# The Burger Court Opinion Writing Database

## *Director, Office of Workers' Compensation Programs v. Perini North River Associates*

459 U.S. 297 (1983)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University




Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1982

Re: No. 81-897, Director, OWCP v. Perini

Dear Sandra:

I have been troubled in this case, not by your draft, but by the burdens Congress places on courts when the statutes are so imprecise. I had framed a splendid, lucid concurring opinion which would point this up. However it might also irritate our relations with Congress should any Members happen to read it.

Moreover, your responses to John's dissent have, I think, strengthened your opinion.

I therefore consign my Holiday prose to the wastebasket and join your opinion.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 22, 1982

Re: Director v. Perini, No. 81-897

Dear Sandra:

I agree with your opinion.

I confess that, for me, this case has given rise to some of the same doubts that John expressed in his letter of November 19. I believe it is vital to avoid resurrecting the jurisdictional monstrosity of pre-Calbeck days, as the Second Circuit has done. At the same time, I would be reluctant to hold simply that injury over actual navigable waters necessarily satisfies the status test in every case. As John points out, that would risk creating coverage for the pizza delivery man. If he is in "maritime employment", then it sould seem that his employer has at least one employee in maritime employment and is hence an "employer".

Unlike John, I do not read your opinion as extending coverage to the pizza man. Not only do you expressly reserve the question (p. 12 n.21), but your discussion on pp. 21-22 makes it clear that workers on water still must

meet a status test, if not the test propounded by the Second Circuit.

Of course, excluding the pizza man from coverage (if, in a future case, we do so) would not recreate the jurisdictional monstrosity. Any person with such an attenuated connection to navigable waters as to fall within a "pizza man exception" will have no room for doubt that he can be covered by state worker's compensation under Davis.

Perhaps the difficulty could be alleviated, if not resolved, by expanding your footnote 32 somewhat, along these lines:

> Our holding, of course, extends only to those persons "traditionally covered" before the 1972 amendments. We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously over actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters. Our decision today should not be read as exempting water-based workers from the new status test. Rather, our holding is simply a recognition that a worker's performance of his duties over actual navigable waters is necessarily a very important factor in determining whether he is engaged in "maritime employment."

Sincerely,

Bill

WJB,Jr.

Justice O'Connor
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 22, 1982

Re: 81-897 -

Director, Office of Workers' Compensation Programs, United State Department of Labor v. Perini North River Associates

Dear Sandra,

I agree.

Sincerely yours,

Justice O'Connor

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 30, 1982

Re: No. 81-897-Director v. Perini North River Associates

Dear Sandra:

In your latest circulation in this case you begin with:

> "JUSTICE O'CONNOR, with whom JUSTICES BRENNAN, WHITE, and POWELL, join, delivered the opinion of the Court."

Since this is an innovation to do this before all the votes are in I hope it is not intended to prevent others of us from joining. On this assumption, I respectfully request you to join me in your opinion.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1982

Re: No. 81-897, Director v. Perini N. River Associates

Dear Sandra:

I am glad to join your opinion in this case.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 18, 1982

81-897 Director v. Perini North River Associates

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 22, 1982

81-897 Director v. Perini

Dear Sandra:

Although I am still with you, I do think the addition to footnote 32 suggested by Bill Brennan would be helpful.

Sincerely,

Lewis

Justice O'Connor

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 20, 1982

81-897 Director v. Perini

Dear Sandra:

I am still with you.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: DEC 28 1982

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1982]

JUSTICE REHNQUIST, concurring in the judgment.

At the time of his injury, Churchill was engaged in unloading materials from a supply barge to a cargo barge. This work is very much like the work of longshoremen, who typically load and unload vessels. Therefore Churchill was "engaged in maritime employment" within the meaning of section 2(3) the Act, and was within its coverage. Accordingly, I concur in the judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 19, 1982

Re: 81-897 - Director v. Perini
North River Associates

Dear Sandra:

Your opinion is extremely well done and is most persuasive. Nevertheless, I must confess that the more I have reflected about this troublesome case, the more doubtful I become about our disposition. Let me share some of my concerns with you.

First, although it is less important than the substantive holding, on the standing issue, instead of relying on "the unusual procedural posture in which the case comes before the Court," I would much prefer to hold that the Director has standing to litigate as a party in the Court of Appeals and also standing to petition for certiorari provided, of course, that the employer and the employee have not settled. This seems to me to be correct as a matter of law; I think it is appropriate for us to resolve the issue on this record, and it will avoid a good deal of further confusion if we settle the point unequivocally now. Moreover, I have some difficulty with the suggestion that the Director's standing to petition for certiorari is buttressed in any way by the fact that Churchill is an automatic respondent under our rules.

On the more important question of the meaning of the statute, it seems to me that the language of the 1972 Amendment requires us to choose between two quite different tests of coverage when an employee is injured over navigable waters. On the one hand, we might hold that any injury seaward of the Jensen line

automatically satisfies both the situs and the status tests. In other words, status is only relevant for land-based injuries in the area to which the 1972 Amendment extended the Act's coverage. Your circulation, however, carefully avoids this result. See page 12 n.21; pages 21-22.

On the other hand, we might hold that the status test applies to injuries over the water as well as to those on land and interpret the words "maritime employment" to limit coverage to certain categories of employment, such as seamen and longshoremen. Under that approach, we might either take the Second Circuit's "traditional" view of maritime employees, or we might fashion our own definition. You have opted for the latter alternative and have suggested that the proper definition is that the employees "are required to perform their employment duties over navigable waters." Page 22.

Your definition, I believe, would encompass the messenger who is required to deliver a pizza to a person aboard ship, a bridge tender or maintenance worker on a bridge over a navigable river, and even the state police officer who regularly traverses the bridge. In fact, I think the definition is broad enough to cover any injury in the course of employment that occurs over navigable water. In other words, while giving lip service to a status requirement over the high seas, we apparently are holding that status is really only relevant when the situs is land-based.

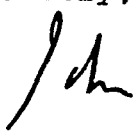
The more I reflect about the case the more doubts I have about whether that is what Congress really intended. It is true, as you demonstrate, that Congress intended to make a substantial expansion in the coverage of the Act and there is no evidence of any intent to withdraw coverage--no evidence, that is, except for the addition of the status requirement itself. I have an uneasy feeling that Congress may simply have overlooked the impact of that new requirement in the limited category of injuries seaward of the Jensen line where the new requirement would make any difference.

It is my understanding--and I may be dead wrong about this--that almost all of the LHWCA cases that arise out of injury seaward of the Jensen line involved employees who were engaged in a traditional maritime job, such as a harbor worker or a longshoreman, and that cases involving construction workers or motor boating janitors were relatively rare. If this be true, the Second Circuit's position would not be inconsistent with the congressional purpose to provide

benefits for the members of the unions who are the primary beneficiaries of this legislation. Moreover, since the constitutional aspects of the Jensen line are no longer defensible, there cannot be any doubt about a State's power to provide coverage for construction workers, bridge tenders, janitors and the nonmaritime workers who happened to be injured over water. It thus is not at all inconceivable that Congress assumed that a "maritime employment" status requirement would not burden the class for whose special benefit it was legislating and believed that workers who were primarily land-based should look to state systems for their compensation.

Perhaps after I have had more time to study the issue, I will end up by simply joining your opinion. Since I am presently somewhat troubled about what may lie over the horizon, however, I thought it best to share my concerns with you.

Sincerely,



Justice O'Connor

Copies to the Conference

P.S. A possible explanation for the failure of Congress to explain the modest cutback in coverage that would result from acceptance of the Second Circuit's view is that the various pressure groups that were interested in the 1972 Amendment simply had no interest in preserving coverage for people outside of the traditional maritime line of work. Indeed, to the extent that we broaden the potential coverage of the statute, we may undermine a justification for more liberal benefits based on the hazardous character of maritime work.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 22, 1982

Re: 81-897 - Director v. Perini
North River Associates

Dear Sandra:

Thank you for your prompt reply to my somewhat hastily dictated letter. I remain troubled, however, on both points.

I think you agree that Churchill's status as a respondent adds nothing to the Director's standing to petition for certiorari. The reason that does support his standing in this case must apply to a category that is somewhat broader than "the unique facts of this case." I think it is necessary to identify that reason and that category in order to explain the standing holding in this case.

On the more important question--what the "maritime employment" status requirement means when an employee is injured over water--your letter makes two new points that I had not found in your opinion. First, you suggest that a limit is provided by the requirement that the employer must have at least one employee engaged in "maritime employment." But that surely does not advance the inquiry because we must still determine what "maritime employment" means. If you intend the term to retain its pre-1972 meaning for injuries over water but the P.C. Pfeiffer Co. v. Ford meaning for injuries over land, it might be better to make that point explicit somewhere near the end of the opinion. I think it might also be useful to express the pre-1972 meaning in the form of a test that may be contrasted with the CA2-Ford test. I would infer from footnotes 21 and 32 that you have in mind a rule defining "maritime employment" for water-injury purposes to mean work for an employer who regularly sends employees out onto floating vessels. I suppose the disadvantage of

being explicit is that it will highlight the fact that the Court is placing two different meanings on the "maritime employment" language of the statute.

Second, you indicate that workers on permanent structures, such as bridges or the foundation of the plant in this case, are not covered because they were not covered before 1972. I think that is right, but I am not sure this is clear from the test you use at page 21 of your opinion. I had not read footnote 32 to exclude such persons, since it expresses no opinion on the subject. I note, by the way, that the four dissenters in O'Rourke thought that the majority's holding would cover a train crew crossing a bridge with its supports in a navigable river. See 344 U.S., at 343.

Frankly, I am not yet entirely at rest in this case, but the more I think about it the more I am inclined to think the words "maritime employment" should have only one meaning.

Respectfully,

John

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 30, 1982

Re: 81-897 - Director v. Perini North River Associates

Dear Sandra:

After another wrestle with this case, I have finally come to the conclusion that in the absence of any evidence in the legislative history--one way or the other--on the question whether the sponsors of the 1972 Amendment intended to preserve all pre-1972 coverage, our duty is to read the statute as it is written, particularly when a uniform application of the new status test should tend to minimize unnecessary litigation and duplicate insurance coverage.

I am sorry that it has taken me so long to reach this conclusion. What it means, however, is that I will be writing a dissent which I hope I can get in your hands fairly promptly.

Respectfully,

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: DEC 10 '82

Recirculated: _____



77. 3, 5, 16, 17

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81–897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1982]

JUSTICE STEVENS, dissenting.

Neither the legislative history nor the judicial history on which the Court relies today justifies a departure from the language of the statute defining the post-1972 coverage of the Longshoremen and Harbor Workers Compensation Act (LHWCA). Indeed, when the issue is viewed in its proper historical perspective, it becomes even more clear that a literal reading of the Act will avoid anomalies that troubled Congress in 1972 as well as unnecessary litigation and duplicate insurance coverage in the post-1972 period. I shall first comment on the statutory language and then discuss its history.

I

The principal focus of the statute is identified by its title as well as its text. It provides workers' compensation benefits for injuries to longshoremen and harbor workers.[1] The cov-

[1] By reason of several specific statutory enactments, the LHWCA's compensation scheme is, or has been, also applied to:

(a) employees on defense bases, Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified as amended at 42 U. S. C. § § 1651–1654),

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: DEC 21 '82

**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 81–897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1982]

JUSTICE STEVENS, dissenting.

Neither the legislative history nor the judicial history on which the Court relies today justifies a departure from the language of the statute defining the post-1972 coverage of the Longshoremen and Harbor Workers Compensation Act (LHWCA). Indeed, when the issue is viewed in its proper historical perspective, it becomes even more clear that a literal reading of the Act will avoid anomalies that troubled Congress in 1972 as well as unnecessary litigation and duplicate insurance coverage in the post-1972 period. I shall first comment on the statutory language and then discuss its history.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1, 3, 11, 17, 18

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: DEC 30 '82



3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81-897

## DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[January ——, 1983]

JUSTICE STEVENS, dissenting.

Neither the legislative history nor the judicial history on which the Court relies today justifies a departure from the language of the statute defining the post-1972 coverage of the Longshoremen and Harbor Workers Compensation Act (LHWCA). Indeed, when the issue is viewed in its proper historical perspective, it becomes even more clear that a literal reading of the Act will avoid anomalies that troubled Congress in 1972 as well as unnecessary litigation and duplicate insurance coverage in the post-1972 period. I shall first comment on the statutory language and then discuss its history.

I

The principal focus of the statute is identified by its title as well as its text. It provides workers' compensation benefits for injuries to longshoremen and harbor workers.[1] The cov-

[1] By reason of several specific statutory enactments, the LHWCA's compensation scheme is, or has been, also applied to:

(a) employees on defense bases, Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified as amended at 42 U. S. C. § § 1651–1654),

(b) employees of nonappropriated fund instrumentalities such as post ex-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: NOV 18 1982

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

77

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[November ——, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1972, Congress amended the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 86 Stat. 1251, 33 U. S. C. § 901, *et seq.*, (hereinafter LHWCA or Act). Before 1972, LHWCA coverage extended only to injuries sustained on the actual "navigable waters of the United States (including any dry dock)." 44 Stat. 1426. As part of its 1972 amendment of the Act, Congress expanded the "navigable waters" *situs* to include certain adjoining land areas, § 3(a), 33 U. S. C. § 903(a) (1978). At the same time, Congress added a *status* requirement that employees covered by the Act must be "engaged in maritime employment" within § 2(3) of the Act.[1] We granted certiorari in this case to consider whether a marine construction worker, who was injured while performing his job over actual navigable wa-

[1] Section 2(3) of the Act, 33 U. S. C. § 902(3), provides: "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 20, 1982

Re: 81-897 - Director v. Perini North River Associates

Dear John:

I am not quite certain why you wish to address the standing issue in a manner that is unnecessary to the decision of this case. In our prior cases in which the Director alone petitioned for review, the Director, as federal respondent, defended an order of the Benefits Review Board (BRB) in the courts of appeals. The Director in those cases was not seeking to obtain review of a decision of the Board with which he disagreed. In cases where the Director acts as federal respondent in place of the BRB, he acts much as the NLRB does when it seeks to enforce its own orders in the courts of appeals, and it probably makes sense to accord the Director standing in such cases. However, if the Director has standing to petition in his own right to challenge Board orders with which merely he disagrees, the Director is in the position of being able to ask this Court for advisory opinions. We may decide at some point to go in this direction, but I do not think it is necessary that we do so now. Such a holding might have serious consequences with respect to other federal agency heads as well.

I also do not think it is necessary in this case that we decide whether the Director has standing to appeal BRB decisions to the courts of appeals under section 21(c) of the LHWCA, 33 U.S.C. §921(c). I did not mean to imply that the Director's standing is buttressed by the fact that Churchill is an automatic respondent under Rule 19.6; my reference to Rule 19.6 was intended only as an explanation of how, in a technical sense, Churchill is before the Court even though he is not the petitioner.

As I understand your comments about the interpretation of the coverage of the 1972 amendments, you are concerned that certain employees, who may have been covered before 1972, will continue to be covered by the 1972 amendments in

violation of congressional intent. In my view, none of the examples you mention would have been likely to have had pre-1972 coverage. The 1927 Act, as well as the 1972 amendments, provide that the worker must be the employee of a covered employer. In Pennsylvania R. Co. v. O'Rourke, 344 U.S. 334, 341-42 (1953), we held that an employer must have at least one employee engaged in "traditional maritime employment" before his employee, who was injured on the water but was not himself in maritime employment, could seek LHWCA coverage. See also Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 264 (1977). There was not much litigation concerning the meaning of "employer" under the 1927 Act, and I was unable to discover any case where we found someone similar to the owner of a pizza parlor to be a statutory employer. It is unlikely he would have fit the definition of an employer under LHWCA. This definition of a statutory employer, which is also present in the 1972 amendments, is sufficient to take care of "happenstance" injuries like the pizza delivery boy.

As to your bridge examples, I am not aware of any pre-1972 case that upheld LHWCA coverage for injuries that occurred on a structure permanently affixed to the land, like a bridge. In fact, it was Congress' desire to extend LHWCA coverage to injuries occurring on land, or structures attached to the land, that resulted in the 1972 amendments. The SG confirmed at oral argument, in response to what may have been your question, that pre-1972 coverage would not extend to cover an injury that Churchill sustained while he was working on the foundation for the sewage treatment plant because it would have been considered as "land." See transcript of oral argument at 10. See my footnote 4. In any event, both the delivery person and the bridge accidents are addressed in my footnotes 21 and 32.

If, as you suggest, Congress may have intended by its "maritime employment" language to return to some version of the Second Circuit test, then the group of employees that would be excluded from coverage would not be a "limited category," but rather, the excluded group would encompass employment that was considered "maritime but local" before Calbeck. For the reasons I have stated in the opinion, I find it difficult to believe that Congress merely overlooked those employees to whom we extended coverage under Calbeck. It is also difficult to believe that Congress would use the phrase "maritime employment" to exclude "maritime but local" employees. Moreover, employees with whom Calbeck, Davis, and Parker were concerned were not "engaged in a traditional

maritime job," as you suggest. The whole point of these decisions is that employees who would not meet "direct relationship to navigation or commerce" test were nevertheless covered by LHWCA even though their employment was local in nature.

Finally, I note that you mention LHWCA coverage for "seamen." Seamen are covered by the Jones Act, and are excluded under the LHWCA. I will point this out in my second circulation. I hope that we are essentially in agreement about these matters, and that I have answered your concerns.

Sincerely,

Justice Stevens
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 24, 1982

No. 81-897 - Director v. Perini North River Associates

Dear Bill,

Thank you for your excellent suggestion. I will eliminate footnote 21 and replace footnote 32 with your suggested addition.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 26, 1982

Re: 81-897 - Director v. Perini North River Associates

Dear John,

For the reasons that I indicated in my response to your first letter on this case, I am hesitant to decide the issue of the Director's standing to petition for review of BRB decisions with which he disagrees. Further, as I pointed out in my response to you, I did not mean to suggest that Churchill's presence somehow "gave" the Director standing in this case for purposes of urging reversal of the CA2 decision. I will clarify this in my second circulation. The Director has authority under 28 U.S.C. §1254(1) to petition for review as a party below, although he may not have Article III standing to urge reversal of the CA2 decision. The Director's filing properly brings Churchill before us, and Churchill, of course, may urge reversal of the decision below. This approach is not significantly different from what we held in O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 783-84 n. 14 (1980). Although we held in that case that the petitioner had Article III standing to urge reversal of the decision below, we also held that the party who actually litigated the matter below could urge reversal in this Court as a respondent who did, in fact, urge such reversal.

You have suggested that we decide that the Director has standing in all cases except those where the parties have settled. I do not think that this solution will eliminate my advisory-opinion concern. In those cases where the party aggrieved below shows no interest in our determination of the case, the Director's standing would be predicated solely on his administrative and minimal

enforcement responsibilities, which is questionable as a basis for Article III standing.

I might add that if we were to decide the issue of the Director's standing in this case, I think that we would necessarily decide the issue whether the Director has standing under §21(c) for purposes of appealing BRB decisions in the Courts of Appeals. Congress used the "adversely affected or aggrieved" language in that section, and in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), we held that such language incorporated constitutional standing requirements when used in §10 of the Administrative Procedure Act. If we hold that the Director has Article III standing to seek review of any BRB decision, then it would seem that the Director would have standing under §21(c) of LHWCA as well, and, I believe we should not decide that here if it is not necessary.

As to your concern with the merits, our decision in P.C. Pfeiffer did not adopt the Second Circuit test, or any version of it, to determine that the employees in that case were "engaged in maritime employment." Rather, P.C. Pfeiffer involved employees who were "engaged in longshoring operations" and are covered as such in the express provisions of sections 2(4) and 3(a) of the Act. In fact, our decision in Sun Ship appears to have abolished the "maritime but local" test for injuries to land-based employees. It appears that no resurrection of the "significant relationship" test is required for land-based injuries because the focus for deciding landward coverage may be placed on whether the employee "fits" one of the categories included in the parenthetical language following "maritime employment" in sections 2(4) and 3(a). In Northeast Marine Terminal Co., we recognized that when Congress extended coverage landward, it became necessary "to describe affirmatively" the scope of coverage in the expanded situs.

Although it would be conceptually "neater" to have the same focus or test for coverage of injuries upon the navigable waters as for those which are land based, the legislative history seems clear that Congress never intended to withdraw LHWCA coverage from certain employees, like Churchill, who might be excluded by such a singular test. In any event, the present case does not require that we settle the scope of landward coverage as well. No doubt there may be potential difficulties in future application of the status test to land-based injuries, but that should not

deter us from applying Congress' intended coverage in this case.

In my next circulation I will incorporate a number of changes in an effort to articulate this position more clearly.

Sincerely,

Justice Stevens

Copies to the Conference

Stylistic Changes Throughout

pp. 8, 14, 19, 23

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: NOV 29 1982



**2nd DRAFT**

# SUPREME COURT OF THE UNITED STATES

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[November ——, 1982]

JUSTICE O'CONNOR, with whom JUSTICES BRENNAN, WHITE, and POWELL, join, delivered the opinion of the Court.

~~In 1972,~~ Congress amended the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 86 Stat. 1251, 33 U. S. C. § 901, *et seq.*, (hereinafter LHWCA or Act). Before 1972, LHWCA coverage extended only to injuries sustained on the actual "navigable waters of the United States (including any dry dock)." 44 Stat. 1426. As part of its 1972 amendment of the Act, Congress expanded the "navigable waters" *situs* to include certain adjoining land areas, § 3(a), 33 U. S. C. § 903(a) (1978). At the same time, Congress added a *status* requirement that employees covered by the Act must be "engaged in maritime employment" within the meaning of § 2(3) of the Act.[1] We granted certio-

[1] Section 2(3) of the Act, 33 U. S. C. § 902(3), provides: "(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 30, 1982

No. 81-897 Director v. Perini North River Associates

Dear Thurgood,

All joinders gratefully received. The opening sentence will be corrected on the next circulation.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

pp. 1, 7, 10-14, 17, 20, 21, 23, 24.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: DEC 15 1982

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[December ——, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

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pp. 10, 11, 12, 20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: DEC 23 1982

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER *v.* PERINI NORTH RIVER ASSOCIATES ET AL.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 81-935 Jeffboat, Inc. v. Robertson

In this case, the DC found that petr's provision of inadequate lighting and failure to supply life preservers or alarm bells was sufficient to establish petr's negligence as a vessel owner under LHWCA §5(b) even though petr was also the employer of the injured worker. Petr appealed to CA6 and after oral argument in the circuit court, we rendered our decision in Scindia Steam Navigation v. de Los Santos, 451 U.S. 156 (1981). CA6 applied Scindia and affirmed the DC, reasoning that actual knowedge of the petr as shipbuilder could be attributed to petr as vessel owner. The petr argues that CA6 failed to draw the proper distinction between duties as employer and as vessel owner, as required by §5(b), and that CA6 defined the vessel owner's duty in a way that conflicts with Scindia.

The issue presented by this case is completely unrelated to the Perini decision, which concerned LHWCA §§ 2(3) and 3(a). As far as petr's Scindia claim is concerned, there is no reason for our review at this time. In Scindia, we held that it was possible that a vessel owner would have a duty to intervene and repair where the stevedore's judgment was so improvident as to create an unreasonable risk of harm to employees. This case presents such a situation. In the absence of any conflict concerning the scope of LHWCA §5(b) and our Scindia decision, I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 81-1039 Wiley N. Jackson Co., et al. v. Director, OWCP, et al.

CAll held that an employee, injured while temporarily working on a barge in a navigable river and engaged in unloading pilings that were to be used in the construction of two bridges over the river, was covered under LHWCA. The employee in this case was injured on the actual navigable waters in the course of employment which was actually longshoring activity at the time of the injury. The CAll decision correctly interprets the scope of coverage under the Act and the decision is consistent with Perini. I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 81-1109 Robert W. Kirk & Associates, Inc. v. Holcomb, et al.

CAll held that an employee, injured while working as a night watchman on a vessel which was on actual navigable waters, was covered under LHWCA. This decision is consistent with our decision in Perini and with pre-1972 cases that extended coverage to watchmen. Although other issues are raised concerning the propriety of the application of the presumption under 33 U.S.C. §920(a), and whether the findings of the Administrative Law Judge were improperly rejected, I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 81-2328 Hellenic Lines Ltd. v. Fanetti

In this CA2 case, the petitioner, a vessel owner who directly employed his own longshoremen, challenged jury instructions in a LHWCA §5(b) action brought against petitioner by an injured worker. According to petitioner, the jury instructions failed to distinguish between petitioner's role as vessel owner, and his role as stevedore, in violation of our decisions in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, (1979) and Scindia Steam Navigation Co. v. de los Santos, 451 U.S. 156 (1981). Petitioner also argued that the trial court failed to give an instruction requiring the jury to deduct future income taxes from its determination of the amount of future lost wages.

This case arises under a different section of LHWCA than we considered in Perini, and Perini sheds no light on any question raised in this petition. Petitioner's Edmonds/Scindia claim has some merit. The instructions seem deficient in that they do not refer to the dual role of this shipowner. The CA2 decision does not appear to even address the instruction argument, however, and consequently, the decision may be of limited precedential value. In addition, petitioner conceded that its actions as shipowner were a contributing cause of the employee's injuries, and under Edmonds, petitioner would be liable for all injuries. Petitioner's tax deduction claim does not merit review.

On balance, I plan to vote to deny cert.

Sincerely,

Sandra

FAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 81-2362 B. F. Diamond Construction Company, Inc., et. al. v. Lemelle, et al.

The employee in this case was injured while employed by petitioner as a concrete finisher on a bridge over navigable water. CA4 held the employee's injury was covered under LHWCA because the bridge was in aid of navigation and therefore, the employee had a "realistically significant relationship to maritime activities." The rationale of CA4 is inconsistent with our decision in Perini. Moreover, because the bridge was affixed to the land, it is possible that the employee failed to satisfy the "situs" test, although that issue was not raised below.

On balance, however, I plan to vote to deny the petition.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 82-4 B. F. Diamond Construction Company, Inc. v. Director, OWCP

CAll held that an employee injured while supervising the unloading of a crane barge in a bridge construction project was covered under LHWCA because he was engaged in "longshoring" operations." This case does not involve application of that aspect of the "status" requirement with which we were concerned in Perini, i. e., whether Churchill was "engaged in maritime employment." Moreover, there is no conflict with our decisions in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). Accordingly, I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 82-53 McCarthy v. The Bark Peking, et al.

Relying on Fusco v. Perini North River Assocs, 622 F.2d 1111 (CA2 1980), cert. denied, 449 U.S. 1131 (1981), CA2 denied LHWCA coverage to an injured worker employed to paint the mast of a museum ship afloat in actual navigable waters. CA2 reasoned that the mast painting did not "bear a significant relationship to navigation or to commerce on navigable waters." The employee in the case was injured over the actual navigable waters in the course of his employment. The CA2 Fusco test, which was the same used to deny coverage in Perini, was probably misapplied in this case. Therefore, I would grant, vacate and remand in light of Perini.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 82-523: Sanger Boats, et al v. Schwabenland, et al.

CA9 held that an employee injured while racing a recreational boat in the course of promoting his employer's boats was covered under LHWCA. The case is similar to Parker v. Motor Boat Sales, Inc. 314 U.S. 244 (1941) on which CA9 relied. The CA9's decision is consistent with Perini, and I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 82-566 Zapate-Haynie Corporation, et al. v. Ward, et al.

In this CA5 case, the employee was killed as he was flying his employer's plane over navigable waters to spot fish for his employer's fishing boats. CA5 held that the employee was covered under LHWCA because he was required to work on navigable waters. This case is distinguishable from Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) for two reasons. First, Executive Jet involved whether federal admiralty jurisdiction extended to tort claims under 28 U.S.C. §1331(1), and did not involve LHWCA. Second, our decision in Executive Jet denying jurisdiction was predicated on the fact that the situs of the crash was fortuitous because the flight was principally over land. In the present case, the employee was required to fly the plane over the water as his regular employment. CA5 was probably correct in permitting LHWCA coverage, although the case is not directly covered by Perini. In the absence of conflict, I recommend the petition be denied.

Sincerely,

Sandra

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 18, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 81-897, Director, OWCP v. Perini

No. 82-605 A.W.I., Inc. v. American Insurance Co., et al.

The employee was injured while working as an oil field specialty worker on a barge on inland navigable water. The CA5 applied the same test this Court used in Perini to determine that LHWCA coverage was appropriate. I recommend the petition be denied.

Sincerely,

Sandra

HAL

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 20, 1983

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 81-897, Director, OWCP v. Perini

No. 81-2328 Hellenic Lines Ltd. v. Fanetti
No. 81-935 Jeffboat, Inc. v. Robertson

After sending the memo on these two cases which were held for Perini, I discovered that we will be considering a case next month which deals with one of the issues raised in each of these cases. On February 28 we will hear arguments in Jones & Laughlin Steel Corp. v. Pfeifer, No. 82-131. One issue in Jones & Laughlin is whether a longshoreman who is receiving benefits under LHWCA can also maintain an action for negligence against his employer pursuant to LHWCA §905(b), when the employer is also the owner of the vessel on which the injuries occurred.

Although our holding in Perini does not govern our disposition of these petitions, I recommend we hold them both for Jones & Laughlin Steel because our resolution of the §905(b) issue in the latter case could determine the proper disposition of these cases.

Sincerely,

Sandra