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INTRODUCTION

As far back as the Grecian and Roman empires, civilizations recognized the unparalleled economic gain offered by trade on the high seas and created systems to harness that profit. The ancient Greeks and Romans built their empires on maritime commerce. The Roman Empire thrived on its commercial ships, which carried up to 400 tons of cargo in a single vessel to merchant ports throughout the Mediterranean, the Black Sea, and the Atlantic Ocean.[1] In short time, the competing commercial interests that arose between merchants, shippers, and laborers required laws regulating their interactions. Thus, the Romans developed their own maritime law by borrowing from the precepts of Grecian, and more specifically Rhodian, law of the sea.[2] Greek culture and Greek courts alike revered and protected maritime commerce; that reverence became a cornerstone of admiralty law.[3]

Centuries after the Greeks and Romans flourished, the search for maritime trade routes to the Far East prompted the discovery of the Americas. For colonists in the New World, ports became the gateway for all commerce. Soon, cities grew up around major ports. Colonists built railways and roads to connect these port cities, crisscrossing the expanse between the coasts and carrying goods and people into the heartland. This network of passageways that intended to achieve ease of access to ports contributed to the growing recognition of the American colonies as an interconnected whole. Upon gaining independence, maritime commerce and its law remained so integral to America's burgeoning identity as a unified nation that the Framers expressly provided for federal admiralty jurisdiction in the Constitution itself.[4] That federal jurisdiction controls the operation of an industry woven through the fabric of American life and trade, and, in so doing, governs the safety and well–being of an army of American maritime laborers.

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1. Lionel Casson, Ships And Seafaring Vessels in Ancient Times 105 (University of Texas Press, 1994). In his most recognized work, Parallel Lives, Plutarch described how Cato the Elder (234–149 B.C.) organized associations of investors that engaged in the joint venture of underwriting ships for profit. Plutarch, *Cato the Elder*, in Makers of Rome 144 (Ian Scott-Kilvert trans., 1965).
2. Dig. 14.2.9 (Volsusius Maecianus, From the Rhodian Law) (Alan Watson trans.).
3. *See generally* Edward E. Cohen, Ancient Athenian Maritime Courts (1973).
4. *See* U.S. Const. art. III, § 2.

Even after the industrial revolution and the dawning of the technological age,[5] the maritime industry remains solidly at the foundation of the American economy. The contemporary United States maritime industry encompasses over 40,000 vessels and provides jobs to approximately 13 million Americans.[6] Producing a $100 billion economic output each year, the industry yields $29 billion in wages and $11 billion in taxes annually.[7] Moreover, roughly thirty percent of the national economy depends on imports and exports[8]—ninety-five percent of which are transported by sea.[9] It is not surprising, then, that the maritime industry still drives Americans' understanding of both the domestic economy and the country's interactions with the rest of the world.

Maritime trade and transport does not happen on its own. The industry thrives through the sweat—and sometimes the blood—of hardworking men and women. The work of the maritime laborer remains difficult and dangerous. In 2005, the Office of Workers' Compensation Programs received roughly 27,000 reports of on-the-job injuries from longshoremen and harbor workers alone.[10] Since maritime workers make up such a large portion of the working population, and because the industry remains so vital to the American economy, the need to protect workers injured in furtherance of maritime commerce is crucial. With this very interest in mind, Congress conceived the Longshore and Harbor Workers' Compensation Act (LHWCA) in 1927.[11]

Unfortunately, ambiguities regarding the scope of coverage have plagued the LHWCA since its inception. The confusion surrounding LHWCA coverage first centered largely on a lack of clarity as to the extent of the Act's jurisdiction. The murkiness surrounding coverage led Justice

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5. Maritime commercial efforts now incorporate advanced technologies to track shipments and port activity, monitor weather and traffic on the seas, and to ensure security in the shipping industry, among other things. *See* Michael S. Bruno, *Port Security and Technology: The US Perspective*, Stevens Institute of Technology, www.oceanologyinternational.com/RXUK/RXUK [https://perma.cc/A7ZH-9RCB](Mar. 12, 2012).

6. *Americas Maritime Industry: The Foundation of American Seapower,* Navy League of the United States 7, 13, http://www.seapowermagazine.org/pdf_files/americas-maritime-industry.pdf [http://perma.cc/P5WY-H9EK] (last visited October 24, 2014) [hereinafter Navy League].

7. *Id.* at 14.

8. *World Trade-to-GDP Ratios,* The World Bank (2015), http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS.

9. Navy League, *supra* note 6, at 13.

10. *DLHWC Fact Sheet*, U.S. Dep't of Labor http://www.dol.gov/owcp/dlhwc/lsfact.htm [http://perma.cc/56FC-ZGNE] (last visited October 5, 2014).

11. 33 U.S.C. § 901–950. In a lay sense, longshoremen and harbor workers are those land-based workers that facilitate maritime commerce once a boat has reached the pier.

Brennan to label the 1927 Act "a jurisdictional monstrosity."[12] One lawmaker characterized the Act as "about as unclear as any statute could conceivably be."[13] Regrettably, steps taken to increase clarity ultimately gave birth to new ambiguities, only amplifying the already complicated application of the law.

Jurisdictional problems have commonly arisen in determining who is actually covered by the LHWCA. As with any specialized compensation structure, "there will always be a boundary to coverage, and there will always be people who cross it during their employment."[14] Today, the boundary questions revolve around the connection between the injured worker and actual maritime duties. In particular, tension exists in assessing the worker's temporal connection to maritime tasks and the reach of that connection.

The health of the maritime industry and its workers depends upon resolving that tension. The expeditious and economical provision of benefits in a workers' compensation structure rises and falls on ease of application. Until a clear line of coverage can be drawn, both workers and employers will continue to suffer from the lack of predictability and uniformity in LHWCA enforcement, and workers will have to fight for benefits. Disputes over whether coverage applies can be tied up in courts for years, depriving injured employees of financial resources at the time when they need them most. Further, these disputes hurt their employers as well, prolonging disputes, costs, and ill will. Unclear lines of coverage harm maritime businesses, and in turn harm the American maritime industry as a whole. The wasted costs stemming from the vagaries of the LHWCA incentivize diversion of trade—and profits—to other countries with less onerous coverage structures.[15] Failure to resolve the gray areas of coverage under the Act threatens to degrade an industry that has long been a bastion of the American economy. A clear and predictable line must be drawn to stop the harm felt by all parties.

This comment argues that Congress should adopt a bright line standard that refines the temporal restriction urged by Judge Clement in her concurring opinion in *New Orleans Depot Services, Inc. v. Director, Office of Worker's Compensation Programs,*[16] into a workable rule.[17] Part I

12. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 720 (1980).

13. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearing on S. 1182 Before the Subcomm. on Labor of the S. Comm. On Labor and Human Resources*, 97th Cong. 5 (1981) [hereinafter *1981 Hearing*] (statement of Don Nickles, Senator of Oklahoma).

14. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223–24 (1969).

15. For a more thorough explanation of the threat of diversion, see *infra* Part II, Section C.

16. 718 F.3d 384 (5th Cir. 2013) (*en banc*) (Clement, J. concurring).

17. *Id.*

examines the origins and creation of the LHWCA. Part II discusses the 1972 Amendments to the Act, exploring both the issues Congress set out to remedy and the new questions created by its enactment. Part III delves more deeply into the resulting "status test," examining its importance in determining LHWCA eligibility.[18] Part IV highlights the question of temporality created by the status test and emphasized by Judge Clement. Finally, Part V advocates a statutory revision of the definition of "employee" in order to clarify congressional intent and further the best interests of the shipping industry, its employees, and the national economy.

Pending enactment of that bright line rule, this article gathers the growing authorities that warrant its adoption by the courts and urges adoption as the best—if not only—way to ensure effective provision of the benefits the LHWCA seeks to afford. While it is true that the status test still suffers confounding ambiguities—and that those ambiguities threaten the health of the maritime industry—this attainable and workable solution is already percolating in admiralty law. The following pages will crystallize that cure and provide advocates with effective tools for tackling the conundrum of LHWCA coverage through interpretation of existing case law and legislation.

I. BORN OUT OF NEED: THE CREATION OF THE LHWCA

Prior to the 20th century, laborers generally had no realistic claim of action against their employers for injuries sustained in the course of their work.[19] The rise of the Industrial Revolution created new and pervasive dangers for workers, and the resulting injuries became increasingly severe: "By the turn of the century . . . it became apparent that the toll of industrial accidents of both the avoidable and unavoidable variety had become

18. 33 U.S.C. § 902.

19. Aubrey E. Denton & John H. Hughes, Longshore and Harbor Workers' Compensation in Louisiana 3 (National Business Institute, 1995). The lack of action resulted largely from the "fellow servant rule," which barred damage actions arising from the negligence or fault of a fellow servant. *See, e.g.* Nappa v. Erie R. Co., 195 N.Y. 176 (1909). Another obstacle to recovery was the equitable theory of contributory negligence, which barred liability of employers where an injury resulted at least partially from the workers' own carelessness, unless the employer's negligence was gross, willful, or wanton. *See, e.g.,* Schirm v. Dene Steam Shipping Co., 222 F. 587 (E.D.N.Y. 1914). *See also,* Wex S. Malone, Louisiana Workmen's Compensations Law and Practice 7 (West Publishing Co., 1951). To add insult to injury, the common law assumption of the risk doctrine barred remedy in many cases on the ground that the employee knowingly encountered certain dangers while in the course of employment, and was "deemed to accept all 'ordinary' or 'usual' risks." *See, e.g.,* The Maharajah, 49 F. 111 (2d Cir. N.Y.1891). *See also id.,* at 11–12.

enormous, and government was faced with the problem of who was to pay for the human wreckage wrought by the dangers of modern industry."[20]

A. Protecting the Unprotected

In the area of maritime employment, admiralty law afforded special remedies to injured maritime workers who fell into the category of seamen—but no specialized coverage existed for their land-based counterparts, longshoremen and harbor workers.[21] Most assumed that these workers would be covered by state workers' compensation acts.[22]

But in 1917, the Supreme Court rejected this assumption, denying coverage under a New York state compensation statute to a worker killed on the gangway during the process of loading and unloading cargo.[23] The Court reasoned that injuries over navigable waters were subject solely to federal jurisdiction under admiralty law; application of a state compensation structure to an injury over water would directly conflict with that jurisdiction.[24] The case resulted in what famously came to be known as the "*Jensen* line," drawn strictly at the water's edge. Longshoremen injured on the portion of the pier with pilings on land were covered by state compensation acts, but once they crossed over the *Jensen* line to the

20. Malone, *supra* note 19, at 32. To illustrate, forty-six workers were killed in the South Chicago United States Steel Corporation factory in 1906. Carl Gersuny, *Work Injuries and Adversary Processes in Two New England Textile Mills*, 51 The Bus. History Rev. 337 (1977). A shocking 526 men were killed in one year in the course of employment in Allegheny County, Pennsylvania: 125 rail-workers, 71 miners, and 195 steel workers. *Id.* For more information on labor conditions and the viability of compensation actions during the industrial revolution, see Arthur F. McEvoy's essay on the Triangle Shirtwaist Factory Fire that killed 146 people, with 62 victims jumping to their deaths. *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 Law and Social Inquiry 621–51 (Spring, 1995). McEvoy explains: "The fire symbolized the helplessness of industrial workers in the face of dangers over which they had little control and to which the law had hitherto, for the most part, simply abandoned them. It made clear in a new and powerful way that industrial accidents had causes whose roots lay in employers' near-total power over the workplace environment; causes which government had the capacity and the responsibility to address." *Id.* at 622.

21. *See* The Osceola, 189 U.S. 158 (1903) (granting a right to seamen to recover for injuries sustained as a result of the "un-seaworthiness" of the vessel). *The Osceola's* distinction of seamen was left undefined by the Court, but was designed to distinguish sailors from their land-based brethren. Denton, *supra* note 19, at 3 (interpreting *Osceola*, 189 U.S.).

22. Denton, *supra* note 19, at 3. *See, e.g.,* Sabella v. Brazileiro, 86 N.J.L. 505 (1914).

23. So. Pac. Co. v. Jensen, 244 U.S. 205, 208 (1917).

24. *Id.* at 216–17.

seaward side of the pier, they were left with no remedy.[25]

Congress twice attempted to cure this anomaly through legislation. In two separate acts, Congress expressly extended state workers' compensation structures over navigable waters.[26] However, the Supreme Court struck down both of these acts as unconstitutional usurpations of state power, as the federal government could not dictate the coverage applied by state-created law. [27] Moreover, extending state statutes into maritime jurisdiction would interfere with the express grant of admiralty jurisdiction to the federal government.[28] The Court reasoned that the Founders established admiralty jurisdiction specifically to ensure the uniformity of law required to foster free movement of both domestic and foreign powers upon the navigable waters.[29] Allowing disparate legislation in waters according to state lines would destroy that uniformity.[30] In *dicta* in *Washington v. W.C. Dawson & Company*, the Court invited legislators to create a federal compensation structure that would not interfere with states' rights or the federal admiralty jurisdiction.[31]

Responding to the Court's suggestion that "what Congress could not empower the States to do, it could do itself," Congress enacted the LHWCA in 1927.[32] By passing the LHWCA, Congress finally succeeded in accomplishing what it had tried to do through its earlier acts: creating a compensation remedy for longshoremen injured over navigable waters that avoided interference with state remedies.[33]

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25. State Industrial Comm'n of State of New York v. Nordenholt Corp., 259 U.S. 263, 273 (1922).

26. Act of October 6, 1917, ch. 97, 40 Stat. 395 (invalidated 1920); Act of June 10, 1922, ch. 216, 42 Stat. 634 (invalidated 1924).

27. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924). For a more thorough discussion of these Acts and cases, see Marian Mayer, Workmen's Compensation Law in Louisiana 124–26 (Louisiana State University Press, 1937).

28. *W.C. Dawson*, 264 U.S. at 227 ("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.").

29. *See, e.g., United States v. Rodgers,* 150 U.S. 249, 280, 14 S. Ct. 109, 121, 37 L. Ed. 1071 (1893).

30. *Id.* at 228 ("[T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare.").

31. *Id.* at 227.

32. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 216 (1969). *See also* Hearings on S. 3170 before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., 18, 31, 103 and n. 3 (1926); Hearing on H.R. 9498 before the House Committee on the Judiciary, 69th Cong., 1st Sess., ser. 16, pp. 18, 119 and n. 3 (1926).

33. *Id.*

B. Coverage Designed to Fill the Gap

The LHWCA created a federal no-fault system of compensation for longshoremen and harbor workers.[34] Benefits under the Act were highly structured, limiting damages to pecuniary losses, including lost earnings, and medical and rehabilitation expenses.[35] Injured workers relinquished claims for non-pecuniary damages such as pain and suffering in exchange for no-fault liability.[36]

In its original form, the LHWCA only provided coverage for injuries occurring over navigable waters, with land-based injuries covered through state compensation proceedings.[37] This framework evinced Congress' sole intent to fill the gap in coverage created by the *Jensen* line.[38] A worker injured on the deck of a ship while loading cargo could now recover for his resulting expenses and lost wages under the LHWCA. However, if that worker sustained injury while working on the loading dock, he was expected to seek compensation through the benefits of the state where the injury occurred. The LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by non-seaman maritime employees [of statutory employers] on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy."[39]

C. An Insufficient Remedy with Unforeseen Effects

Unfortunately, the LHWCA effectively served to reduce the remedies available to longshoremen. The problem resulted from Congress' specific incorporation of the *Jensen* line into the text of the LHWCA.[40] While any covered laborer injured over navigable waters could recover benefits regardless of the nature of his work, laborers in the "maritime but local" area—the area occupied by maritime employment but still covered by state

34. 33 U.S.C. § 901, et. seq. (1927). *See also,* Denton, *supra* note 19, at 5.

35. 33 U.S.C. §§ 906–910 (2013). *See also,* F. Nash Bilisoly, *The Relationship of Status and Damages in Maritime Personal Injury Cases*, 72 Tul. L. Rev. 493, 526 (1997).

36. *Bilisoly, supra* note 35, at 526.

37. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 258 (1977).

38. Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 338 (1983) (Stevens, dissenting). The Supreme Court later expanded its interpretation of the LHWCA. *See* Davis v. Dep't of Labor & Indus., 317 U.S. 249 (1942) (acknowledging the "twilight zone" between state and federal compensation structures and asserting concurrent jurisdiction); Sun Ship v. Pennsylvania., 447 U.S. 715 (1980) (holding that the LHWCA does not supplant state workers' compensation remedies, but rather supplements them).

39. Calbeck v. Travelers Insurance Co., 370 U.S. 114, 124 (1962).

40. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 220 (1969) (*citing* Davis v. Dept. of Labor & Industries, 317 U.S. 249, 256 (1942)).

compensation structures—could not.[41] This lack of coverage resulted from the 1927 Act's provision allowing compensation only if it "may not validly be provided by State law."[42] Therefore, injuries to longshoremen and harbor workers were only covered past the water's edge. This gap in coverage was particularly troublesome due to the amphibious nature of the employment the Act sought to cover. Determination of coverage relied entirely on *where* the accident in question occurred.[43] The result was a system in which workers were frequently "walking in and out of coverage."[44]

A number of problems stemmed from these conflicting coverage structures. First, a significant disparity existed between state and federal remedies.[45] Workers injured over water received substantially better benefits than their counterparts with analogous injuries occurring on the pier. This incongruity served to "exacerbate the harshness of the already unpopular *Jensen* line."[46] Second, technological advances, like the containerization of cargo, moved many of the duties conducted by

41. *Perini*, 459 U.S. at 311 (*citing* G. Gilmore & C. Black, The Law of Admiralty 429–430 (2d ed. 1975)). As the Supreme Court explained,"[i]f the employment of an injured worker was determined to have no "direct relation" to navigation or commerce, and "the operation of local law [would not] materially affect" the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the state could provide a compensation remedy. If the employment could not be characterized as "maritime but local," then the injured employee would be left without a compensation remedy." Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Associates, 459 U.S. 297, 306, 103 S. Ct. 634, 641, 74 L. Ed. 2d 465 (1983) (citing *Grant Smith-Porter v. Rohde,* 257 U.S. 469, 477, 42 S.Ct. 157, 158, 66 L.Ed. 321 (1922). See also *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242, 42 S.Ct. 89, 90, 66 L.Ed. 210 (1921)). The maritime but local doctrine developed during the jurisdictional quagmire that followed Jensen, and was later incorporated into the passage of the LHWCA. *See, e.g.,* Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). *See also,* Denton, *supra* note 19, at 6.

42. Crowell v. Benson, 285 U.S. 22, 38 (1932).

43. *Perini*, 459 U.S. at 339 (Stevens, dissenting).

44. *Id. See also,* Clare R. Pitre, *Muddy Waters—Clarifying Maritime Coverage Under the Longshore and Harbor Workers' Compensation Act,* 59 Loy. L. Rev. 981, 998 (2013). Justice Douglas pointed out the absurdity of this rule in his dissent to *Nacirema*, 396 U.S. at 225 (Douglas, dissenting). While the three workers in that case were denied LHWCA coverage because they were injured on the pier while loading a ship, the Court of Appeals had affirmed granting LHWCA benefits to the widow of a fourth injured worker in that same case. *Id.* That worker had also been struck while working on the pier, but the blow had knocked him into the water. *Id.* Since he technically died while in navigable waters, LHWCA applied. *Id.* The lesson to be learned from this result: the unlucky workers in *Nacirema* were denied coverage due to their failure to be fortuitously knocked into the water and drowned.

45. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 262 (1977) (asserting that state workers' compensation benefits were inadequate).

46. *Id.*

longshoremen and harbor workers onshore, barring a great number of claims that would traditionally have been covered by the LHWCA at the time of its enactment.[47]

Perhaps most vexing, applying the "maritime but local" doctrine necessitated a case-by-case assessment of which coverage system applied at the site of any given injury.[48] With any luck, a worker who sustained injury over navigable waters could recover the superior benefits offered by the LHWCA. In contrast, if the injury occurred on the pier, that unfortunate worker was stuck with the subpar benefits offered by the state compensation statute. Further complication arose when the injury was not an isolated incident that occurred in a finite place. For instance, if the worker suffered exposure to a hazardous substance in the loading process, or if he injured his back in the course of a long day of unloading heavy cargo, where did that injury occur? It would be difficult, if not impossible, to say whether harm occurred on land or over water.

As a result of this uncertainty, both employers and employees alike were "often required to make a perilous jurisdictional guess as to which of two mutually exclusive compensation schemes was applicable to cover his injury."[49] A claim for injury brought under the wrong system could be tied up in lengthy litigation, resulting at best in an untimely provision of benefits and expensive legal fees, and at worst in barring of the suit under the statute of limitations, with no recourse for recovery. Furthermore, the 1927 construction of the LHWCA created a "twilight zone of overlapping jurisdiction," wherein employers had to carry duplicative insurance policies to ensure their workers were covered during the entirety of their employment.[50]

II. THE 1972 AMENDMENTS: COLORING OUTSIDE OF THE JENSEN LINE

Prodded by the growing consternation concerning LHWCA application in the courts and in practice, Congress sought to cure many of the problems surrounding the *Jensen* line through amendment in 1972. The new legislation aimed to eliminate the risk of "walking in and out of coverage" borne by amphibious longshoremen and harbor workers. Congress had to devise an effective plan to mitigate the rigidity imposed

47. *Id.* For more information on the development, implementation, and effects of container shipping, *see* John Tomlinson, *History and Impact of the Intermodal Shipping Container*, Pratt Institute (September 22, 2009), http://www.johntomlinson.com/docs/history_and_impact_of_shipping_container.pdf [http://perma.cc/4WGG-NSF9].

48. *Perini,* 459 U.S. at 307 (1983).

49. *Id.*

50. *Id.* at 339 (Stevens, dissenting).

by the *Jensen* line while maintaining the initial intent of the LHWCA to cover a specific class of maritime workers. With that goal in mind, Congress devised an expanded test to determine beneficiary eligibility. The new test managed to address many of the problems posed by the 1927 Act but bore with it new and unforeseen challenges.

A. "An Affirmative Exercise of Admiralty Jurisdiction": Correcting Inconsistent Coverage

Congress primarily intended these amendments to improve the LHWCA's benefit structure. The amendments were in part a reaction to the prompts of the Supreme Court in *Nacirema Operating Company v. Johnson*, which affirmed the boundary of LHWCA coverage along the *Jensen* line.[51] There, the Court asserted that since Congress explicitly chose the *Jensen* line in its drafting of the 1927 Act, the Court could not depart from that standard in determining coverage: "The invitation to move that line landward must be addressed to Congress, not to this Court."[52]

Congress responded by enacting the 1972 Amendments. In doing so, they embraced the argument set forth in Justice Douglas' dissent to *Nacirema* regarding the evolution of the LHWCA: "No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction."[53]

The 1972 Amendments served as a direct assertion that the "walking in and out of coverage" phenomenon was antithetical to the idea of the no-

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51. 1972 U.S.C.C.A.N. 4698, 4700. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223–24 (1969). The 1972 Amendments served two other purposes. 1972 U.S.C.C.A.N. 4698. First, in *Seas Shipping Co*. v. *Sieracki*, 328 U.S. 85 (1946), the Supreme Court held the owner of a ship liable when a worker not employed by the owner sustained injury on board. The result was that longshoremen could potentially recover twice: once from their employer and once from the owner of the vessel. In the 1972 Amendments, Congress eliminated the strict-liability unseaworthiness remedy against the owner of the ship. 33 U.S.C. § 933 (1972). Similarly, in *Ryan Stevedoring Co*. v. *Pan-Atlantic S.S. Corp*., 350 U.S. 124 (1956), the Court upheld an indemnity claim by the owner of a vessel against a stevedoring company when the vessel's employee was injured as the result of the stevedoring company's failure to secure cargo. Congress eliminated such indemnity claims in 33 U.S.C. § 905(b) (1972). The overriding policy in these amendments is that the employer of the injured claimant takes responsibility for compensation under the LHWCA. Further exploration of these amendments is not germane to the present discussion.

52. *Nacirema*, 396 U.S. at 223–24.

53. *Id*. at 224 (Douglas, dissenting) (*quoting* Michigan Mutual Liability Co. v. Arrien, D.C., 233 F.Supp. 496, 500, *aff'd*, 2d Cir., 344 F.2d 640).

fault, strict liability structure of workers' compensation laws.[54] In the course of hearings before the House of Representatives, one legislator opined, "[t]he longshoremen are the only workers in the United States who must worry about their injury to determine the compensation . . . . It is time for a Federal law for compensation for all longshoremen."[55] The House Report, in explaining the purpose of the legislation, asserted that "compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water."[56]

Congress highlighted the inadequacy of state benefits to underline the importance of changing the LHWCA.[57] If injury occurred on the pier, the worker would be deprived of the funds necessary to effectively compensate him for his loss. Congress took offense at the principle that the site of an accident dictated radical differences in coverage for the same worker performing the same function.[58]

B. Expanding and Constraining Coverage through a Two-Prong Test

By amending two sections of the LHWCA, Congress converted the accident-situs test into a two-pronged conjunctive test, with an expanded situs component and a new maritime status component.[59] First, Congress redefined "employee" in Section 902 as including "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ."[60] On that foundation,

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54. Strict liability mitigated the burden of extensive litigation related to the precise specifics of a given injury by providing blanket coverage to workers injured during the course of employment. Requiring a case-by-case assessment of where and how a work-related injury occurred in order to determine LHWCA coverage directly contradicted that goal.

55. *1981 Hearing, supra* note 13, at 5.

56. 1972 U.S.C.C.A.N. 4698, 4708.

57. *Id.* at 4707. State laws fell far short of meeting the nationally recommended standard of benefits under workers' compensation structures; the maximum limit suggested at the time was not less than 200% of statewide average weekly wages. *Id.*

58. *Id.* at 4707–08. Congress also pointed to the effects of containerization and the use of LASH-type vessels moving a substantial amount of the longshoremen's work onshore. *Id.*

59. As referenced in the LHWCA and other workers' compensation statutes, situs refers to the physical location where an injury is incurred.

60. 33 U.S.C. § 902 (2013). The statute specifically excludes office clerks, secretaries, security personnel, data processors, individuals employed by clubs, camps, recreational operations, restaurants, museums or retail outlets, aquaculture workers, seamen, persons building, repairing or dismantling recreational vessels under 65 feet in length, workers engaged by a master to load or unload a small

Congress amended Section 903 by broadening the definition of "navigable waters of the United States" to "adjoining" land-based activities involving vessels:

> [C]ompensation 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, dismantling, or building a vessel).[61]

These amendments changed what was a strictly situs test for coverage eligibility to one that looks to the situs of the injury in conjunction with the status of the injured worker.[62] The Supreme Court, in interpreting the

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vessel under 18 tons, persons employed by suppliers, transporters, or vendors and who are not engaged in work normally performed by the employees of the covered employer, and individuals employed by marinas not engaged in the construction, replacement, or expansion of the marina, notwithstanding routine maintenance. 33 U.S.C. § 902(3)(a–h) (2013). Workers engaged in building repairing or dismantling small vessels are generally excluded, unless the employer's facility receives federal maritime subsidies or if the worker is not subject to coverage under state workers' compensation structures. 33 U.S.C. § 903(d)(2) (2013). Finally, employees of the United States, any agency of the United States, or a state or foreign government or any subdivision thereof are excluded from coverage. 33 U.S.C. § 903(b) (2013). The Benefits Review Board has defined the category of coverage to harbor-workers as including employees directly involved in the alteration, maintenance, repair, or construction of harbor facilities. Stewart v. Brown & Root, Inc., 7 BRBS 356 (1978). Harbor facilities include piers, docks, wharves, and adjacent areas used in the loading, unloading, repair, or construction of vessels. *Id.*

61. 33 U.S.C. § 903 (2013). Theoretically the employer must also meet the statutory definition of a qualified employer, though the courts question how strictly this requirement applies. *Cf.* Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981); Dir., Office of Workers' Comp. Programs v. Perini North River Associates, 103 S. Ct. 634 (1983). *See also,* Denton, *supra* note 19, at 11. Further exploration of this issue is outside the scope of this comment.

62. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 264–65 (1977). Note that a current split exists among the circuits related to the interpretation of "adjoining land" with regard to the situs requirement. Some circuits have determined that adjoining land means any area near water. *See* Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), and Sea–Land Service, Inc. v. Dir., Office of Workers' Comp. Programs, 540 F.2d 629 (3d Cir.1976). Others have found that injury must occur on a situs directly contiguous with navigable waters. *See* New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 394 (5th Cir. 2013) (*en banc*) (overturning Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (*en banc*)), and Sidwell v. Express Container Servs., Inc., 71 F.3d 1134 (4th Cir. 1995). While

two prongs used in this new test, indicated that the status and situs requirements, "while separate and distinct, should not be read to render the other superfluous."[63] Status and situs do not overlap to the point that they merge into one, but rather remain two independent, conjunctive requirements for determining coverage.[64]

Although these amendments sought to remedy the problem of workers walking in and out of coverage by extending coverage onto "adjoining lands," it was not Congress' intention to cover "all those who breathe salt air."[65] Rather, "[t]he expansion of the definition of navigable waters to include rather large shore-side areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement."[66]

The legislative history confirms the conjunctive independence of the two prongs, as evidenced in the Report by the House Committee on Education and Labor, which delineates the exclusion of non-maritime workers injured in the loading area:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.[67]

The Supreme Court interpreted this comment to mean that Congress intended status to define the scope of the newly extended landward coverage.[68]

The addition of the status requirement particularly limited coverage of land-based injuries incorporated by the new situs requirement. Congress did not intend to deprive workers on the other side of the *Jensen* line of a

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this circuit split awaits determination by the Supreme Court, it is the subject of another paper altogether.

63. Bilisoly, *supra* note 35, at 518 (*citing* Herb's Welding v. Gray, 470 U.S. 414 (1985); *Perini,* 459 U.S. (1983)).

64. *Herb's Welding*, 470 U.S. at 426.

65. *Id.* at 450.

66. *Id.* at 423.

67. 1972 U.S.C.C.A.N. 4698, 4708; H.R. Rep. No. 92-1441, 11 (1972).

68. *Perini*, 459 U.S. at 317–18.

remedy to which they would have otherwise had access under the original LHWCA.[69] The purpose of the amendments was, after all, to "extend coverage to protect additional workers."[70] Still, the limited nature of that extension was clear.

C. New Ambiguities Create an Unforeseen Burden

The implementation of the status requirement created new ambiguities. Particularly, the 1972 Amendments failed to establish sufficiently clear jurisdictional lines, and thus, confusion abounded as to where federal jurisdiction ended and state jurisdiction began.[71] This new uncertainty led to a flood of expensive litigation that many in the industry deemed unnecessary and unfair.[72]

The expansion of coverage predictably resulted in a substantial influx of LHWCA claims, which proved to be costly for employers liable under the Act.[73] In 1978, LHWCA costs relative to payroll were more than double those in other industries such as manufacturing, carpentry, foundry, and logging.[74] Expenses rose to 50% of total payroll costs, a staggering number in comparison to the American average of 1.5%.[75] The increased burden imposed by the new amendments led many shippers to divert cargo outside the United States in an effort to avoid LHWCA-related costs.[76] A Department of Commerce study reported that 7.4 million tons of cargo were diverted to Canada between 1976 and 1979, resulting in a loss of $9.4 billion to the American economy.[77] In the end, this exodus out of the American market created an overall loss of jobs for American workers, lost profits for their employers, and a hit to the national economy.[78]

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69. *Id.* at 324 (establishing that LHWCA applies when a worker is injured on navigable waters).

70. *Id.* at 316–17.

71. *1981 Hearing, supra* note 13, at 5 (statement of Don Nickles, Senator of Oklahoma).

72. *Id.*

73. *1981 Hearing, supra* note 13, fig.14 (US Dep't of Labor, *Increase in Claims and Benefit Levels Since 1972 Amendments to the Longshore Act*). Between 1972 and 1977, injuries reported under the Act increased by 185%, jumping from 72,000 to 205,000 per year. *Id.*

74. *1981 Hearing, supra* note 13, fig. 16 (US Dep't of Labor, *Final Report on the Interagency Task Force on Workplace Safety and Health* (December 14, 1978)).

75. *Id.*

76. *1981 Hearing, supra* note 13, fig.16 (US Dep't of Commerce, *Longshore Cost Promotes Diversion of U.S. Cargo*).

77. *Id.*

78. One shipyard reported costs jumping from twenty percent to sixty percent; under duress, the company "literally and figuratively packed their bags and left Brooklyn." *1981 Hearing, supra* note 13, at 27 (statement of William L. Gardner, representative of Braswell Shipyards, Inc.). In 1981, a bill was

III. THE SUPREME COURT ATTEMPTS TO MAKE SENSE OF THE STATUS TEST

Immediately following the 1972 Amendments, confusion arose as to what exactly "in the course of maritime employment" meant. In the years that followed, the Supreme Court did substantial work in establishing clear guidelines for judges and industry participants alike in defining the maritime employment status test.[79]

First, the Court focused on the loading and unloading of cargo from a vessel as the touchstone of maritime employment conducted on land.[80] The Court defined the unloading process as "taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area."[81] Accordingly, workers injured on the situs but not involved in the overall process of loading and unloading ships were not covered.[82] The Court rejected the "point of rest" theory proffered by the petitioners in *Northeast Marine Terminal v. Caputo*.[83] While petitioners argued that the loading process terminated as soon as cargo landed on the pier, the Court found that this theory construed the definition of loading and unloading too narrowly.[84] Still, maritime unloading required some "nexus with a vessel."[85]

Next, the Court reiterated the importance of keeping the status and situs requirements distinct. In *P.C. Pfeiffer Company v. Ford*, the Court determined that the scope of the status test included "any worker who moves cargo between ship and land transportation," reasoning that such a definition provided consistency and predictability for interpretation of the status requirement.[86] The holding in *Pfeiffer* comported with congressional intent by focusing narrowly on the nature of the employment in assessing status, rather than commingling status and situs in a single inquiry.[87]

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introduced proposing to address these problems by amending the LHWCA. The proposed amendment would delete the independent status and situs requirements and instead employ a definition of status as incorporating both job activity and location the time of injury. The bill, however, failed to pass. *Longshoremen's and Harbor Workers' Compensation Act Amendments,* S. 1182, 97th Cong., 1st Sess. (May 14, 1981).

79. Kenneth G. Engerrand, *LHWCA Coverage After New Orleans Depot Services, Inc. v. Dir., Office of Workers' Comp. Programs*, Twelfth Judge Alvin B. Rubin Conference on Maritime Personal Injury Law 57 (April 11, 2014).

80. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

81. *Id.* at 266–67.

82. *Id.* at 267.

83. *Id.* at 277–78.

84. *Id.*

85. BPU Mgmt., Inc/Sherwin Alumina Co. v. Dir., Office of Workers' Comp. Programs, 732 F.3d 457, 462 (5th Cir. 2013) (interpreting *Caputo*, 432 U.S. at 267).

86. *See* P. C. Pfeiffer Co. v. Ford, 444 U.S. 69, 83–84 (1979).

87. *See id.* at 83.

Moreover, the decision refrained from extending coverage to every worker occupying the maritime situs, and thus retained the integrity of both status and situs as individual inquiries.[88] Further emphasizing this principle, in *Herb's Welding, Inc. v. Gray*, the Court reiterated the notion that the status inquiry embodies an occupational test.[89] Coverage could not be extended to a laborer just because his place of work was an inherently maritime location; the worker had to also be engaged in traditionally maritime employment—duties conventionally relegated to longshoremen and harbor workers.[90]

The Court issued its last clarification on the status requirement to date in *Chesapeake & Ohio Ry. Co. v. Schwalb*.[91] In *Schwalb*, the claimants participated in the loading process solely by performing repair and maintenance services on loading equipment.[92] The Court ruled that injuries incurred during the repair and maintenance of equipment were covered by the LHWCA, as long as they were integral to the loading and unloading process.[93] According to the Court:

> Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured.[94]

Neither the absence of the worker's continuous participation in loading, nor the sporadic nature of the repair and maintenance, gave the Court pause.[95]

The notion that a worker qualifies as a maritime employee when he provides services essential to—but not directly involved in—the loading process blurs the boundaries around the status test and muddies its relationship to situs. It reopens ambiguities as to the scope of coverage, threatens to consume most, if not all, of the exclusion of non-maritime workers, and simply shifts the status inquiry to a determination of how close or detached the non-loading function may be to the loading function. Essentially, it creates a sliding spectrum with no fixed point separating LHWCA coverage from non-coverage.

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88. *See id.*
89. 470 U.S. 414, 424 (1985) (denying LHWCA coverage to a welder on a stationary drilling platform located in state territorial waters).
90. *Id.* at 425,26.
91. 493 U.S. 40 (1989).
92. *Id.* at 46.
93. *Id.* at 47.
94. 493 U.S. 40, 47 (1989).
95. *Id.*

IV. TIME MARCHES ON: A TEST DEVOID OF TEMPORALITY

A piece of cargo must pass through many hands in order to travel from a factory in Asia to a warehouse in New Orleans. Days, upon weeks, upon months of work must be accomplished in order to make its voyage possible. But not every worker who lifts a hammer in furtherance of the cargo's journey does so in the scope of maritime employment. Likewise, not every task that facilitates the loading and unloading of cargo in a port should be covered by the LHWCA. For example, a worker who fits a pipe on a barren lot that will be used to load oil onto a tanker in five years time should not be considered to be engaged in maritime employment, even if that lot was at one point a loading dock, and one day will be again. Of course, without this task completed, loading could not be accomplished. However, status under the LHWCA is not a but-for test.[96] The Act never intended compensation to reach a worker of this sort who was not engaged in traditional longshoring activities, and extending coverage to him and other workers in similar positions leads to absurd results and an unacceptable strain on the industry by inflating its financial liabilities to otherwise ineligible workers.

A. The Subtle Incorporation of Temporal Considerations in Supreme Court Precedent

While *Caputo* rejected the point of rest theory, the Court characterized a qualified worker participating in the loading process as one who carried cargo "*immediately* . . . to a storage or holding area."[97] *Caputo* borrows this language directly from the House Report on the 1972 Amendments.[98] There, Congress emphasized that "cargo, whether in break bulk or containerized form, is typically unloaded from the ship and *immediately* transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters."[99] The use of the word "immediately" suggests that Congress intended for timing to play a role in determining whether a worker is functioning in the course of maritime employment when facilitating the loading and unloading of a vessel. While the point of rest theory proffered by the petitioners in *Caputo* may not be the appropriate test, a line must be drawn somewhere.

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96. New Orleans Depot Servs. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 396 (5th Cir. 2013) (*en banc*) (Clement, J., concurring).

97. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 266–67 (1977) (emphasis added).

98. *See* 1972 U.S.C.C.A.N. 4698, 4708.

99. *Id.* (emphasis added).

Similarly, *P.C. Pfeiffer* asserted a limitation on the temporal attenuation of the connection between the vessel and loading with regards to the status inquiry. In keeping with congressional intent, the Court was careful not to extend coverage to every worker within the situs area.[100] The Court emphatically stated, "neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs."[101] A person integral to loading, but only by means of furthering terrestrial shipment of cargo, did not possess sufficient ties to the loading process to satisfy the status test.[102] The Court acknowledged the absurdity of attenuating the connection between the employee and the vessel.[103] This connection implicitly requires that the ship and laborer occupy roughly the same space at the same time. In other words, a worker needs to be actively engaged in the loading of vessels to be considered a maritime worker.

The success of loading and unloading operations must turn on the worker effectively carrying out his duties. This understanding of maritime employment is illustrated in the *Schwalb* opinion, where the Court emphasized that the loading and unloading process actually stopped for repairs and that the employee's supervisor urged the worker to hurry up so that loading might continue.[104] "The determinative consideration," the Court asserted, "is that the ship loading process could not continue unless the retarder that [the machinist] worked on was operating properly."[105] In so ruling, the Court implied that the maintenance and repair of the equipment must be directly and temporally connected to the actual cessation of a specified loading or unloading task. Because the Court cites this temporality consideration as determinative, it should not be considered *dicta*, but rather incorporated into the status analysis.

B. Circuit Courts Watch the Clock

Judges in the lower courts have acknowledged the role of temporality in assessing status eligibility and established jurisprudential support for a

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100. P. C. Pfeiffer Co. v. Ford, 444 U.S. 69, 83 (1979).
101. *Id.*
102. *Id. Cf.* Boudloche v. Howard Trucking Co. 632 F.2d 134 (5th Cir. 1980), (extending LHWCA coverage to a driver who loaded cargo onto the ship five percent of the time). Carrying cargo from the ship to land-based transportation constitutes maritime employment, whereas simply driving the vehicle involved in further transportation does not.
103. *Pfeiffer*, 444 U.S. at 83.
104. *Schwalb*, 493 U.S. at 48.
105. *Id.*

reading of *Schwalb* that requires immediacy.[106] This position is perhaps most explicitly and eloquently explained in the concurrence offered by Judge Clement in *New Orleans Depot Services v. Director, Office of Workers' Compensation Programs*.[107]

In her concurring opinion, Judge Clement asserts that the original *New Orleans Depot* panel misread *Schwalb*, cutting it off from its roots.[108] *Schwalb* turned on the fact that workers conducting repair and maintenance participate in the loading process "because the actual process, *once begun*, would be arrested in the absence of their contributions."[109] According to Judge Clement, the panel erred because *Schwalb* does not demand that

> all employees who repair any equipment that may be used in the loading process are similarly integral. If this were the inquiry, it would only be a short step to the conclusion that a manufacturer of shoes or walkie talkies should be covered, because, arguably, the modern loading process cannot be accomplished without those items.[110]

Judge Clement pointed out the error in interpreting the LHWCA as providing a but-for status test by highlighting the absurdity of the temporal attenuation it would cause.[111] Instead, the inquiry should look to the duties of a traditional longshoreman in loading and unloading a vessel. For example, repairing his own tools would qualify a longshoreman for

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106. *See generally* New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (*en banc*); Sidwell v. Va. Int'l Terminals, Inc., 372 F.3d 238 (4th Cir. 2004); In re Norfolk S. Ry. Co., 592 F.3d 907 (8th Cir. 2010).

107. *New Orleans Depot*, 718 F.3d at 394–99 (Clement, concurring). The majority opinion in *New Orleans Depot* was decided based on a failure to meet the situs requirement, overturning the long-standing test set forth in Texports Stevedore Co. v. Winchester, 632 F.2d 504, 518 (5th Cir. 1980). *Id.* at 394. In her concurrence, Judge Clement suggested that her opinion was not *dictum*, but rather binding as an alternative holding. *Id.* at 394 (Clement, J. concurring). Her assertion was incorrect, as Judge Clement failed to achieve a majority by one vote. *Id*.

108. *Id.* at 396. The *en banc* decision in New Orleans Depot overturned the Fifth Circuit Court of Appeals earlier decision that held that a container repairman operating at a site detached from the loading site met both the status and situs requirements under the LHWCA. *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 689 F.3d 400,* 407 (5th Cir. 2012) *reh'g en banc granted sub nom*.

109. *New Orleans Depot*, 718 F.3d at 396 (emphasis added). The Fourth Circuit expressed a similar reading in *Sidwell*, 372 F.3d at 243 (arguing that the standard proposed in *Schwalb* that the loading process could not continue "makes the capacity to interrupt ongoing long-shoring activities paramount.").

110. *New Orleans Depot*, 718 F.3d at 396 (Clement, concurring).

111. *Id.*

coverage, but repairing a shipping container not necessarily destined for a vessel would not.[112] While containers may affect the loading and unloading process, their repair is not within the customary duties of longshoremen.[113] Rather, satisfaction of the status test requires that repair or maintenance of equipment be "one step in the direct chain of unloading a ship . . . when 'the maintenance men would [halt] the entire loading process' if they were not available for the repair."[114] In the *New Orleans Depot* concurrence, Judge Clement argued that, where a welder repaired containers that may have been destined for shipping, but had never even witnessed a vessel being loaded, much less assisted in the process, no coverage could be provided due to his lack of status as a maritime worker.[115] Such a worker was "a far cry from the paradigmatic longshoreman who walked in and out of coverage during his workday."[116]

Shortly after *New Orleans Depot*, a panel of Fifth Circuit jurists seemed to endorse Judge Clement's view on the status test. In *BPU Management/Sherwin Alumina Company v. Director, Office of Workers' Compensation Programs*, the court found that a worker injured while cleaning a cross-tunnel in a bauxite production facility did not qualify for coverage under the LHWCA.[117] The court held that cleaning the tunnel was not integral to loading and unloading in spite of the fact that, if the tunnel filled up, loading and unloading would have to stop.[118] Because it would have taken an excessively long time for the tunnel to fill up substantially enough to interfere with loading, the court reasoned that cleaning the tunnel could not be viewed as part of the direct chain of loading and unloading a vessel.[119] Further, the facility stockpiled bauxite for years, so its storage on the site could hardly be defined as a step in the loading process.[120] The underlying implication of this analysis is that some expiration date exists in applying the status test to activities facilitating loading and unloading.

Not every activity that facilitates the eventual shipping of cargo over navigable waters is maritime in nature. Improper application of the status test threatens to bring about that absurd result. The Eighth Circuit resisted this overly broad interpretation of *Schwalb* in *In re Norfolk Southern*

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112. *See id.* at 396–97.
113. *Id.* The customary duties Judge Clement refers to are undoubtedly the actual physical loading and unloading of the vessel.
114. *Id.* at 397 (*citing* Sea–Land Serv., Inc. v. Rock, 953 F.2d 56, 67 (3d Cir.1992)).
115. *Id.* at 397–98.
116. *Id.*(citing Herb's Welding v. Gray, 470 U.S. 414, 427 (1985)).
117. 732 F.3d 457, 465 (5th Cir. 2013).
118. *Id.*
119. *Id.*
120. *See id.* at 464.

Railway Company.[121] In that case, the court refused coverage to workers who switched railroad cars full of coal onto the correct tracks to deliver them to the dumpers that would be used to load the coal onto ships.[122] Because the claimants worked with the cars before the loading process began and did not initiate their descent to the coal dumpers, the court found that their tasks were not sufficiently linked to the loading process.[123] It was not enough that their activities were generally essential to shipping the cargo; rather, to be covered under LHWCA, workers' activities must have a direct nexus with actually loading the vessel.[124]

C. The Benefits Review Board Starts Keeping Time

Decisions issued by the Benefits Review Board (BRB), the administrative tribunal adjudicating LHWCA claims, have drawn several time-based distinctions related to the status inquiry.[125] First, the Board distinguished the difference between present and future involvement in maritime activities; it is not enough to establish that work contributes to some function that will, at some point in the future, be involved in loading and unloading cargo.[126] Instead, to qualify as a maritime employee, a laborer's duties must be directly associated with contemporaneous loading and unloading. In conducting this future/present analysis, the BRB has taken into account the transitory nature of employment. Specifically,

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121. 592 F.3d 907, 914 (8th Cir. 2010).
122. *Id.*
123. *Id.*
124. *Id.*
125. Congress created the Benefits Review Board in 1972 to adjudicate appeals of administrative judges' decisions related to claims arising under the LHWCA and the Black Lung Benefits amendments to the Federal Coal Mine Health and Safety Act of 1969. U.S. Dep't of Labor, *Benefits Review Board Mission Statement,* www.dol.gov/brb/mission.htm (last visited October 9, 2014). The Board consists of five members appointed by the Secretary of Labor. *Id.* BRB decisions can be appealed to the circuit court in the circuit where the injury occurred. *Id.* Courts generally show no deference to BRB decisions; these cases represent a trend in the industry that needs to be taken up by the courts.
126. *See, e.g.*, Weyher/Livsey Constructors, Inc. v. Prevetire, 27 F.3d 985, 989–90 (4th Cir. 1994) (where a pipe fitter injured while building a power plant was not within maritime employment when his only connection to maritime activity was the fact that energy from the power plant he helped build would eventually be used by a shipyard); *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001) (where construction of a building that would be used as a storage facility in the future was not uniquely maritime employment). *Cf.* Kerby v. Southeastern Public Service Authority, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998), cert. denied, 525 U.S. 816 (1998) (where workers at a power plant that provided power to a shipyard were found to be involved in maritime employment because the maintenance and repair was integral to the loading and unloading process).

where a claimant's relationship to a maritime facility is temporary or time-limited, LHWCA coverage is not appropriate, even if his work may further the loading and unloading of vessels in the future.[127] This qualification rests on the understanding that the employee will not be present when the actual loading and unloading necessary to confer status occurs.[128]

Second, the BRB has emphasized the importance of some temporal nexus with the vessel to satisfy the status test. While it is not necessary that a worker actually handle cargo, some nexus must exist between their activities and the actual loading of the ship.[129] Case law and administrative proceedings like these illuminate the need to connect the status requirement with a finite place in time in order to clearly and reasonably delineate boundaries to LHWCA coverage.

V. ADDRESSING STATUS AMBIGUITY THROUGH TEMPORAL CONSTRAINTS

Tension exists between a broad definition of maritime labor that includes all those activities integral to loading and unloading and a tighter definition of maritime labor that relies on the immediacy referred to in *Caputo* and *Schwalb*. Resolving this tension is crucial to establishing a compensation structure that benefits laborers, employers, and the industry as a whole. In order to determine an appropriate application of the status test, statutory language, congressional intent, and policy concerns must be considered. Doing so will lead to an interpretation of status that is narrower than blanket coverage yet broad enough to incorporate all deserving parties. A legislative revision drafted with these goals in mind will best serve the viability of LHWCA compensation in the future. Notwithstanding congressional action, a just remedy to the problem of status may be accorded through appropriate judicial and practical application of the current Act.

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127. Southcombe v. A Mark, B Mark, C Mark Corp., 37 BRBS 169 (2003) (where a claimant involved in the construction of a facility that would have future maritime use was not covered because his relationship to the facility was temporary, lasting only until construction was completed).

128. Balonek v. Texcom, Inc., 43 BRBS 153 (2009) (finding claimant's temporary presence at the shipyard was not covered, even though the cable system he installed would later be used in maritime functions: Future use cannot confer coverage).

129. Terlemezian v. J.H. Reid General Contracting, 37 BRBS 112 (2003) (holding that no nexus existed between a road project to improve land transportation at a shipping facility and the actual task of loading the ship); *cf.* Ruffin v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 52 (2002) (providing coverage to a worker injured while loading machinery was in operation and the claimant had to wear a hard hat and safety goggles).

A. Temporality Imposes Boundaries that Congress Intended

Congressional intent regarding status has been misconstrued, resulting in an erroneous application of the LHWCA statute. Based on the idea that Congress intended to expand—not limit—coverage through the 1972 Amendments, scholars have advocated for a broad reading of the two-pronged test. According to one such scholar, "[t]he Benefits Review Board has embarked on a slippery road of analyzing shipyard workers status by creating a new test for coverage instead of relying on the statutory language."[130] Under his theory, the overarching intent of the Act was to resolve jurisdictional anomalies by expanding coverage.[131]

While it is true that Congress intended to expand coverage under the 1972 Amendments, this reading is overly simplistic. To read the statute accordingly conflates the status and situs tests. The amended situs test indeed intended to expand coverage; therefore, in analyzing the situs requirement, a broad interpretation may be appropriate.[132] Status, however, served the function of a *limiting* clause. As such, it follows that the status requirement should be read narrowly. As Justice Stevens proffered in his *Perini* dissent, "[in] this statute, the subcategories—longshoremen and harbor workers—are both described in detail, and no other subcategory is even mentioned, giving rise to an especially strong inference that Congress intended a *snug fit* between 'maritime employment' and the two subcategories."[133] The incorporation of the status test into the 1972 Amendments meant to rein in the expansion of situs; this "snug fit," therefore, seems a more appropriate interpretation.

To stay true to congressional intent, courts need only look to the plain language of the statute. The Act states that maritime employment is related to traditional longshoring tasks, like loading and unloading. No reason exists to read more into that definition than what the words plainly state. Elucidating a trend toward strict construction within the Fifth Circuit, noted scholar Kenneth Engerrand explained, "[t]he full court has expressed its intent to apply the LHWCA as written, and not to give liberal construction that departs from the plain language of the Act . . . and continues the Fifth Circuit's course toward rejection of policy arguments

130. Thomas C. Fitzhugh III, *Who Is Covered? Recent Cases Regarding Longshore Situs and Status*, 16 U.S.F. Mar. L.J. 265, 279–80 (2004).

131. *Id.* at 318.

132. Alternatively, the expansion of situs over land might be best interpreted as a jurisdictional gap-filler. No arguments regarding the appropriate means of situs analysis are asserted here.

133. Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 327 (1983) (Stevens, dissenting) (emphasis added).

proffered to circumvent the plain language in the LHWCA."[134] This trend in the Fifth Circuit flows from the Supreme Court's assertion of "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written."[135] Reading the status requirement in an overly broad manner exceeds the scope of the actual language of the LHWCA. Such a reading unduly favors the policy interest of expanding coverage, while failing to give substantial credence to the actual language and intent of Congress in enacting the statute.

B. Prioritizing the Wrong Policy: Predictability Trumps Expanded Coverage

If any policy is to be favored over the statutory language, it is not the predisposition towards expanded coverage. Upholding a policy of expansion ignores an even more important policy concern: that of predictability and uniformity of coverage. The LHWCA (or any other workers' compensation system, for that matter) is rendered useless without predictability. History has shown that "[m]ore than perhaps any other statutory scheme, a worker's compensation statute should be geared toward a non-litigious, speedy, sure resolution of the compensation claims of injured workers."[136] A framework that facilitates the predictability and uniform application of that coverage benefits all parties across the spectrum.

First, it is axiomatic that, in the case of injury, a worker is best served by receiving benefits in a timely fashion. The principal purpose of workers' compensation is to provide support to a worker who loses wages and incurs medical expenses as a result of injury in the workplace. Such support cannot be provided, nor can those expenses be compensated, if disputes over coverage keep a claim tied up in court for years.

Second, employers benefit from the speedy and efficient resolution of claims. An employer bears the onerous costs of litigation for claims that are disputed throughout the administrative and judicial systems. Providing clear workers' compensation benefits allows an employer to maintain a satisfied and protected workforce, control costs of production, and avoid exorbitant litigation costs.

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134. Engerrand, *supra* note 79, at 60.

135. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992).

136. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 518 (5th Cir. 1980) (Tjoflat, J., dissenting), *overruled by* New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (*en banc*). The majority in *New Orleans Depot* agreed with this premise, stating, "One could hardly imagine an area where predictability is more important." 718 F.3d at 394.

Finally, predictability of coverage serves a broader economic interest in a workers' compensation system:

> The employer absorbs the cost of accident loss only initially; it is expected that this cost will eventually pass down the stream of commerce in the form of increased price until it is spread in dilution among the ultimate consumers. So long as each competing unit in a given industry is uniformly affected, no producer can gain any substantial competitive advantage or suffer any appreciable loss by reason of the general adoption of the compensation principle.[137]

The distribution of burden across the industry absorbs harm to individual employers, and in turn, the economy. When this balance is disturbed by inconsistencies in coverage and liability, the result is detrimental to individual business owners and the industry as a whole. Furthermore, uncertainty regarding application of the LHWCA leads to increased costs related to resolution of claims, which in turn leads to increased production costs. These costs eventually trickle down to the consumer.

C. Improving Section 902 through Revision Incorporating Temporality

Concerns related to predictability and uniformity in LHWCA application may easily be addressed by a simple statutory revision. Activities related to the loading and unloading of vessels should be part of a direct chain. As such, Congress should amend the LHWCA to redefine the definition of employee in Section 902 to read:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, *insofar as their duties are conducted in the course of, and are necessary to, the direct loading and unloading of cargo onto a vessel,* and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . .[138]

This solution suggests grafting the language employed in state workers' compensation statutes onto the employee definition to achieve a targeted timing nexus. In other state workers' compensation statutes, "in the course of" generally denotes a requisite closeness between a worker's

137. Malone, *supra* note 19, at 34–35.
138. *See* 33 U.S.C. § 902 (2013) (emphasized language added).

injury and employment.[139] Here, the same language is incorporated to impose a similarly close relationship between the activities of the worker and the actual loading and unloading process.[140] The language narrows coverage in regards to a point in time and space.[141] Still, it provides a cushion so as to prevent a caustic application of coverage: "A reasonable time is allowed before and after the assumption of duties, especially when the employee is on the premises either preparing for work or leaving it."[142]

Requiring that longshoring activities be done in the course of loading or unloading a vessel creates a direct and temporal link to the actual process. It prevents an overly attenuated extension of coverage to workers, while keeping in line with the cessation of loading described in *Schwalb*. The new language clarifies application of the statute. It reads the Act narrowly enough to prevent over-coverage that could be harmful to workers and the industry alike, while still allowing for enough flexibility to continue providing coverage to workers outside actual loading and unloading duties, such as maintenance and repair integral to the immediate loading process. Revising the text thus inserts the necessary temporal immediacy suggested by the courts since the 1972 Amendments.

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139. *See generally,* Stewart v. Boh Bros. Const. Co., 13-193 (La. App. 5 Cir. 10/9/13), 128 So. 3d 398, 405 (La. Ct. App. 2013) ("The requirement that an employee's injury occur "in the course of" employment focuses on the time and place relationship between the injury and the employment."); Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002) (asserting "[T]hat the injury arose in the course of employment by demonstrating that (A) it occurred within the boundaries of time and space created by the terms of employment; and (B) it occurred in the performance of an activity . . . if reasonably expected and not forbidden, or an activity of mutual benefit to employer and employee."); Crowe v. Blum, 9 F.3d 32, 34 (7th Cir. 1993) ("An injury occurs "in the course" of employment if the time, place and circumstances indicate that it was suffered while the injured employee was furthering the ends of the employer.").

140. This requirement would only apply to assessing whether the general duties of a worker throughout the course of his employment were maritime in nature; it should not be read so congruently with state remedies to assume that the worker must actually be injured while carrying out these duties. Rather, such duties must simply make up a substantial part of his work responsibilities. To read otherwise would simply create a new system in which workers would continuously walk in and out of coverage.

141. Mayer, *supra* note 27, at 56.

142. *Id. See, e.g*., Sanders v. Kirby, 171 So. 2d 281, 284 (La. App. 1 Cir. 1965) (awarding workers' compensation for a worker injured on the job site while preparing to begin work in ten minutes and discussing the tasks of the day with his supervisor). *Cf.* Tarver v. Energy Drilling Co. 645 So.2d 796 (La. App. 2 Cir. 1994) (denying workers' compensation to an employee injured in a car accident while travelling from the work site to a temporary employee housing unit provided by his employer).

1. Familiar Terms of Art Foster Ease of Application in the Courts

As courts are accustomed to applying the language associated in this statutory revision in other workers' compensation claims, judges should not have difficulty applying the new LHWCA amendment. Interpretation of the term "in the course of" would employ the same standard exercised in state workers' compensation adjudications; only here it would be used in relation to the loading and unloading of ships. A critical analysis of the proposed legislation identifies only two potential pitfalls associated with the amendment: myopia and the incentivization of inaction. These weaknesses, however, are not inherent to the actual letter of the law, but instead result from a wrongful interpretation of the amended language.

First, a myopic reading of the new language risks construction that is too narrow, thus excluding a class of workers that might otherwise be covered under the superior benefits of the LHWCA. After all, are there not other tasks completed by maritime workers that are not directly related to the loading and unloading of the vessel? Additionally, what if a worker does load and unload vessels, but is injured while conducting some other duty?

The answer to this problem of judicial tunnel vision is two-fold. First, the plain text of the LHWCA accounts for most of these other various jobs in different, unrevised sections of the Act.[143] Second, the newly revised language of the statute does not necessitate an evaluation of the activity of the worker *at the moment of his injury* to determine coverage. To read the language as such would wrongly conflate the use of the language in the state statutes with its use and purpose here. In state statutes "in the course of" describes what one is doing at the time of injury, while in the proposed revision, "in the course of" defines what duties are part of maritime employment in general. Once it is established that a worker's employment qualifies as maritime based on duties conducted in the course of loading and unloading a vessel, he will be eligible for the LHWCA. If he is completing some other task at the moment he is injured, it is of no concern; he is nonetheless a maritime employee.[144] In other words, if a worker's duties involve a

143. 33 USCS § 902 ("any harbor-worker including a ship repairman, shipbuilder, and ship-breaker"); 33 USCS § 903 ("repairing, dismantling, or building a vessel").

144. To illustrate this point, a worker whose primary responsibility is to load cargo on a ship would still be covered, even if he were sweeping out a storage container on a covered situs when he was injured. He was injured in the course of his employment, and his employment is maritime in nature. His employment is maritime in nature because his duties generally are conducted in the course of

tight temporal connection with the loading of a ship, then his job description is "maritime employee." Once that status attaches, he remains a maritime employee throughout the course of his workday, regardless of his particular actions at the time of injury.

Judge Higginson focused upon the second pitfall of tight temporality in his dissent to *New Orleans Depot*.[145] The problem arises from a reading of *Schwalb* that denies coverage to workers repairing and maintaining equipment unless loading is interrupted for the repair. Judge Higginson argued that such a rule would foster inefficiency in the industry by incentivizing reactivity.[146] Instead of being proactive and keeping equipment in good running order, workers would prefer to wait until equipment breaks so that the loading process is interrupted and coverage is ensured. The statutory revision here avoids that strange result by allowing some flexibility in temporality. Adding "in the course of" to the statute creates a cushion of time on either side of the loading and unloading processes, during which repairs could reasonably be made and still be covered under the LHWCA. Still, that cushion is a small one—it would not be allowed to extend maritime status beyond those repairs immediately necessary to loading and unloading.[147] Put simply, repair and maintenance must be done to facilitate the actual task of loading or unloading a particular vessel.

An appropriate reading of the proposed statutory language avoids these pitfalls while allowing for a time-limited application of the status requirement. Because this proposed amendment is familiar language to judges, its application should be straightforward and consistent, as long as it is appropriately interpreted to modify the assessment of employment status and not read so constrictively as to torpedo efficient operations.

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loading and unloading vessels; the fact that he was not loading the ship at the time of injury is irrelevant.

145. Judge Higginson decried Judge Clement's concurrence because her application prevented workers who kept machines running smoothly from receiving benefits. *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs* 718 F.3d 384, 404 (5th Cir. 2013) (*en banc*) (Higginson, dissenting). According to Judge Higginson, under Judge Clement's reading of *Schwalb,* workers would have to wait for machinery to break before fixing it to meet the tight temporal construct Clement suggested. *Id.*

146. *Id.*

147. For example, in a traditional state workers' compensation case, an employee may be considered "in the course of" employment when he is preparing his tools before beginning his duties, but he is not "in the course of" his employment when he is brushing his teeth in the morning and readying for work.

2. No Time to Wait: Addressing the Harms of Unbounded Temporality Today

Revising the LHWCA status requirement to incorporate a temporal element is the ideal solution to the problem of determining coverage for injured maritime workers. Realistically, however, a statutory revision does not appear to be looming on the horizon—the LHWCA has only been amended twice in its almost ninety year history.[148] As such, courts and practitioners should not wait on Congress to establish a temporal boundary to coverage. To do so would sacrifice the interests of injured workers and their employers and cause harm to an industry integral to the national economy.

Furthermore, waiting for congressional action is not necessary. The plain language of the statute bears sufficient authority. The LHWCA already requires that the injury in question occur in the course of employment, just as other workers' compensation structures do.[149] The Act requires employment to be maritime in nature.[150] Finally, Section 903(a) expressly describes the conventional activities that fall within the scope of employment as "loading, unloading, repairing, dismantling or building a vessel."[151] No reason stands to extend this language beyond its most straightforward meaning: Coverage only applies to those injuries incurred by employees who are actively engaged in the actual loading of a vessel (among the other tasks listed).

Any further attenuation unnecessarily complicates application of the compensation structure. Expansion of the statute beyond this simple reading could not possibly be based on the letter of the law, but rather on some unfounded desire to extend coverage under the LHWCA farther than ever intended. Congress explicitly intended the statute to apply to those tasks "immediately" related to unloading, as they stated clearly in the 1972 Amendments.[152]

An appropriate interpretation of the case law also supports this reading. In *Caputo*, *Pfeiffer*, and *Schwalb*, the Supreme Court emphasized the tight link between the worker's employment and the loading and unloading process. A requirement of immediacy is inferred. Courts should plainly read *Schwalb's* assertion that the actual cessation of a particular

148. In addition to the amendments discussed here, the LHWCA was amended once more in 1984, on grounds unrelated to the subject matter at hand. *Longshore and Harbor Workers' Compensation Act Amendments of 1984*, Pub. L No. 92-576, 98 Stat. 1639.
149. 33 U.S.C. § 902(2) (2015).
150. 33 U.S.C. § 902(3).
151. 33 U.S.C. § 903(a).
152. 1972 U.S.C.C.A.N. 4698, 4708.

task was determinative. This is not *dicta*: Temporality is determinative. While a clear assertion from Congress confirming the existence of a conservative temporal limit on LHWCA status is preferred, the same results can, and must, be reached by the judiciary.

CONCLUSION

The maritime industry remains the bedrock of the United States, both in terms of heritage and current economic and political impact. The industry thrives due to the hard work of American maritime laborers. Thus, the health of the United States is intimately entwined with the health of these men and women. The LHWCA provides maritime laborers with a safety net in case they get hurt on the job. American lawmakers are responsible for ensuring that this safety net does not have any holes.

As it stands today, the LHWCA has one gaping hole that unnecessarily strains the industry and its workers. That hole exists in the lack of clarity regarding how to apply the status test for coverage. Particularly, how attenuated may an employee's relationship to loading and unloading be to qualify for coverage?

Incorporating, through statutory amendment, a temporal component to the status inquiry answers this question while achieving coverage that is both more beneficial to the maritime shipping industry and more in keeping with the intents of the statute. Moreover, no substantial harm would result: Those excluded from coverage would be those for whom federal coverage was never intended. Such individuals could seek compensation under the state compensation structures designed to protect them, and in so doing avoid the risks of lengthy and unsuccessful litigation. Until such amendment takes effect, the courts should embrace the temporality test as the best way to achieve the clarity Congress sought, but failed to attain, in 1972. The stakes are simply too high to wait for another amendment.

The temptation always exists to stretch a statute to meet the facts of a sympathetic case. However, doing so results in absurd and harmful conclusions, even for those workers exclusively covered by state law. Stretching the statute means also stretching—and weakening—predictability in the adjudication of claims. Attenuating coverage may seem benevolent and equitable to a sympathetic judge that aims to compensate a maimed and despondent worker. In the end, a broad application hurts both the employee seeking immediate remedy and his employer, who bears the brunt of heightened litigation costs. A plain reading of statutory language, interpretation of congressional intent, and careful analysis of Supreme Court precedent insists upon a narrow temporal construction in assessing status under the LHWCA. Industry workers, courts, and administrative bodies must determine eligibility for LHWCA compensation accordingly in order to ensure the continued health of the industry and its workers.

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