to the BRB's statutory interpretations was an issue of controversy between various circuits. The Court owed a more thorough explanation of its decision to deny the BRB deference than it afforded in a single footnote, especially where such a declaration was not necessary to deciding this case, and where the policy of deference to BRB decisions previously observed by the District of Columbia Circuit has thus been overruled.

69. *Id.*

70. *See supra* note 6.

71. *Id. See also* 606 F.2d at 1329 n. 33; Dir. Off. Wkrs. Comp. v. Eastern Coal Co., 561 F.2d 632, 649 (6th Cir. 1977).

72. BRB opinions have received greater recognition since the inception of their unofficial reporting in the BENEFITS REVIEW BOARD SERVICE published by Matthew Bender since 1975. *See* Northeast Marine Term. Co. v. Caputo, 432 U.S. 249, 254 n. 3 (1976).

73. *See* 613 F.2d at 980, *supra* note 68. Dir. Off. Wkrs. Comp. v. O'Keefe, 545 F.2d 337 (3rd Cir. 1976); *see also Pittston* (2nd Cir.) and *Tri-State* (7th Cir.), *supra* note 66.

However, the Fourth, Fifth, Ninth, and District of Columbia Circuits all endorsed a standard of great deference to statutory interpretations by the BRB.

In the District of Columbia Circuit, it is clear that statutory interpretation by the BRB *has* been entitled deference by the court:

> The Second Circuit in *Pittston* [citation omitted] suggested that decisions of the Benefits Review Board on the coverage of the LHWCA are not entitled to much

Respondent's reliance on the "recent trend in workman's compensation law away from the idea of exclusivity of scheduled benefits," was given great weight by the circuit court below.[74] However, the Supreme Court countervailed Respondents' argument by citing to the very treatise relied upon by Respondents for support.[75] The Court cited passages that describe the trend toward an election of remedies as neither uniform nor exactly on point with this type of permanent partial disability case.[76] The Court subtly indicated that the existence of such a state-law trend actually supported a literal reading of the federal law.[77] The fact that newer state laws alter the traditionally scheduled awards by permitting an election of remedies only tends to prove that the fifty-four year old LHWCA, without major revision since its adoption, still follows the traditional limitation of scheduled compensation.[78] Finally, the Court disposed of the trend argument by emphasizing that its judicial role was to ascertain Congressional intent in adopting the LHWCA in 1927, not to read changes into the Act because of pressure brought by recent state law policies.[79]

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deference from the courts [citation omitted]. At least in cases regarding the reach of the D.C. Act, we cannot agree. *It would be a poor use of judicial resources for this court to decide for itself whether in each occurring permutation of jurisdictional facts the case is sufficiently related to the District of Columbia to fall within the Act.* This we leave to the Board, which is more familiar with the range of factual situations. *We will not upset the Board's determinations lightly.*

Dir. Off. Wkrs. Comp. v. Nat. Van Lines, Inc., 613 F.2d 972, 980 (D.C. Cir. 1979), *cert. denied*, 100 S.Ct. 3049 (1980) (interpreting 33 U.S.C. § 920(a)) (emphasis supplied). While the Supreme Court cites *Hastings, supra* note 66, as authority for its finding of non-deference, a close reading of that case reveals that it was only concerning the issue of retroactive repeal of a statute (LHWCA § 14(m)), to which the BRB was not given deference.

We acknowledge the numerous Board decisions holding that the repeal of Section 14(m) is not retroactive [citation omitted]. Courts will defer to great extent to a policymaking agency's construction of legislation pertaining to that agency. The Benefits Review Board, however, is not a policymaking agency *in this sense*. The Board's opinion on the retroactivity issue thus is not entitled to our deference. The Board's view accordingly must fail in light of our analysis. [footnotes omitted].

74. *See supra* note 33.

75. *Id.*

76. *See* 101 S.Ct. at 515 n. 19–21, *citing*, 2 A. Larson *supra* note 33, at § 58.00, p. 10–164; § 58.13, p. 10–174; § 58.20, pp. 10–206 to 10–212; E. Blair, REFERENCE GUIDE TO WORKMEN'S COMPENSATION LAW § 11:07, p. 11–24 (1974); 11 W. Schneider, WORKMEN'S COMPENSATION § 2322(a), pp. 562–65 (1957).

77. *See* 101 S.Ct. at 515.

78. *Id.*

79. *Id.* "Assuming for argument the trend had some application here, it is no substitute for legislation. We do not owe our allegiance to the latest fad, but to Congressional intent. Thus whatever the current rage may be, it supplies no warrant for ignoring the language of the statute." 606 F.2d at 1341 (MacKinnon, J., dissenting).

Finally, the Court directed itself toward countering Respondent's assertion that the Act should be liberally construed in order to effectuate its remedial purposes and to avoid harsh or incongruous results.[80] The Court responded with a discussion of the basic theory of workman's compensation law.[81] While imposing strict liability upon employers, workman's compensation statutes do not completely restore injured workers to their previous economic condition. The Court reminded Respondents that the LHWCA represents a compromise between the competing interests of employers and injured workers,[82] and that because of the character of the legislation and the compelling language of the statute itself,[83] it is impossible to avoid all harsh or incongruous results.[84]

IV. CONCLUSION

In *Potomac Electric Power Company,* the Supreme Court restricted a seriously permanent partially disabled worker to scheduled benefits which will not fully compensate him for his lost wage-earning capacity. While the holding of the case may seem harsh, the Court must be applauded for not engaging in judicial legislation in order to find a "just" result by ignoring or rewriting statutory language.[85] However, the Court's unnecessary and poorly explained announcement of a policy of non-deference toward statutory interpretation by the Benefits Review Board will surely have a significant impact upon future litigation under the LHWCA. As a parting gesture of its own dissatisfaction with the award in this case under the contested statutory provision, the Court announced its sympathy for Cross' predicament, and

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80. *See supra* note 24.

81. *See* 101 S.Ct. at 516.

82. *Id.* at n. 24.

83. Baltimore & Philadelphia Steamboat Co. v. Norton, *supra* note 24 at 412–13, mandates that "Nothing less than compelling language" would justify a construction of the Act which would lead to unfair or incongruous results. In the present case, the Court found such compelling language in Section 8(c).

84. Professor Larson pointed out the trade-off Congress achieved between fair compensation and time-consuming litigation of compensation claims for common industrial injuries. "To avoid this protracted administrative task, the apparently cold-blooded system of putting average-price tags on arms, legs, eyes, and fingers has been devised." 2 A. Larson, THE LAW OF WORKMEN'S COMPENSATION, § 58.11 at 10–168.

85. In his dissenting opinion, Justice Blackmun seems to have attempted to justify a "fair" result by any means possible. He implied that as long as it was "possible to construe the statute to allow a claimant seeking compensation for permanent partial disability to choose between the schedule and the provisions of § 908(c)(21)," such a construction should be adopted "so as to avoid the amazingly incongruous result applied by the Court." 101 S.Ct. at 521.

sent a message to those who create the laws, that "It would obviously be sound policy for Congress to re-examine the schedule of permanent partial disability benefits more frequently than every half-century."[86] With such a suggestion, the writer must heartily concur.

Stephen F. White

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86. 101 S.Ct. at 517–18.