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Section 22 of the Longshoremen's and Harbor Workers' Compensation Act: When is an Award Not an Award? - Strachan Shipping Co. v. Hollis

SECTION 22 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: When Is An Award Not An Award?

Strachan Shipping Co. v. Hollis[1]

The Longshoremen's and Harbor Workers' Compensation Act[2] was enacted in 1927 "to give longshoremen a national workmen's compensation law to supply the void (in that respect) by decisions of the Supreme Court that longshoremen, because exclusively within admiralty jurisdiction, could not come within state compensation laws."[3] The statute is remedial in nature[4] and its dominant purpose is to benefit longshoremen.[5]

In construing the Act courts have repeatedly stated that it "should be liberally construed in favor of the employee, and every provision of the Act must be given effect to consistently attain the particular purpose of this remedial legislation."[6] Above and beyond this general policy of liberal construction in favor of the employee, the courts have also held that any doubts as to interpretation are to be resolved in favor of the employee.[7] These rulings recognize the basic premise that the Act was intended to benefit longshoremen, by requiring that where there are two or more equally possible interpretations it will be assumed that Congress intended that interpretation which supports the fundamental humanitarian purpose of the Act.

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1. 460 F.2d 1108 (5th Cir. 1972), *aff'g* 323 F. Supp. 1122 (S.D. Tex. 1970), *cert. denied,* 41 U.S.L.W. 3188 (U.S. Oct. 10, 1972), *rehearing denied,* 41 U.S.L.W. 3254 (U.S. Nov. 7, 1972).

2. Act of March 4, 1927, ch. 509, §§ 1 *et seq.*, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901 *et seq.* (1970) [hereinafter all citations are to the codified sections].

3. Bassett v. Massman Constr. Co., 120 F.2d 230, 233 (8th Cir. 1941). *See generally* Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917).

4. DeWald v. Baltimore & O.R.R., 71 F.2d 810 (4th Cir. 1934); Gibson v. Hughes, 192 F. Supp. 564 (S.D.N.Y. 1961).

5. Reed v. S.S. Yaka, 373 U.S. 410, 415 (1963); Ruggiero v. Rederiet for M/S Marion, 308 F. Supp. 798, 802 (S.D.N.Y. 1970). *See also* S. REP. No. 973, 69th Cong., 1st Sess. (1926); H.R. REP. No. 1190, 69th Cong., 1st Sess. (1926).

6. Hillcone S.S. Co. v. Pillsbury, 55 F. Supp. 916, 917 (S.D. Cal. 1944), *aff'd,* 147 F.2d 546 (9th Cir. 1945). *Accord,* Voris v. Eikel, 346 U.S. 328 (1953); Pillsbury v. United Eng'r Co., 342 U.S. 197 (1952); Nalco Chem. Corp. v. Shea, 419 F.2d 572 (5th Cir. 1969); Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), *cert. denied,* 394 U.S. 976 (1969); McClendon v. Charente S.S. Co., 348 F.2d 298 (5th Cir. 1965).

7. Vinson v. Einbinder, 307 F.2d 387 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 934 (1963); Friend v. Britton, 220 F.2d 820 (D.C. Cir.), *cert. denied,* 350 U.S. 836 (1955).

Despite these general rules of construction, the United States Court of Appeals for the Fifth Circuit recently resolved an ambiguity in the Act against an injured claimant in *Strachan Shipping Co. v. Hollis*.[8] There the claimant was injured in 1956 in the course of his employment as a longshoreman. His employer reported the injury to the Department of Labor Deputy Commissioner, and the insurer began voluntary payment of compensation. A month later the insurer stopped voluntary payments but did not contest liability. The claimant then sent a letter to the Deputy Commissioner making claim for the resumption of payments. Although this was not a formal claim, the Deputy Commissioner accepted the letter as a claim, and gave notice to the insurer and the claimant that a pre-hearing conference was to be set. A series of pre-hearing conferences followed and after the fifth such conference the claims examiner reported that the parties had agreed on the amount of compensation payable, and recommended that the insurer make further voluntary payments in the agreed amount. In September 1957 the insurer notified the Department of Labor that it had paid the recommended amount and had stopped further payment.

Medical care, provided by the employer and not affected by the compensation determination, continued off and on for almost ten years. When the employer then refused further medical care the first and only formal hearing was held before a Deputy Commissioner in 1970. At this time counsel for the insurer and the employer asserted two defenses: first, that the claimant's letter of 1956 did not constitute a claim; and second, that even if it did constitute a claim, the examiner's memo following the pre-hearing conference in 1957 fully adjudicated it and triggered the one year limitation period of section 22.[9] The Deputy Commissioner held that the letter constituted a sufficient informal claim under section 13(a)[10] of the Act and that the claims ex-

8. 460 F.2d 1108 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3188 (U.S. Oct. 10, 1972), *rehearing denied*, 41 U.S.L.W. 3254 (U.S. Nov. 7, 1972).

9. 33 U.S.C. § 922 (1970). This section states in part:

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner, may at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

10. 33 U.S.C. § 913(a) (1970), which states:

The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to com-

aminer's recommendation did not affect the status of the pending claim, which was not fully adjudicated in the absence of a compensation order. He then awarded the claimant further compensation.

In the appeal to the district court that followed,[11] the court agreed that the letter constituted an adequate claim and that the claims examiner's memo was not a "compensation order." The court held, however, that the voluntary payments of September 1957 still constituted a "last payment" within the meaning of section 22 of the Act,[12] thereby barring the award which resulted from the formal hearing.

A divided three judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court decision. It found that the Department of Labor handled large numbers of compensation claims in the same way as it handled the claim in *Strachan,* that is, by encouraging voluntary payments and not disposing of complaints by final orders. The court spoke of the Commissioner's failure to terminate[13] cases and of the Department of Labor's apparent belief that the time limitations prescribed by Congress were too short. In its discussion it stressed the legislative intent in the Act to encourage voluntary payments and to discourage the utilization of formal adjudicatory proceedings. Thus, in the opinion of the court, it would be inequitable to encourage voluntary payments on the one hand while approving the Deputy Commissioner's refusal to terminate cases by means of a compensation order where voluntary payments are made. The court rejected arguments by the Deputy Commissioner and the claimant that such a decision was in conflict with the prohibitions on waiver and release by claimants stated in sections 15(b) and 16 of the Act.[14]

A dissent criticized this decision as setting aside "the agency interpretation of forty years."[15] In the view of the dissent, a longshore-

pensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

11. Strachan Shipping Co. v. Hollis, 323 F. Supp. 1122 (S.D. Tex. 1970).

12. 33 U.S.C. § 922 (1970).

13. 460 F.2d at 1115.

14. 33 U.S.C. § 915(b) (1970) states: "No agreement by an employee to waive his right to compensation under this chapter shall be valid."

33 U.S.C. § 916 (1970) states:

No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

15. 460 F.2d at 1117 (Ainsworth, C.J., concurring in part and dissenting in part).

man's timely filed claim under the Act remains pending until a final determination by a Deputy Commissioner under section 19(a),[16] and the provisions of section 22 precluding modification of awards not applied for within one year of the last payment apply only to cases where such a determination has been made by a Deputy Commissioner. Since no such determination had been made in this case, according to the dissent the limitation should not apply.

The essential issue in this case is the interpretation to be given under these circumstances to the clause in section 22 which states that modification of an award is precluded later than one year after the last payment *"whether or not a compensation order has been issued."* Since *Strachan* represents the first judicial attempt to interpret this clause in such a situation, it is necessary to look to how the rest of the Act, particularly related sections, have been interpreted, so that each portion of the Act may be construed in connection with the whole in order to harmonize its terms.[17]

Both the district court and the Fifth Circuit based their decisions on the assumption that the 1970 order by the Deputy Commissioner was a modification within the meaning of section 22 of the Act, subject to that section's one year limitation. Their discussion therefore was concerned chiefly with whether or not the insurer's last voluntary payment was a "last payment" within the meaning of the section.

This note will discuss first the validity of that assumption, that is, the issue of whether a claim remains pending until adjudicated by a Deputy Commissioner in compliance with section 19 of the Act,[18] or

16. 33 U.S.C. § 919(a) (1970), which states:

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

17. International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2d Cir.), *cert. denied,* 304 U.S. 565 (1938); Adreance v. Lorentzen, 60 N.Y.S.2d 834 (Sup. Ct., Special T., Queens Cty. 1946).

18. 33 U.S.C. § 919 (1970) states in part:

. . . .

(b) Within ten days after such claim is filed the deputy commissioner in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant) whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is

whether it is fully adjudicated when payment is made voluntarily in accordance with a pre-hearing conference. If the former is true, then the award by the Deputy Commissioner in 1970 was merely a final adjudication, not a modification, and therefore not subject to section 22; if the latter is true then section 22 might apply. Secondly, the note will discuss whether, if section 22 does apply, the last voluntary payment was a "last payment" within the meaning of that section.

I.

It has previously been held that a claim under the Act, once filed, remains pending until fully adjudicated by the Deputy Commissioner. In *Lumber Mutual Casualty Co. of New York v. Locke*[19] the claimant had received voluntary compensation payments for six months following an injury in October of 1927. Two months after the last voluntary payment, in June of 1928, he presented a claim for compensation. In September of 1928, following a conference with a claims examiner from the office of the Deputy Commissioner, he received a voluntary payment in "full settlement." After this payment the claims examiner notified both the claimant and insurer that the case had been closed "within the limitations provided by section 22 of the Act."[20] The claimant appeared before the Deputy Commissioner again in January of 1930 and was awarded further compensation. On appeal brought by the employer the Second Circuit affirmed and held that upon the filing of a claim the Deputy Commissioner had a duty to make an investigation and order a hearing if such action was requested by either party. If no hearing was ordered then the Deputy Commissioner was required to re-

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ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

. . . .

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

19. 60 F.2d 35 (2d Cir. 1932).

20. Act of March 4, 1927, ch. 509, § 22, 44 Stat. (vol. 2) 1437, was the provision in effect at the time of *Locke* and barred review of an order except within the term of the award and after the compensation order in respect of such award had become final.

ject the claim or make an award as provided in section 19(c) of the Act.[21]

According to the court it was clear that the Commissioner had made no award at the time the claims examiner arranged for the settlement payment by the carrier. "Not only had Willard no power to make an award, which only the Deputy Commissioner could make, but no accord and satisfaction between the parties was lawful when [sic] once the jurisdiction of the Commissioner had been invoked and the claim was pending before him."[22]

The facts in *Locke* are strikingly similar to those in *Strachan.* In both cases claims were filed following the cessation of voluntary payments, informal conferences were held resulting in further payments and additional compensation was later awarded by the Deputy Commissioner at a formal hearing. The difference between the two cases is that the time limitation provided in the earlier version of section 22 was more severe than the version in *Strachan,* and barred review if not applied for "during the term of [the] award."[23] According to the *Locke* court, since no order of a Deputy Commissioner was ever filed his action was not a review, but was instead the final adjudication of the original claim and thus not within section 22. The district court in *Strachan* was aware of *Locke* but stated that it did not teach that "a claim, informally disposed of with the Bureau's blessing, survives indefinitely."[24] *Locke* does hold, however, that even though some payment is made as a result of an informal conference, a claim, once filed, remains pending before the Deputy Commissioner until fully adjudicated with an award. How indefinite its survival is should depend on the actions of the Deputy Commissioner, not those of the employer paying compensation.

Four years after the *Locke* decision, the Third Circuit, in *American Mutual Liability Insurance Co. of Boston v. Lowe,*[25] reiterated the policy of *Locke* that a claim is not fully adjudicated in the absence of a final order complying with the statutory requirements of sections 19 and 21(a) of the Act.[26] The *Lowe* decision goes even further than

21. 33 U.S.C. § 919(c) (1970).
22. 60 F.2d at 37.
23. See note 20 *supra.*
24. 323 F. Supp. at 1125.
25. 85 F.2d 625 (3d Cir. 1936).
26. 33 U.S.C. §§ 919, 921(a) (1970). Section 921(a) states:
A compensation order shall become effective when filed in the office of the deputy commissioner as provided in Section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

the position advocated by the claimant and the Deputy Commissioner in *Strachan* on the question of how long a claim remains pending. There a formal hearing before the Deputy Commissioner was held, resulting in a memo recommending further payment. More than two years later the claimant applied for further compensation and a formal compensation order was issued. This formal order was upheld by the court on the ground that the memo resulting from the first formal hearing was not a compensation order because it did not meet the statutory requirements of section 19(e).[27] If the memo of a *formal* hearing in *Lowe* was not a final adjudication then it is difficult to see how the memo of an *informal conference* in the present case could be a final adjudication.

The district court in *Strachan* dismissed *Lowe,* saying that the court there indicated that if the 1934 amendment to section 22,[28] which inserted the one year period of limitations in place of the "term of the award" period, had been applied retroactively, then a different result would have been reached.[29] *Lowe* was decided after the 1934 amendment but filed before it was enacted. However, the district court in *Strachan* failed to note that the *Lowe* opinion implied that had the amendment been in force, a different result would be reached only "if we assume that the memorandum of May 3, 1932 was a final order."[30] The court in *Lowe* had already found that the memorandum was not a final order, and thus the amended limitation discussion has no bearing on the substantive finding that in the absence of an order the claim is still open.

That a claim remains pending absent a final order was reaffirmed in *Candado Stevedoring Corp. v. Willard.*[31] There the employer had made some voluntary payments to the employee under the Act. In 1940 the Deputy Commissioner entered an order awarding compensation to the employee "until disability shall have ceased or until otherwise ordered."[32] In 1944 the employer discontinued payment on the grounds that the claimant no longer suffered from the disability. The next month the employee filed a claim for further compensation, but an order awarding that compensation was not filed until 1949, five

27. 33 U.S.C. § 919(e) (1970).

28. Act of May 26, 1934, ch. 354, § 5, 48 Stat. 807.

29. 323 F. Supp. at 1125. The *Lowe* court stated that: "[T]he statute as amended gives no indication that it was to have a retroactive effect. Therefore it should not be so interpreted." American Mut. Liability Ins. Co. v. Lowe, 85 F.2d 625, 627 (3d Cir. 1936).

30. 85 F.2d at 627.

31. 91 F. Supp. 77 (E.D.N.Y. 1950).

32. *Id.* at 78.

years later. In upholding the Commissioner's action the court held that ". . . the jurisdiction of the Deputy Commissioner to review this case arose on the filing of the claim, and that such *jurisdiction* remained unaffected by the delay in holding hearings and making an award."[33]

This policy has also been followed in recent lower court cases which have dealt with the Deputy Commissioner's duty to act within a reasonable time after he has a claim filed before him[34] and the requirement that he hold hearings and make final adjudications.[35] It is clear, therefore, that if the *Strachan* decision is distinguishable from these cases, the pre-hearing conference is the element which provides that distinction.

II.

Pre-hearing conferences are provided for by an administrative regulation issued under the Act.[36] That regulation states expressly that a recommendation made by the person in charge of the conference "is not a 'decision' in the case and will not affect or prejudice the rights of any party or the further adjustment of the case, should the recommendation not be accepted by such parties and a later hearing be found necessary."[37] In *Fenney v. Willard*[38] the United States District Court for the District of Columbia adopted these very words in defining the nature of a pre-hearing conference. Though the facts in *Fenney v. Willard* are different from those of *Strachan,* one of the issues involved was whether or not a pre-hearing conference was a "hearing" within the meaning of the Act. The court held there that such a conference was not a "hearing" since the claims examiner who presided had no authority to make an award and, "[o]nly the Deputy Commissioner may make a determination of the claim."[39]

33. *Id.* at 80.

34. Nix v. O'Keefe, 255 F. Supp. 752 (N.D. Fla. 1966).

35. Atlantic & Gulf Stevedores, Inc. v. Donovan, 274 F.2d 794 (5th Cir. 1960).

36. 20 C.F.R. § 31.8 (1972).

37. *Id.*

38. 129 F. Supp. 414 (S.D.N.Y. 1955). In this case a claim was rejected on the basis of the fact that it had not been filed within one year of injury. Under 33 U.S.C. § 913(b) (1970) such a failure to file in time is not a bar unless objection is made on those grounds at the first hearing. In *Feeney* there was a pre-hearing conference and no objection was raised to the late filing until the first formal hearing. The claimant argued that the objection should have been raised at this pre-hearing conference.

39. 129 F. Supp. at 417. Earlier in the opinion, in deciding whether the pre-hearing conference should be considered a hearing, the court had said:

> The purpose of a hearing is to decide whether the claim should be rejected or an award made based upon it. The purpose of a prehearing conference is to dispose of controversies amicably where possible, to narrow issues and to simplify the subsequent methods of proof. While it is called upon notice, it

It thus appears from the regulations promulgated under the Act that a pre-hearing conference has no effect on the status of the claim, and that, in light of the cases discussed previously, the claim remains pending until a determination is made by the Deputy Commissioner. In fact, this is the manner in which the Department of Labor has interpreted and administered the Act for nearly forty years. According to a letter written by the Assistant Director of the Office of Longshoremen's and Harbor Workers' Compensation:

> Section 31.8 prescribes the procedure for pre-hearing agreements of the parties leading either to informal adjudications under § 01.11 of the Regulations and § 19(c) of the Act, or to interlocutory agreements upon recommendations which lead to voluntary payments by the carrier for a certain period without any such "informal adjudication," thus leaving the matter for later determination by the deputy commission under § 19 of the Act. To prevent any misunderstanding, § 31.15 of the Regulations expressly prescribes that "during the pendency of a compensation case" formal orders shall not be made "with respect to interlocutory matters" in the course of proceedings on a claim and § 31.8 further prescribes that the parties should be told that such agreements, although recommended, cannot be determinations or decisions of the deputy commissioner as required by § 19 of the Act.[40]

Thus the words of the regulation and the application of those words by both the judiciary and the administrative authorities point to one conclusion — that a pre-hearing conference has no effect on the pendency of a claim.

If the pre-hearing conference did not terminate the pendency of the claim in *Strachan,* then the only basis for concluding that it was no longer pending at the time of the 1970 award would be the proposition that the claimant's acceptance of the examiner's recommendations and the resulting payments constituted a settlement of the claim and a waiver of the right to any further compensation. Such an argument

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must be kept informal and not stenographically reported. The person in charge of the conference prepares, at its conclusion, a memorandum setting forth the results achieved, and he may make recommendations to the parties for the disposition of the controversy, but his recommendations do not amount to a decision and they will not affect or prejudice the rights of any party or the further adjustment of the case if they are not accepted.

129 F. Supp. at 416.

40. Letter from John E. Stocker, Assistant Director, Office of Longshoremen's and Harbor Workers' Compensation to Leavenworth Colby, Special Assistant to the Attorney General, Aug. 6, 1971, as quoted in Strachan Shipping Co. v. Hollis, 460 F.2d 1108, 1118 (5th Cir. 1972) (appendix to dissenting opinion).

is weak in light of sections 15(b) and 16 of the Act,[41] which expressly prohibit any waiver or release by an employee of his right to compensation. Both the *Locke*[42] and *Lowe*[43] cases discussed this issue of waiver as well as the issue of pendency. In *Locke* the claimant had received a voluntary payment in "full settlement" following a pre-hearing conference. The court held that under sections 15(b) and 16, no accord and satisfaction between the parties was lawful once the jurisdiction of the Commissioner had been invoked and the claim was pending before him.[44]

Agreed settlements are allowed in some cases notwithstanding sections 15(b) and 16, where the Deputy Commissioner determines that such a settlement is in the best interests of an injured employee entitled to compensation.[45] The procedures for this type of settlement, however, require that application be made in writing to the Deputy Commissioner.[46] If he determines that the proposed settlement is in the employee's best interests he must then send the proposal and a complete file of the case to the Bureau of Employee's Compensation with his detailed recommendations.[47] This procedure was not followed in *Strachan;* thus no argument can be made that the parties reached an agreed settlement under the Act.[48]

In *Lowe,*[49] the contention was made that the memorandum issued following a hearing by the Deputy Commissioner was formal approval

41. 33 U.S.C. §§ 915(b), 916 (1970).
42. 60 F.2d 35 (2d Cir. 1932).
43. 85 F.2d 625 (3d Cir. 1936).
44. 60 F.2d at 37.
45. 33 U.S.C. § 908(i) (1970); 20 C.F.R. § 31.26 (1972).
46. 20 C.F.R. § 31.26(b) (1972) states:
Application for approval of an agreed settlement under section 8(i) of the said act shall be made in writing to the commissioner by the parties in interest. The application shall set forth fully all facts necessary to disclose the status of the case and the reason for seeking approval of an agreed settlement under said section, as well as the specific terms of such agreed settlement, and shall be accompanied by a report of examination of the employee, if a recent report is not of record in the office of the deputy commissioner. Such application, including all supporting papers, shall be submitted in duplicate.
47. 20 C.F.R. § 31.26(c) (1972) states:
If the case is one coming within the purview of section 8(c)(21) or section 8(e) of said act, and the deputy commissioner should determine that the proposed agreed settlement according to such application is for the best interests of the injured employee, the deputy commissioner shall transmit to the Bureau a copy of the proposed agreed settlement, together with a statement of his recommendation to such effect. The deputy commissioner shall transmit to the Bureau his complete file in the case. All papers shall be sent by registered mail.
48. Both courts in *Strachan* rejected the argument, however, that barring the 1970 award would constitute a violation of these prohibitions on waiver and settlement.
49. 85 F.2d 625 (3d Cir. 1936).

of a settlement of a claim. The court there rejected this argument on the basis of the section 15(b) prohibition on waiver, stating that "this section prevents any private settlement of a claim between the employer and employee."[50]

It would seem, in the light of the *Locke* and *Lowe* cases, the nature of the pre-hearing conference, long standing agency policy and the prohibitions within the Act itself against waiver, that the claim in *Strachan* would remain pending until the 1970 hearing. This, however, is not how the court viewed the situation. In the opinion of the district court, "[i]t is unreasonable that the operation of this provision should be indefinitely suspended by the mere filing of a claim."[51] Such, however, has been the policy of the past, as is illustrated by the *Lowe* and *Candado* cases. In response to the argument that the order in question was merely the adjudication of the original claim the district court replied that "[h]owever it is labeled, what the Commissioner did in 1970 was the functional equivalent of a modification, and is therefore subject to the strictures of section 922."[52] Such reasoning would lead to the conclusion that although an order is in fact merely the delayed adjudication of a claim as required by the Act, if because some voluntary payments have been made in the interim the order happens to modify those voluntary payments, then this award is prohibited because it is the "functional equivalent" of something else, that is, a modification. In other words, the reasoning is that although strictly speaking such an order is permissible, and in fact required, it is barred because it accomplishes the same result as something that is barred. The court, nonetheless, applied section 22 and went on to hold that the compensation order issued in this case was barred by that part of section 22 precluding modification of an award not made within one year of the "last payment."

III.

Even if the premise that section 22 applies is accepted, it still must be determined whether or not the voluntary payment of September 1957 was a "last payment" within the meaning of that section. Both the district court and the court of appeals decisions in *Strachan* in finding that it was, stressed the self-executing nature of the Act. To support this principle the district court cited section 14(a)[53] and a

50. *Id.* at 628.

51. 323 F. Supp. at 1122, 1125.

52. *Id.* at 1125.

53. 33 U.S.C. § 914(a) (1970) states: "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

portion of *Flowers v. Travelers Insurance Co.*[54] In determining whether state or federal compensation laws should apply, the Fifth Circuit in *Flowers* had noted:

> Unlike some State compensation acts, the Longshoremen's Act is almost self-executing. Compensation benefits are payable and paid, medical care and attention furnished, generally without even the necessity of filing a formal claim, as such, almost universally without a formal hearing by the Deputy Commissioner, only in a few cases does the matter proceed to formal hearing and award and even more rare is the resort to the limited judicial review.[55]

The *Strachan* court failed to note, however, that this statement was made only to point out the necessity for compliance with pre-claim procedural provisions. Those in question concerned the filing by employers of reports of injuries in order to fulfill the self-executing nature of the Act. *Flowers* does indicate, as does section 14(a), that compensation under the Act ideally would be voluntary and in most cases is. If voluntariness were the sole rule, however, those sections pertaining to the filing, adjudication and review of claims would be unnecessary. The voluntary stage in *Strachan* was passed when the insurer stopped the original voluntary payments of compensation and the claim was filed. Upon the filing of the claim the procedures of section 19 should have then become effective, providing that if no hearing is ordered on the claim the Deputy Commissioner, "shall, by order, reject the claim or make an award in respect of the claim."[56] The district court in *Strachan* stated that "[u]nless it is compelled by clear authority, the limitations provisions of the statute should not be placed at war with its self-executing nature."[57] On the other hand, neither the limitations provision nor the self-executing nature of the Act should be placed at war with the rightful expectation of an employee to a full adjudication by the Deputy Commissioner of a timely filed claim as provided by section 19.

The district court also gave great weight to *Ocean Accident & Guarantee Corp. v. Lawson,*[58] where the section 22 limitation was held

54. 258 F.2d 220 (5th Cir. 1958), *cert. denied,* 359 U.S. 920 (1959). The claimant was injured while making repairs on a floating drydock. The court of appeals held that he was upon navigable waters and was engaged in a maritime employment and was therefore within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act and not the Texas Workers' Compensation Act.

55. 258 F.2d at 225.

56. 33 U.S.C. § 919 (1970).

57. 323 F. Supp. at 1125.

58. 135 F.2d 865 (5th Cir. 1943).

to apply to voluntary payments. There the insurer of the employer made voluntary payments to the injured employee and no claim was ever filed. The Deputy Commissioner, on his own, ordered a hearing three years after the last of these voluntary payments. The meaning of "last payment" was at issue in the case because section 13 prohibited the filing of a claim where a year had passed since the last voluntary payment.

In the opinion of the district court in *Strachan* the fact that no claim was filed in *Lawson* while one was filed in *Strachan* was a "difference rather than a distinction."[59] The opinion in *Lawson,* however, stressed very strongly the fact that no claim had been filed. The issue to which the court specifically addressed itself was "whether or not under Sections 914 and 922, Title 33, U.S.C.A., the Commissioner had the right to proceed with the claim, notwithstanding the fact that the claimant had failed to file a claim within one year as required by Section 913 of said Act."[60]

Without a claim having been filed in *Lawson* the Deputy Commissioner granted a compensation order more than a year after the cessation of voluntary payments. He justified the order on the basis of section 14(h)[61] of the Act, which allows the Deputy Commissioner in any case where payment is being made without an award, or where compensation payments have stopped, to take such action as is necessary to protect the rights of all parties. The court held that the Deputy Commissioner's action was invalid since the claimant had failed to file a claim and therefore had no rights to protect. If this is a difference rather than a distinction, it is a very large difference indeed.

Whether or not voluntary payments made after the filing of a claim trigger the section 22 limitation where the claim itself is never formally adjudicated depends primarily on the interpretation of the clause "whether or not a compensation order has been issued."[62] The court in *Strachan* interpreted it to mean any payment of compensation,

59. 323 F. Supp. at 1125.

60. 135 F.2d at 866.

61. 33 U.S.C. § 914(h) (1970) states:

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

62. See note 9 *supra.*

whether strictly voluntary payments (where no claim has ever been filed), voluntary payments made after the filing of a claim but without formal or informal adjudication, or payments pursuant to a formal compensation order. Such an interpretation, while seemingly valid if one looks solely at the bare words of the section, ceases to be convincing when considered in the light of past agency interpretation of this provision itself and the previously discussed interpretation of related sections by the courts. It would be more reasonable, in light of the detailed procedures outlined in section 19 for handling claims,[63] section 14(h),[64] and the reasoning in *Lawson*[65] to interpret the clause as being intended to cover, in addition to cases where formal compensation orders are issued, only those cases where the payments were strictly voluntary and no claim was ever filed. This is not to say, as does the dissent in *Strachan,*[66] that section 22 applies only to cases where a final determination has been made by the Deputy Commissioner — to do so *would* be to thwart the ideal of voluntariness. Rather, it is meant that section 22 applies: first, where no claim was filed and voluntary payments were made; and second, where a claim was filed and a compensation order issued. Such an interpretation would not "delete the limitation provisions from the statute" as feared by the district court in *Strachan,* and would encourage the deputy commissioner to terminate cases in compliance with section 19 of the Act. If the *Strachan* court's interpretation of the Act prevails, a reluctant insurer could make as few as one voluntary payment after a claim is filed and the section 22 period of limitations would begin to run. The employee would then have to file a new claim, one more voluntary payment could be made and the employee would have to start all over again. Such an interpretation would allow for stalling at best and harassment at worst. The narrower interpretation proposed here would be compatible with the ideal of voluntariness in cases where the injured employee is satisfied with the voluntary payments and therefore need never file a claim unless those payments are stopped or, due to a change in circumstance, become inadequate. It would also provide for certainty by limiting the time period during which a claimant who has had full adjudication of his claim could obtain modification of the award. At the same time an employee who has filed a timely claim will not be cut off from relief in the form of compensation if he accepts some voluntary payments before final adjudication of his claim.

63. See note 18 *supra.*

64. See note 61 *supra.*

65. 135 F.2d 865 (5th Cir. 1943).

66. 460 F.2d at 1116 (Ainsworth, C.J., dissenting in part and concurring in part).

CONCLUSION

Strachan presents the initial judicial attempt to interpret this vague clause of the Act and to apply it to a fact situation not specifically provided for. While the clause in question is outstanding in its ambiguity, the court could have given a reasonable and just interpretation that would have been in keeping with other portions of the Act and which would have avoided the fear expressed by the Office of Longshoremen's and Harbor Workers' Compensation that the interpretation chosen would ". . . destroy the existing interlocutory claim procedures by which all but a few claims are amicably disposed of without either informal or formal adjudication."[67]

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67. Letter from John E. Stocker, Assistant Director, Office of Longshoremen's and Harbor Workers' Compensation to Leavenworth Colby, Special Assistant to the Attorney General, as quoted in 460 F.2d at 1119.