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NOTES

THE DOCKING OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: HOW FAR CAN IT COME ASHORE?*

INTRODUCTION

Maritime employment, in general, and longshoring, in particular, have long been recognized as unusually hazardous occupations because of the dangers inherent in handling unwieldy cargo within the confining spaces on and around ships. This reputation is substantiated by records indicating that in the United States during fiscal year 1971, there were 68,464 reported injuries involving longshoremen.[1] Of these, 29,006 arose in port cities within the Fifth Circuit; and in Florida alone, 1,873 injuries were recorded.[2] The longshoremen's disabling injury rate for 1969 was almost five times the national average for manufacturing operations.[3] Thus, the need to provide immediate and certain relief is even greater for injured longshoremen than for other workers.

In 1972 Congress made several far-reaching changes in the special compensation program designed for these maritime workers. This note will examine the courts' interpretations of those sections that extended the coverage of the federal compensation act inland from its original shoreline boundary.

HISTORY OF THE ACT

Initially, compensation benefits for longshoremen were provided through state workmen's compensation laws.[4] Voluntary compliance with this procedure ended in 1917 with *Southern Pacific Co. v. Jensen*,[5] in which the Supreme Court held the New York state workmen's compensation statute unconstitutional as applied to a longshoreman fatally injured on a gangway connecting a vessel with a pier. The majority based its decision primarily on the need for a uniform system of general maritime law,[6] concluding that

*EDITOR'S NOTE: This note received the *Gertrude Brick Law Review Apprentice Prize* for the best note submitted in the Spring 1977 quarter.

1. Letter from the U.S. Department of Labor, Employment Standards Administration, Office of Workmen's Compensation Programs, to the Committee on Education and Labor, House of Representatives (1972).

2. *Id.*

3. Letter from the employer — members of the New York Shipping Association to Committee on Education and Labor, House of Representatives (1972).

4. 1A BENEDICT ON ADMIRALTY, ch. 1, §2 (7th ed. E. Jhiral 1977).

5. 244 U.S. 205 (1917) (5-4 decision).

6. The majority opinion included three other reasons for disallowing coverage under the state compensation statute. First, the Court noted an analogous rule respecting Congress' power to regulate interstate commerce. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations.

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uniformity would be weakened if ships were subjected to the states' individual workmen's compensation laws.[7]

The same year Congress attempted to return state act coverage to maritime workers by amending the "saving to suitors" clause of the Judiciary Act.[8] The amendment, which saved "to claimants the rights and remedies under the Workmen's Compensation Law of any state,"[9] was immediately struck down by the Supreme Court as an unconstitutional delegation to the states of power over a subject entrusted exclusively to federal regulation.[10] As in *Jensen*, the Court viewed the attempted delegation as a threat to the uniformity of maritime law.[11]

After this setback Congress again amended the "saving to suitors" clause;[12] but, in an effort to preserve uniformity in maritime law, Congress redefined the class of affected workers. Thus, the 1922 amendment expressly excluded from coverage the "master or members of the crew of a vessel."[13] Even as limited, however, the delegation was held unconstitutional two years later in *Washington v. W.C. Dawson & Co.*[14] In *Dawson* the Court finally suggested an acceptable legislative alternative:

> Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employers' Liability Law or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise, wide discretion is left to Congress.[15]

The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Id.* at 217. Next, the majority argued that the state's jurisdiction could not arise under the Judiciary Act's "saving to suitors" clause since "[t]he remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." *Id.* at 218. Finally, the majority found that such coverage was inconsistent with the policy of Congress to encourage investments in ships. *Id.*

7. Citing *The Loftawanna,* (Rodd v. Heartt) 88 U.S. (21 Wall.) 558 (1875), as the basis for the uniformity doctrine, the majority concluded: "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." 244 U.S. at 216.

8. The Act gave district courts exclusive admiralty jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." Judiciary Act of 1789, ch. 20, §9, 1 Stat. 76 (1789) (current version at 28 U.S.C. §1333 (1970)).

9. Act of October 6, 1917, ch. 97, 40 Stat. 395 (1917) (held unconstitutional 1919).

10. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1919).

11. *Id.* at 164.

12. Act of June 10, 1922, ch. 216, 42 Stat. 634 (1922) (held unconstitutional 1924).

13. *Id.*

14. 264 U.S. 219 (1924).

15. *Id.* at 227-28.

Thereupon, Congress directed its efforts toward the promulgation of a maritime workers' compensation act.

The Longshoremen's and Harbor Workers' Compensation Act[16] was passed by Congress in 1927 and subsequently upheld by the Supreme Court.[17] Since Congress had intended that the Act only fill the voids left by the Court decisions denying state workmen's compensation remedies to maritime workers,[18] coverage was limited to those employees (1) whose injuries occurred upon navigable waters, and (2) for whom "recovery . . . may not validly be provided by state law."[19]

Had the provision that the injury occur upon navigable waters been the sole requirement, its ease of application would have resulted in certainty of coverage without the expense and delay of litigation. Even under a simple navigable waters test, however, benefits would be fortuitously controlled by the side of the shoreline on which the worker was injured. Larson, in his treatise on workmen's compensation,[20] demonstrated the inequities of this procedure by examining two early Supreme Court cases, *T. Smith & Son, Inc. v. Taylor*[21] and *Minnie v. Port Huron Terminal Co.*[22] In *Taylor*, decided in 1927, a longshoreman standing on a dock was struck by a crane operated from a vessel and knocked into the water. The Court allowed state compensation because the impact occurred on land. Seven years later in *Minnie*, a workman, who while aboard a vessel was knocked onto land by a land-based crane, was denied state compensation because the impact occurred over navigable water.

Neither the type of work performed nor the risk of injury to the employee was considered by the courts in applying the navigable waters test. Thus, two employees injured while performing identical tasks would be compensated differently if one had been standing on a gangway and the other on the deck of a vessel only a few feet away. Since many employees spent much of their workday crossing back and forth over this imaginary line, they were continuously passing into and out of the Act's coverage.

In the 1969 decision of *Nacirema Operating Co. v. Johnson*,[23] a case

16. 44 Stat. 1424 (1927) (current version at 33 U.S.C. §§901-950 (Supp. II 1972)).

17. Crowell v. Benson, 285 U.S. 22 (1932).

18. Parker v. Motor Boat Sales, 314 U.S. 244, 250 (1941); Bassett v. Massman Constr. Co., 120 F.2d 230, 233 (8th Cir. 1941) (citing 67 CONG. REC. 10,614 (1925)).

19. The original §903(a) read: "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of — (1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." 33 U.S.C. §903(a) (1927) (as amended 1972).

20. *See* 4 A. LARSON, WORKMEN'S COMPENSATION LAW, §89.23(a) (1976 & Supp. 1977).

21. 276 U.S. 179 (1928).

22. 295 U.S. 647 (1935).

23. 396 U.S. 212 (1969).

factually similar to *Taylor* and *Minnie*, the Court suggested that Congress was the appropriate body to remedy the inequities caused by the navigable waters test. *Nacirema* overturned an award under the Act to three longshoremen, two of whom were injured and the third killed when cargo being hoisted by a ship's crane knocked them against the pier. The Court concluded:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. . . . [But] construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction – whatever they may be and however they may change – simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress [could have so defined] the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.[24]

The confusion referred to in *Nacirema* had been created by the second provision of the 1927 Act which stated that federal compensation was not available if recovery could validly be provided by state law. This provision was universally interpreted as incorporating into the Act the judicially created "maritime but local" rule.[25] The rule made state compensation acts applicable to injuries resulting from certain judicially recognized activities that took place over navigable waters but had no direct relationship to navigation and maritime commerce.[26] Since claimants falling within the "maritime but local" rule had a remedy under state compensation law, Congress excluded them from coverage under the federal Act.

Despite this background, problems arose over the scope of the "may not validly be provided" clause. For example, some early federal court decisions interpreted this language as precluding coverage if the state could have provided a remedy,[27] while other decisions gave the provision a more restricted

24. *Id.* at 223-24.

25. *See* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 419 (2d ed. 1975); D. ROBERTSON, ADMIRALTY AND FEDERALISM 208 (1970).

26. This exception to the *Jensen* national uniformity doctrine first appeared in a 1921 Supreme Court decision, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921) (holding that application of a state's wrongful death statute was so local in character that it would "not work material prejudice" to general maritime law). *Garcia* was applied one year later in a workmen's compensation action in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922). The *Rohde* Court denied relief under general maritime law principles to a worker who was injured while constructing a vessel and had elected to receive payments under a state compensation act. The Court held that since the parties had contracted under local rules and since construction of a vessel is not a maritime incident, the uniformity of the general maritime law would not be materially affected by application of local rules. *Id.*

27. United States Cas. Co. v. Taylor, 64 F.2d 521, 525 (4th Cir.), *cert. denied*, 290 U.S. 639 (1933). "South Carolina, unlike most of the states, has not seen fit to pass a workmen's compensation act. But this circumstance is not material in the pending case, for our decision depends upon the existence, and not upon the exercise, of the power of

meaning, limiting the exception to instances in which the state actually had provided a remedy.[28] In *Davis v. Department of Labor & Industries*,[29] decided in 1942, a worker had drowned while dismantling a bridge over a navigable river. Although the Washington courts denied relief based on that state's workmen's compensation statute, the United States Supreme Court granted the desired relief. The Court recognized a "shadowy area" in which courts had been unable to give definitive rulings on whether relief should be sought in state or federal courts. This lack of direction caused problems for employees who, if they chose the wrong forum, faced expensive delay and the possibility that a subsequent, properly filed claim would be barred by a statute of limitations. To end this confusion and unfairness the Court established a "twilight zone" of concurrent jurisdiction encompassing those situations in which the court had not been able to give definitive rulings. The "twilight zone" doctrine was based upon the presumptive validity of both state and federal statutes, leaving the choice of forum to the claimant.[30]

Under the authority of *Davis*, the Court later extended state compensation to employees injured while repairing completed vessels at rest upon navigable waters. Previously such injuries had been definitely established as falling outside the "maritime but local" exception and within admiralty jurisdiction. In *Calbeck v. Travellers Insurance Co.*,[31] decided in 1962, the Court allowed compensation under the federal Act to an employee injured while working upon a vessel under construction, even though such work had long been established as falling within state jurisdiction under the "maritime but local" doctrine.[32] Rather than further extend the "twilight zone" doctrine, the Court interpreted the Act to cover *all* injuries occurring on navigable waters. This surprising opinion[33] in effect overruled the traditional view that the "may

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the state to give its people the benefits of such legislation." For a discussion of this interpretation problem, see 1A BENEDICT ON ADMIRALTY, *supra* note 4, §9.

28. Continental Cas. Co. v. Lawson, 64 F.2d 802, 805 (5th Cir. 1933). "State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the act of 1927 must be taken into consideration and given effect in determining whether under section 3 (33 USCA §903) thereof the compensation laws of the states are valid and applicable; for state laws cannot now validly apply to a subject matter over which Congress has exercised its exclusive jurisdiction."

29. 317 U.S. 249 (1942).

30. Justice Frankfurter in his concurring opinion stated: "Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the Jensen ruling that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being. Therefore, until Congress sees fit to attempt another comprehensive solution of the problem, this Court can do no more than bring some order out of the remaining judicial chaos as marginal situations come before us." *Id.* at 259.

31. 370 U.S. 114 (1962).

32. *See* cases cited note 26 *supra*.

33. The majority was severely criticized by both the dissent and commentators for its interpretation of the Act. Justice Stewart, joined by Justice Harlan, said: "I cannot join in this exercise in judicial legerdemain. I think the statute still means what it says, and what it has always been thought to mean — namely, that there can be no recovery under the Act in cases where the State may constitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is

validly be provided" provision incorporated the "maritime but local" doctrine into the Act. The *Calbeck* opinion established the shoreline as the sole boundary of the covered area and thereby set the stage for the *Nacirema* Court's invitation to Congress to move the line landward.

THE 1972 AMENDMENTS

To obtain coverage under the 1972 Amendments to the Act an injured employee must pass a two-pronged situs-status test. The situs provision contained in the original section 903(a) required that the injury occur over navigable waters of the United States or any dry dock. Congress expanded that provision by redefining "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[34] While the situs of covered injuries was thus enlarged, a narrower new status test was created by redefining "employee" in section 902(3). Under the original act an employee was covered unless specifically excluded. The Amendments affirmatively define "employee" as "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."[35] Thus, the net effect of the Amendments was to increase the area in which an injury would be covered and decrease the classes of eligible persons.[36] In addition, the Amendments did not include the troublesome phrase excluding those cases in which recovery could be obtained under state law.

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simply not what the law provides." 370 U.S. at 132. For a summary of Justice Stewart's attack on the majority opinion along with an excellent rebuttal by the author, see D. ROBERTSON, *supra* note 25, at 214-19, 304-14. *See also* 4 A. LARSON, *supra* note 20, §89.52.

34. Section 903(a) now reads: "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any *adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of — (1) 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; or (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." 33 U.S.C. §903(a) (1970 & Supp. II 1972) (emphasis indicating change added). The Amendments also changed the definition of "employer" to correspond with this broadened situs test. 33 U.S.C. §902(4) (1970 & Supp. II 1972).

35. Section 902(3) now reads: "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." 33 U.S.C. §902(3) (1970 & Supp. II 1972) (emphasis indicating change added).

36. *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 41 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729 (1977); Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir.), *cert. denied*, 97 S. Ct. 179 (1976); I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d 1080, 1083 (1975), *modified on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976).

Although the 1972 Amendments might appear to be a direct response to the *Nacirema* invitation to extend coverage shoreward,[37] legislative history suggests other more compelling reasons for the change. Congress was particularly concerned with two other modifications of the Act: increasing the inadequate benefits for injured workers[38] and removing from longshoremen the seaman's remedy of unseaworthiness.[39] While these latter two provisions were vigorously debated in the committee hearings,[40] the landward extension of coverage did not appear in the early drafts but was added to the proposed Amendments in "the frantic 4 a.m. final conference mark-up sessions."[41] The

37. I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d 1080, 1086 (1975), *modified on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976).

38. Prior to the 1972 Amendments, the maximum benefit under the Act was $70 a week while the average weekly wage for amphibious workers was over $200 in some ports. The Amendments to the Act raised the maximum to $167 a week with a provision increasing benefits to $318.38 in 1975. H.R. REP. No. 92-1441, 92d Cong., 2d Sess. 2, 3, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4700-01. The Senate Report, S. REP. No. 92-1125, 92d Cong., 2d Sess. 5 (1972), and the House Report, H.R. REP. No. 92-1441, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, are almost identical.

39. "The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) which held that the traditional seamen's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of 'unseaworthy' conditions even though the unseaworthiness was caused, created, or brought into play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. . . . Furthermore, . . . under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the techniques of suing the vessel under the unseaworthiness doctrine." H.R. REP. No. 92-1441, *supra* note 38, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4702. *See also* Cohen & Doughterty, *1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587 (1974); Stockers, *An Analysis of the Formulation of Policy: The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972*, Program Material for Admiralty Law Seminar (June 15, 1973); Thies, *Amended Section Five of the Longshoremen's and Harbor Workers' Compensation Act*, 41 TENN. L. REV. 773 (1974); Note, *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972).

40. *See, e.g., Hearings on S. 2318, S. 525, S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 174-77, 820-21 (1972).

41. 4 A. LARSON, *supra* note 20, §89.48.

extension was apparently a concession to maritime workers in exchange for surrender of the right to unlimited awards through unseaworthiness actions.[42]

This history might explain, but does not excuse, the unfortunate lack of care in drafting those sections of the Amendments extending coverage onto shore. Courts interpreting the amended coverage sections have had only the rather dim light shed by committee reports accompanying the final drafts of the Amendments to assist them. As one might expect under these conditions, the courts' interpretation have shown little consistency.

For several years, the sole interpreter of the Amendments was the Benefits Review Board[43] which replaced the federal district courts as the reviewer of decisions made by administrative law judges.[44] Thus, a considerable body of law, invariably favoring injured maritime workers,[45] had developed before the circuit courts first confronted the changes.[46] By October, 1975, Judge Craven of the Fourth Circuit was able to identify six consistent Board interpretations involving the shoreward extension of the Act:

> 1. Outright rejection of the "point of rest" theory[47] as a determinative factor in cases where coverage is disputed.
> 2. Waterborne cargo remains in maritime commerce until such time as it is delivered to a trucker or other carrier to be taken from the terminal for further transshipment.
> 3. Cargo first enters maritime commerce when it is unloaded from a truck or other carrier and is handled by terminal employees working upon the "navigable waters" of the United States as defined in the Act.
> 4. The "loading and unloading" of ships is a continuous process involving many different employees working at various places within the terminal area and performing different tasks, but includes the handling of cargo during all times it is in maritime commerce.
> 5. It is sufficient to bring an employee within the scope of maritime employment that his duties at the time of injury involve handling cargo that is in maritime commerce.
> 6. The Act does not require that one actually be engaged in loading or unloading vessels to be an "employee" within the meaning of the Act.[48]

42. Professors Gilmore and Black call the concessions a "political resolution" and a "tradeoff." G. GILMORE & C. BLACK, *supra* note 25, at 411.

43. *See* 33 U.S.C. §921(b) (1970 & Supp. II 1972).

44. 33 U.S.C. §919 (1970 & Supp. II 1972). This section explains the procedure for presenting a claim. *See also* Fallon, *Practice and Procedure for Handling Claims Under the Longshoremen's and Harbor Workers' Compensation Act as Amended,* 23 LA. B.J. 121 (1975).

45. *See generally* 4 A. LARSON, *supra* note 20, §§89.27-.49. Professor Larson's treatise contains a detailed interpretation of the 1972 Amendments based on an extensive analysis of opinions by administrative law judge and the Benefits Review Board.

46. Because the Act applied only to injuries arising after the date of enactment, October 27, 1972, it was not until late 1975 that circuit court opinions construing the new coverage provisions began to appear. Conversely, as late as March 29, 1977, a case was decided under the preamendment coverage provision. *See* St. Louis Shipbuilding Co. v. Director of the Office of Workers' Compensation Programs, 551 F.2d 1119 (8th Cir. 1977).

47. For a discussion of the point of rest doctrine, see text accompanying notes 93-96 *infra.*

48. I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d 1080, 1092-93 (1975)

Although Judge Craven argued that these interpretations are "entitled to great deference by the courts,"[49] no circuit has demonstrated an intent to defer to the Board's decisions; indeed, the two circuits that have directly addressed the issue expressly rejected the suggestion.[50]

While the courts have not deferred to the Board's interpretations of the Act, they have indicated a willingness to give the Board a freer hand in the application of the Act to specific cases[51] and to limit their review of the Board's factual findings to the substantial evidence rule.[52] Since the Board now performs essentially the same function as did the district courts prior to the Amendments,[53] a limited review of the Board's decisions seems proper.[54]

(Craven, J., dissenting), *modified on rehearing en banc,* 542 F.2d 903 (4th Cir. 1976).

49. Arguing in favor of judicial deference to Board rulings, Judge Craven contended: "A consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." 529 F.2d at 1091. Under the Act's new provisions the Secretary of Labor is given authority to administer the Act and to make necessary rules and regulations. Furthermore, the Board, whose members are appointed by the Secretary, is directed to hear substantial issues of law and fact. Concluding that the Board had interpreted the coverage provision in a consistent manner, Judge Craven suggested that these decisions should be accorded great weight. 529 F.2d at 1093-94.

50. The First Circuit in Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264 (1st Cir. 1976), and the Second Circuit in Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729 (1977), examined the deference question in light of three criteria suggested by Professor Davis in his treatise on administrative law, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§30.01-.09 (1958 & Supp. 1970): (1) the relative expertise of agency and court; (2) whether there is express statutory delegation of the question to the agency; and (3) whether the problem involves general propositions or the application of general propositions to specific facts. These courts agreed that all three criteria as applied to Board interpretations militated against deference. Stockman v. John T. Clark & Son of Boston, 539 F.2d at 269-70; Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d at 49-50.

51. The Fifth Circuit said broadly that it "will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion." Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 541 (5th Cir. 1976). While it may appear that the court adopted an approach of general deference to Board rulings, including statutory interpretation, such a reading is of dubious merit. First, the general statement of deference is qualified by the last phrase, "so long as there is a reasonable legal basis for the Board's conclusion." This legal basis will most probably come from the circuit court's interpretation of the statute. It is also significant that this statement appears in the section entitled "The Coverage Issue in *These* Appeals" and no mention of deference is made in the preceding section of the opinion construing the coverage provision of the amendments. *Id.* at 541 (emphasis added). Similarly, the First Circuit concluded: "[W]hile *on occasion we may well expect to defer to the Secretary or the Board in particular applications,* we see neither the Board nor the Secretary as having been commissioned to settle the sort of question, involving the general construction of an act of Congress, encountered here." Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 269-70 (1st Cir. 1976) (emphasis added).

52. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48-49 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729 (1977); Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 270 (1st Cir. 1976).

53. See note 44 *supra* and accompanying text.

54. I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d at 1091-92.

Thus, while all circuit courts will probably view the decisions of the Benefits Review Board with "interest and respect,"[55] the job of redefining the inland boundary of the Act's coverage rests with the several circuit courts of appeal and, ultimately, with the Supreme Court. Most of the admiralty circuits have now addressed the problem of interpreting the dual situs-status requirements.

THE EXPANDED SITUS TEST

As previously discussed, the amendment to section 903(a) expanded the definition of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."[56] The requirement that an employee's injury occur within such a situs thus far has presented few problems for claimants. The change, however, has already started to create problems of interpretation in the courts.

The most expansive interpretation of the situs test was offered by the Third Circuit in *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs (Johns)*,[57] in which the situs requirement was effectively read out of the Act.[58] The claimant in *Johns* was injured when the truck he was driving overturned on a public street one-half mile from the nearest water but within a large marine terminal. The administrative law judge denied recovery, finding that while the claimant had been engaged in maritime employment, thus meeting the status test, he was not injured at a situs within the amended coverage section. The Board reversed, ruling that the claimant was injured at a covered situs. On appeal, the Third Circuit began its interpretation with the unique view that a dual situs-status test existed prior to the 1972 Amendments.[59] Relying heavily on legislative history, the court noted that the dominant purpose of the landward extension was

55. Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 269 (1st Cir. 1976).

56. See note 34 *supra* and accompanying text.

57. 540 F.2d 629 (3rd Cir. 1976). *See generally* 50 TEMP. L. Q. 177 (1976).

58. However, the *Johns* court remanded the case to the administrative law judge to determine whether the facts supported a finding that the employee met the status test. The employee in this case was injured "on a public street *in the marine terminal*," *id.* at 639 (emphasis added), and would therefore have clearly met the situs requirement under the more restrictive interpretation of the coverage section. While this point might be urged by persons wanting to revive the situs requirement in the Third Circuit, the court left little doubt that the place of injury was not dispositive.

59. *Id.* at 636. The Supreme Court and other circuits have stated that prior to the Amendments the situs requirement was the only test that an employee had to pass. These courts recognize the status test as a creation of the amended "employee" definition in 33 U.S.C. §902(3) (1970 & Supp. II 1972). *See* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729, 4733 (1977) ("The amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured."); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 41 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729 (1977); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 537-38 (5th Cir. 1976); Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 271 (1st Cir. 1976); I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d at 1083. *See generally* Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976).

to create uniformity of coverage for maritime workers. The court then concluded that in order to create uniformity, any geographic limitations upon federal coverage must be eliminated. As a result, the sole test in the Third Circuit is whether the employee's activities have a "functional relationship" with maritime transportation.[60]

In an attempt to reconcile this interpretation with some apparently conflicting language in the Act,[61] the *Johns* court reasoned that references to "navigable waters" in the amended "employer" definition and "coverage" section were not restrictive situs requirements, but were only a shorthand method of establishing a jurisdictional nexus between the claimant and waterborne transportation.[62] Thus, it is the locus of the vessel and not the situs of the injury that creates admiralty jurisdiction.[63]

This construction of the amended sections distorts the congressional uniformity objective and disregards language in the Act that clearly suggests that the congressional purpose was not so venturesome. The "employee" and "employer" definitional sections are sufficient to insure that a jurisdictional nexus is maintained with maritime activities. Thus, if the Third Circuit's understanding of the congressional intent is correct, there was little need for the retention, and less need for the revision of the coverage provision.

The specific language of the amended coverage section is even more difficult to reconcile with the Third Circuit's interpretation. Section 903(a) retained the provision that compensation is payable "*only if* the disability or death results from an *injury occurring upon the navigable waters of the United States.*"[64] This language clearly requires that the situs test be met by the injured employee,[65] not by only the vessel, for purposes of establishing a jurisdictional nexus. Significantly, Congress limited the extension of coverage to "any *adjoining* pier, wharf, dry dock . . . , or other *adjoining* area customarily used by an employer in loading, unloading, repairing or building a vessel."[66] If the list of covered areas is merely illustrative, as the Third Circuit contended in *Johns*, there was no reason for Congress to employ "adjoining," a word that could only serve to limit coverage. The decision in *Johns* failed to address these objections.

Other circuits, taking a more literal approach to the wording of section 903(a), agree that a situs test does exist and must be met by the claimant

60. See text accompanying note 116 *infra*.

61. The court recognized that its interpretation was not within the clear meaning of the Act: "Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. . . . We concede, as we must, that the draftsmanship of the 1972 Amendments leaves something to be desired and, to a certain extent, obscures this purpose from view." 540 F.2d at 638.

62. *Id.*

63. The Third Circuit has thus retained a situs requirement only as it relates to the vessel. "It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in [that court's] view Congress referred to by its reference to navigable waters." *Id.*

64. 33 U.S.C. §903(a) (1970 & Supp. II 1972) (emphasis added).

65. *See* A. LARSON, *supra* note 20, §89.30.

66. 33 U.S.C. §903(a) (1970 & Supp. II. 1972) (emphasis added).

to recover under the Act. All circuits agree that "adjoining" means "adjoining navigable waters."[67] In *Stockman v. John T. Clark & Son of Boston, Inc.*[68] the First Circuit rejected the argument that Congress had intended to limit "adjoining" to those areas contiguous to the specific vessel being unloaded. The claimant in *Stockman* was injured while removing cargo from a container at a marine terminal located on the water but across the harbor from the berth of the vessel that had discharged the container. Upon discharge the container had been hauled by an independent trucking firm overland two miles to the situs of the injury. The court recognized that Congress intended only to cover terminals "associated with the shipboard movement of marine cargoes."[69] Still the *Stockman* court found that the terminal was a covered situs since it adjoined navigable waters and was customarily used in loading and unloading vessels.[70]

The most troublesome problems of interpretation have arisen over the requirement that an area be "customarily used by an employee in loading, unloading, repairing or building a vessel." Apparent confusion has developed whether to apply the "customarily used" requirement to all of the specified areas of coverage or only the catch-all "other adjoining area." One decision, while not turning upon the interpretation of "customarily used," failed to distinguish between the specified areas and the catch-all phrase in applying the coverage section. The Fifth Circuit in *Jacksonville Shipyards, Inc. v. Perdue*[71] denied recovery to an employee injured while going to "punch out" at a management office located within the terminal but approximately one mile from the vessel on which the employee was working.[72] The court found that neither the office nor the facilities separating the office from the docks were customarily used for loading, unloading, or any other specified use, or adjoined navigable waters; therefore, these areas did not meet the situs test.[73]

The *Perdue* decision raised the additional question of how much of an area must be customarily used for the specified activities. Is the use of a part of a large terminal for one of the specified uses sufficient when the particular part of the terminal at which the injury occurs is not so used? The Fifth Circuit in *Perdue* held that it was not.[74] In denying recovery to the employee, the court "reject[ed] the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction,"[75] requiring that "a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act."[76]

67. *See also* Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 272 (1st Cir. 1976) ("'Adjoining' can only refer to navigable waters.").

68. 539 F.2d 264 (1st Cir. 1976).

69. *Id.* at 272.

70. *Id.*

71. 539 F.2d 533 (5th Cir. 1976).

72. *Id.* at 541.

73. *Id.* at 542.

74. *Id.*

75. *Id.*

76. *Id.* at 541.

The Fourth Circuit in *I.T.O. Corp. of Baltimore v. Benefits Review Board*[77] allowed recovery when only part of the terminal in which the claimant was injured was customarily used for one of the specified purposes. Even though the court had earlier found that the exact situs of the claimant's injury was not used for a specified purpose[78] it concluded, "We have no doubt that each of the claimants satisfied the situs test of the post-1972 Act. At a minimum, they were injured at a terminal, adjoining navigable waters and used in the overall process of loading and unloading a vessel."[79] Thus, the situs while not adjoining navigable waters nor being used for any of the specified purposes was still a covered situs because it was located within a terminal customarily used for loading and unloading vessels.

Judge Friendly, speaking for the Second Circuit in *Pittston Stevedoring Corp. v. Dellavantura*,[80] addressed both questions: whether "customarily used" applies to the catch-all phrase "other adjoining area" as well as the specified areas of coverage; and whether usage of a part but not the part of a specified area suffices. The *Pittston* court reviewed, along with other cases, the award to Blundo, a worker injured while checking cargo being removed from a container at a pier not being used for actual shipboard loading or unloading but rather as a storage area. In holding that the claimant satisfied the situs requirement, Judge Friendly noted that any pier, wharf, dry dock, terminal, building way, or marine railroad meets the situs requirement if it adjoins navigable water. Thus, the Second Circuit interpreted the "customarily used" requirement to refer only to the catch-all category "other adjoining area."[81] Moreover, the *Pittston* court concluded that a claimant satisfied the situs requirement when his injury occurred on a pier located within a terminal *"a part of which* was used for loading and unloading vessels."[82]

The Supreme Court on certiorari upheld the awards made by the Second Circuit in *Northeast Marine Terminal Co. v. Caputo*.[83] In *Northeast Marine*

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77. Although the *I.T.O.* decision was modified upon rehearing en banc, the Fourth Circuit did not alter the original situs findings. *See* I.T.O. Corp. of Baltimore v. Benefits Review Bd., 542 F.2d 903 (4th Cir. 1976).

78. The Court had rescribed the area in which the claimant was injured: "Shed 11 was 685 feet from the water's edge. It was not connected geographically or functionally with the ships' berthing area, and ships were neither loaded nor unloaded from it." 529 F.2d at 1082.

79. *Id.* at 1083-84.

80. 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 4729 (1977).

81. The court first edited the Act's coverage section to read: "including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing or building a vessel." *Id.* at 51 n.19 (emphasis in original). Relying upon this version the Second Circuit concluded, "It would seem that any pier next to the water is included within the situs definition." *Id.*

82. Neither *I.T.O.* nor *Pittston* satisfactorily answers the question raised above: How much of a terminal needs to be customarily used for a designated purpose to satisfy the situs test? This problem could be a persistent one considering the existence of sprawling marine terminals throughout the country, many of which are large enough to contain their own public roads. *See, e.g.*, Sea-Land Serv., Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d at 634.

83. 45 U.S.L.W. 4729 (1977).

the Court reviewed the consolidated cases of Blundo, the worker injured while checking a container resting on a pier, and Caputo, a worker injured while loading cargo recently unloaded from ships onto a consignee's truck. In Caputo's case, however, the situs requirement was not contested because the truck being loaded was parked within a terminal adjoining navigable water, parts of which were used for loading and unloading vessels.[84]

The stevedoring company again argued that because the "customarily used" requirement was not met, claimant Blundo failed the situs test. The Court noted that while one sponsor of the bill had shown little concern with how piers, wharves, and terminals were used, "it is not at all clear that the adjectival phrase 'customarily used . . .' was intended to modify more than the immediately preceding noun phrase 'other areas' [*sic*]."[85] Nonetheless, the Court continued, even if "customarily used" also modifies the specified areas, "Blundo satisfied the situs test in the same way that Caputo did — by working in an 'adjoining terminal . . . customarily used . . . in loading [and] unloading.' The entire terminal facility adjoined the water and one of its two finger-piers clearly was used for loading and unloading vessels."[86]

Thus, while not resolving the issue of which terms are modified by "customarily used," the Supreme Court has mooted the problem in most situations by adopting a broad definition of "terminal" and allowing coverage if part of the terminal is used for loading, unloading, or some other expressly included function. Such an approach is consistent with the common meaning of "terminal," which includes the entire marine facility regardless of the relationship of the specific place of injury to the loading and unloading processes.[87] For example, an employee, like the worker in *Perdue*, injured in front of the stevedore's management office would satisfy the Supreme Court's situs test provided part of the marine terminal within which the office was located was customarily used for one of the specified uses. The Court left undefined how great a part of the terminal must be so used and how remote that portion may be from the place of injury and still satisfy the test. This problem could be resolved by adoption of the Second Circuit's approach applying "customarily used" only to the catch-all phrase "other adjoining areas."[88] In this manner all areas within a terminal would be included as long as the terminal adjoined navigable waters.

THE STATUS TEST

The goal of creating a uniform compensation system for maritime workers was fulfilled by moving the Act's coverage onto shore. In expanding the situs

84. *Id.* at 4737.

85. *Id.*

86. *Id.*

87. Webster's dictionary defines "terminal" as it relates to carriage of goods as "a: either end of a carrier line (as a railroad, trucking or shipping line, or airline) with classifying yards, dock and lighterage facilities, management offices, storage sheds, and freight and passenger stations, b: a freight or passenger station that is central to a considerable area or serves as a junction at any point with other lines, c: a town or city at the end of a carrier line." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2359 (1961).

88. See text accompanying note 81 *supra*.

of covered injuries, however, Congress did not want to provide benefits for employees who while on the waterfront, were not engaged in loading, unloading, repairing, or building a vessel.[89] The drafters therefore included a status test in the 1972 Amendments redefining "employee" to include only persons "engaged in maritime employment."[90] Unfortunately, Congress failed to define the latter phrase.

While section 902(3) specifically included longshoremen and other persons engaged in longshoring operations, and harbor workers, including ship repairmen, shipbuilders, and shipbreakers,[91] the courts agree that the meanings of these terms are so unsettled, that resort to the legislative history is necessary.[92] However, even reliance on legislative history has failed to produce judicial agreement over when a worker should be considered as engaged in maritime employment.

One of the earliest and most persistent problems involving the status test was the extent to which the Act's benefits were available to persons engaged in the overall process of loading and unloading a vessel. The Fourth Circuit in *I.T.O.*[93] was the first court to interpret "maritime employment" in this context.[94] *I.T.O.* involved claims by three persons injured while engaged in the process of loading and unloading a vessel. Their claims were first decided by a three-judge panel of the Fourth Circuit. At that time Judge Winter, speaking for the majority, explained "that the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest

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89. H.R. REP. NO. 92-1441, *supra* note 38, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708.

90. See note 35 *supra*.

91. *Id.*

92. Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 272; I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d at 1084-85 ("Because we conclude that the terms . . . are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources."). *Contra*, I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d at 1094 (Craven, J., dissenting). Judge Craven would not have resorted to the legislative history, but would have relied instead upon a line of cases that he felt clearly placed the claimants within the established meaning of "maritime employment." Judge Craven suggested that even if the statutory language were ambiguous, the courts should rely upon: (1) an established rule of broad statutory construction, (2) a statutory presumption of coverage, (3) adherence to administrative agencies' liberal construction of the coverage section, and (4) a narrow scope of review of the Board's determinations. *Id.*

93. 529 F.2d at 1080.

94. Actually the first interpretation was made by the Ninth Circuit in Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976), but the facts in that case were so unique that it has not been cited extensively by the other circuits. *See* Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 268 n.3. In *Gilmore* the Ninth Circuit overturned an award to a pondman injured when he fell into a log pond while sorting logs for processing at a lumber mill. The court emphasized that for an employee to be covered his own work "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" 528 F.2d at 961.

at the terminal to the ship."[95] This holding became known as the point of rest doctrine. Applying the doctrine to the cases at bar, the court determined that because all three injuries occurred at some stage of loading or unloading landward of the point of rest, none passed the status test.[96]

Judge Craven, in dissent,[97] found that the point of rest approach erected an artificial, second situs test not intended by Congress.[98] Judge Craven concluded that all three claimants were covered because they were all injured in the process of loading or unloading a ship located within a covered situs.[99]

In 1976, "[b]ecause of the importance and novelty of the questions decided" six judges of the Fourth Circuit court reheard *I.T.O.* en banc.[100] On rehearing the original panel's majority and dissent each gained one vote. The third additional judge, Judge Widener, subscribed to a modified point of rest doctrine redefining the test to be "whether an otherwise eligible employee is injured while engaged in loading or unloading a ship" as opposed to loading or unloading the land-based delivery vehicle.[101] Judge Widener thus concurred in the reversal of the award given to the claimant who was injured while moving cargo from a storage shed onto a waiting delivery truck,[102] finding this claimant was no longer engaged in unloading the vessel but was instead loading the truck.[103] Judge Widener, however, also concurred

95. 529 F.2d at 1081.

96. The specific facts of the three cases were as follows: Claimant Adkins, a forklift operator, was injured while loading cargo, which had been previously removed from its container, onto an awaiting delivery truck. Claimant Brown, also a forklift operator, suffered carbon monoxide poisioning while transporting cargo from a warehouse where it had been stored to the side of a container. Later, the cargo would be loaded into the container and transported to a marshalling area on a pier for loading aboard ship. Claimant Harris was injured while transporting containers from the storage area to the marshalling area adjacent the ship. *Id.* at 1082. In these cases the majority determined that the point of rest for both loading and unloading purposes was the marshalling area at the side of the ship. *Id.* at 1087.

97. *Id.* at 1089 (Craven, J., dissenting).

98. *Id.* at 1096. *Accord,* Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 275. Judge Craven also expressed concern over the fact that the point of rest approach would give stevedoring companies the "power to shift unilaterally [the area of coverage] seaward or shoreward at [their] whim or caprice." 529 F.2d at 1096.

99. Judge Craven recognized that all three claimants had "subject[ed] themselves to the risks inherent in moving and handling cargo and in operating the potentially dangerous machinery of the trade." 529 F.2d at 1101. In support of a risk distribution approach, see Note, *On the Waterfront: The Fourth Circuit Draws the Line at the Point of Rest in a Narrow Interpretation of the LHWCA Amendments of 1972,* 54 N.C. L. Rev. 925, 937 (1976).

100. I.T.O. Corp. of Baltimore v. Benefits Review Bd., 542 F.2d 903, 905 (4th Cir. 1976).

101. *Id.*

102. Thus, Judge Widener's modified point of rest in this case is located at the storage area as opposed to the marshalling area as designated by the *I.T.O.* majority. In a dissenting opinion, Judge Butzner acknowledged that this compromise alleviated some of the harsh results of the *I.T.O.* majority's decision, but added: "It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult." *Id.* at 910 (Butzner, J., dissenting). The compromise point of rest approach is a good example of the often necessary trade-off between uniform coverage and ease of application.

103. *Id.* at 905.

with the dissenters in *I.T.O.* who urged affirmance of the awards to the claimant injured while "stuffing" a container to be later loaded aboard a ship and to the claimant injured while transporting a full container to the marshalling area.[104]

Thus, the Fourth Circuit has suggested three possible approaches to the determination of status: (1) the *I.T.O.* majority's point of rest doctrine, (2) the *I.T.O.* dissent's maritime commerce approach, and (3) Judge Widener's compromise excluding workers engaged in loading and unloading land delivery vehicles. These three different approaches left claimants and stevedoring companies within the Fourth Circuit facing a "twilight zone" equal in breadth to its preamendment predecessor.

The Fourth Circuit's modification of the point of rest doctrine foreshadowed the unfavorable reception the doctrine has had by commentators[105] and other courts,[106] culminating in an outright rejection by the Supreme Court.[107] In *Northeast Marine* the Court echoed the attacks of the circuit courts exposing the weaknesses of the point of rest approach. As first noted by Judge Craven in his *I.T.O.* dissent[108] and later by the Fifth Circuit in *Perdue*,[109] the point of rest approach was never mentioned in the Act, the committee reports, or elsewhere in the legislative history.[110] The Supreme Court called the omission of a term of such alleged widespread use "both conspicuous and telling."[111] Since the Act is remedial in nature, the courts have refused to infer such a restrictive meaning. Instead, the courts opposing the point of rest approach have readily followed the earlier instructions of the Supreme Court that the Act be liberally construed in conformance with its purpose.[112]

Secondly, the language of the committee reports reveals a specific intent to cover workers landward of the point of rest. After noting that the Act expressly covered "any longshoreman" in addition to "other persons engaged in longshoring operations," the *Pittston* court concluded that a longshoreman must sometimes be covered even when not engaged in work traditionally

104. *Id.*

105. *See* Note, *supra* note 99; Comment, *Longshoremen's and Harbor Workers' Compensation Act Recovery Denied Longshoremen Injured Landward of the "Point of Rest,"* 10 SUFFOLK U.L. REV. 1079 (1976).

106. Dravo Corp. v. Maxim, 545 F.2d 374 (3d Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d at 35; Sea-Land Serv. Inc. v. Director, Office of Workers' Compensation Programs (Johns), 540 F.2d at 629; Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d at 533; Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 264.

107. Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. at 4737.

108. 529 F.2d at 1096 (Craven, J., dissenting).

109. 539 F.2d at 540.

110. *But see* Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 41 INS. COUNSEL J. 63, 68 (1974) (arguing that the point of rest was the shoreside boundary intended by the committee).

111. Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. at 4736.

112. In Voris v. Eikel, 346 U.S. 328, 333 (1953), the Supreme Court directed: "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *See* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d at 540 n.21; Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 275 n.9; Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d at 51.

associated with this occupation. Noting that persons handling cargo seaward of the point of rest were involved in longshoring operations, the *Pittston* court further reasoned that if the point of rest theory had been correct, there would have been no need to add the category "longshoreman."[113] Relying on the same language but emphasizing the Act's focus on the employee's occupation rather than his particular task at the moment of injury, the Supreme Court rejected the point of rest doctrine as failing to comply with the uniformity objective.[114]

While the courts that reject the point of rest doctrine are not in total agreement where maritime employment ends, the consensus is that coverage extends to workers whose injuries pass the situs test and who are directly involved in handling cargo until it crosses the transshipment point, entering the possession of the consignee or land carrier.[115] This rule, however, is subject to various limitations discussed below.

Since the Third Circuit in *Johns* had eliminated the situs test from coverage determinations, their sole inquiry concerned the claimant's status. In deciding whether a claimant injured while transporting cargo between an old and new terminal was a covered employee, the Third Circuit concluded: "The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing."[116] Absent sufficient facts, however, the court remanded the case for a determination whether the claimant had met the functional relationship test.

The Fifth Circuit in *Perdue*[117] specifically held that "an injured worker is a covered 'employee' if at the time of his injury (a) he was performing the work of *loading, unloading*, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work."[118] Applying this test to a claimant injured while securing a military vehicle to a railway flatcar for carriage inland, the court reasoned that because the work being performed was "evidently an integral part of the process of moving maritime cargo from a ship to land transportation,"[119] the claimant was "engaged in maritime employment" even though the vehicle had clearly passed the point of rest.[120]

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113. 544 F.2d at 52.

114. 45 U.S.L.W. at 4736.

115. The transshipment point is not a spacial boundary, like the point of rest, but is the place or time at which cargo leaves or arrives in maritime commerce. In practice, it has usually been found to be reached when cargo has been placed on or removed from, in instances of loading vessels, the vehicle of the consignee.

116. 540 F.2d at 639. Coverage therefore depended upon establishing "a nexus between the employer-employee relationship and maritime commerce." *Id.* at 637.

117. 539 F.2d at 533.

118. *Id.* at 539-40.

119. *Id.* at 543.

120. The court was asked by the defendant to deny recovery on the basis of the lapse of time (two to seventeen days) between the unloading of the cargo from the vessel and the reloading on the land carrier's railroad flatcar, the time of injury. The court was also asked to consider that the claimant's union was the "warehousemen's" rather than the "longshoremen's" union. Both of these arguments were rejected. *Id.* at 543 n.24.

Furthermore, the Fifth Circuit required that the status test be met "at the time of the injury,"[121] thereby excluding from coverage a ship repairman injured while at work, but who at the precise moment of injury was not engaged in maritime employment.[122] While this time of injury approach may appear to be supported by the language of the employee section — "engaged in" — as opposed to the broader language of the employer section — "employed in" —[123] it is at odds with the Amendments' purpose of promoting uniform coverage.

Pittston extended coverage to all cargo handlers meeting the situs test who "are engaged in the handling of cargo up to the point where the consignor has actually begun its movement from the pier (or in the case of loading, from the time when the consignor has stopped his vehicle at the pier)."[124] The intent expressed in the committee report to extend coverage only to those employees "who would otherwise be covered by [the] Act for *part of their activity*,"[125] led the court to add the proviso that the employee must have "spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."[126] While the proviso in this instance was mere dictum,[127] if followed in future cases it would only perpetuate the arbitrary distinctions the amended coverage section was intended to eliminate. The First Circuit[128] has avoided this problem by interpreting "part of their activity" to refer to classes of maritime employees rather than to individuals.[129] Thus, that circuit requires only that the claimant establish membership in a class of employees, *e.g.*, longshoremen, whose members would have been covered for part of their activity prior to the Amendments.[130]

Citing the congressional desire to promote uniformity in the coverage of amphibious workers, the Supreme Court in *Northeast Marine* upheld coverage

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121. *Id.* at 539. *Accord,* Weyerhauser Co. v. Gilmore, 528 F.2d 957, 960 (9th Cir. 1975). The Fifth Circuit equates the requirements that the employee be engaged in one of the specified activities *at the time of the injury* with the rules that general job classification and union affiliation are not to be considered. *See* 539 F.2d at 539.

122. 539 F.2d at 542.

123. *See* Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments,* 55 TEX. L. REV. 99, 122-23 (1976).

124. 544 F.2d at 56.

125. H.R. REP. NO. 92-1441, *supra* note 38, *reprinted in* [1972] U.S. CODE CONG & AD. NEWS 4711.

126. 544 F.2d at 56.

127. Because the worker to whom this proviso was directed did spend a significant part of his workday on the vessel, the court did not feel it necessary to examine fully this problem. Instead, the court concluded: "[W]hether this proviso is essential can be left for another day." *Id.* The Second Circuit is apparently interpreting the passage to require that some of the claimant's work be performed aboard a vessel where he would have qualified for coverage prior to the Amendments.

128. Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 264.

129. The *Stockman* court interpreted the provision as a demonstration of congressional intent not to include "whole new groups" and "classes of employees" such as clerical workers. The court concluded that a putative covered class must either fall into a recognized category of maritime employment or be one shown to perform some shipboard duties. *Id.* at 277.

130. *Id.*

for the claimant, Caputo, who was injured while loading cargo onto an awaiting delivery truck.[131] The Court placed little emphasis on the nature of the task being performed by Caputo at the moment of injury, finding an "obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation.' "[132] Therefore, the "time of injury" approach taken by the Fifth Circuit in *Perdue* apparently is overruled. The Court relied instead upon the Act's focus on "occupations – longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker."[133] Thus the Supreme Court's test emphasizes the question whether the injured employee is a longshoreman rather than whether he is at the moment of injury engaged in longshoring operations. Furthermore, the Supreme Court found a congressional intent that "longshoremen" means *persons* who spend "at least some of their time in indisputably longshoring operations *and who, without the amendments, would be covered for only part of their activity.*"[134] Thus, the First Circuit's attempt to eliminate the troublesome "part of their activity" phrase by applying it to classes instead of particular employees was not followed by the Supreme Court. Rather, the phrase remains as an obstacle in the path to recovery for those workers whose employment never requires shipboard activities. Surely, Congress did not intend to promote uniform coverage under the Amendments in this manner.

Closely related to the traditional work of longshoremen – loading and unloading vessels – are the relatively new tasks of "stripping," unpacking cargo containers[135] after they have been removed intact from a vessel, and "stuffing," packing containers prior to their loading aboard a vessel. Legislative history evidences congressional concern about the effects of modern cargo handling techniques, especially containerization, on the nature of longshoremen's work.[136] A primary congressional motive behind the landward extension was to accommodate the Act to these changes.[137] Accordingly, the Second Circuit held that all persons "who are engaged in stripping and stuffing containers" are engaged in maritime employment regardless of whether they satisfy the shipboard duties proviso required of cargo handlers.[138] In

131. 45 U.S.L.W. at 4735.

132. *Id.* at 4736. The Second Circuit had recognized in *Pittston* that "[a] 'longshoreman' may . . . be covered at some times even when he is not engaged in traditional longshoring activity." 544 F.2d at 52. That circuit apparently believes that the amended Act created a status requirement rather than an incident test. Professor Larson refers to the Fifth Circuit's time of injury holding as a "serious blunder." *See* 4 A. LARSON, *supra* note 20, §89.42.

133. 45 U.S.L.W. at 4735.

134. *Id.* (emphasis added).

135. "Containers are rectangular metal structures used to transport cargo. After being taken off the vessel by crane, they are provided with a chassis and wheels and converted into large box trailers capable of being trailed on the highways by tractors." Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 265 n.1.

136. H.R. REP. NO. 92-1441, *supra* note 38, *reprinted in* [1972] U.S. CODE & CONG. AD. NEWS 4207-08. For a discussion on the changes brought about by modern cargo handling techniques, see Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507 (1974).

137. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d at 53; Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d at 275.

138. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d at 56.

Stockman the First Circuit followed Judge Friendly's lead and upheld an award to a worker injured while unloading a container previously discharged from a vessel.[139]

Although recognizing that the First and Second Circuits had extended coverage to all employees stuffing and stripping containers, the Third Circuit in *Sea-Land Service Inc. v. Director, Office of Workers' Compensation Programs (Suarez)*[140] nevertheless concluded that a greater nexus was required. The *Suarez* court reviewed the award to a claimant who had injured his hand while stripping a container at rest within a terminal building. Relying on invalid factual distinctions, the court refused to adopt what they called the "fairly narrow" holdings of the First and Second Circuits,[141] and instead remanded for evidence as to whether the stripping met that court's functional relationship test.

The Supreme Court in *Northeast Marine*, recognizing that "the container is a modern substitute for the hold of the vessel,"[142] upheld the Second Circuit's ruling that claimant Blundo, injured while checking cargo being stripped from a container, satisfied the status requirement because he was performing the "functional equivalent of sorting cargo discharged from a ship."[143] Since no valid factual distinctions can be drawn between the *Northeast Marine* and *Suarez* container stripping cases the Supreme Court has effectively overruled the functional relationship test as applied to cargo handlers.

In addition to coverage for longshoremen, the Act expressly provides coverage for harbor workers such as ship repairmen, ship builders, and ship breakers. Thus far the only problem encountered pertaining to these workers is determining at what point the shipbuilding process begins. Applying its functional relationship test in *Dravo Corp. v. Maxim*,[144] the Third Circuit denied a petition for review of the Board's decision that a claimant, injured while burning steel plates for later use on barge decks and bottoms, satisfied the status test. The court ruled that the relationship of the claimant steel fabricator's activity to the defendant's shipbuilding operation was maritime in character, rejecting the argument that the Act's coverage extended only to

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139. 539 F.2d at 276-77.

140. 552 F.2d 985 (3d Cir. 1977).

141. *Id.* at 995 n.18a. The court distinguished *Stockman* and *Pittston* on three grounds: (1) in *Pittston* the injuries occurred on the pier, (2) "the claimants had frequent occasion to actually perform a substantial part of their duties aboard the vessel," and (3) in *Stockman* "the parties stipulated that the claimant was a 'longshoreman' who worked on the docks." *Id.* As to the first basis, since the injury took place within the terminal it certainly met any situs requirement, especially in the Third Circuit, which claims to have none. The second basis for the distinction is inapplicable to container stuffers and strippers since the Second Circuit applied its "shipboard" proviso only to other cargo handlers. Finally, while the parties had stipulated that Stockman was employed as a longshoreman, the question remained whether in fact his activities met the status requirements.

142. 45 U.S.L.W. at 4735.

143. *Id.*

144. 545 F.2d 374 (3d Cir. 1976).

shipbuilding at the final shoreside point of rest for a vessel under construction.[145]

The Fifth Circuit reached the same result in *Perdue* upon review of an award to a worker, Nulty, injured at a fabrication shop while building a piece of woodwork to be installed on a new ship.[146] The court concluded that Nulty was "directly involved in an ongoing shipbuilding operation" and therefore covered.[147] Subsequently, in *Ingalls Shipbuilding Corp. v. Morgan*,[148] the Fifth Circuit applied its "ongoing shipbuilding" test to a shipfitter helper apprentice crushed to death while cleaning a steel plate in preparation for its use in fabrication.[149] In upholding the award the court rejected Ingalls' arguments that the facts were distinguishable from those of Nulty. First, although Morgan was cleaning steel rather than constructing a part for the vessel, the court considered the cleaning a "necessary prerequisite to fabrication."[150] Nor was it significant that the plate was intended for use on a ship not yet launched. And, since a launched ship was not a prerequisite, it followed that shipbuilders were not required to have spent time working on board a ship.[151]

CONCLUSION

The history of the Act demonstrates the difficulty inherent in promoting fairness and uniformity of coverage while preserving the simplicity in application fundamental to workmen's compensation programs. Certainty in the coverage provision was necessarily forfeited when Congress moved the boundary from the shoreline onto the land. While certainty is indeed a desirable goal in any workmen's compensation program, Congress has placed a higher premium on the establishment of a uniform system of compensation. The courts should honor this intention, and most have done so.

The Supreme Court, by taking a liberal approach to the situs requirement, especially in its coverage of workers injured in any part of an active marine terminal, has avoided many problems that were beginning to arise under the situs test. Future problems could be avoided by not applying the "customarily used" requirement to "terminals" as that term has been defined by the Court.[152] Following the Court's rejection of the point of rest doctrine, future litigation will probably be directed toward the Second Circuit's proviso requiring that a longshoreman-claimant "spen[d] a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel"[153] to qualify for coverage. Because this proviso defeats the principal goals of

145. *Id.* at 379-80.

146. 539 F.2d at 543-44.

147. *Id. See also* Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977) (shipbuilder injured while sandblasting a dissembled crane prior to the crane's use in shipbuilding activities found to be covered).

148. 551 F.2d 61 (5th Cir. 1977).

149. *Id.* at 64.

150. *Id.*

151. *Id.*

152. See text accompanying notes 86-88 *supra*.

153. See text accompanying notes 124-130 *supra*.