The Expanding Coverage of the Longshoremen's and Harbor Workers' Compensation Act

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The history of maritime compensation law has been one of line drawing and overlaps where state and federal compensation meet. Initially, the separate systems were treated as mutually exclusive and their respective jurisdictions were fixed by the perceived limits of federal constitutional power, congressional policy initiatives, and judicial interpretations; but more recently, emphasis on certainty and liberality of remedy has replaced jurisdictional exclusivity as the talisman. As the title suggests, the maritime compensation area has followed other areas of state-federal relations in reflecting an increasing federal power. This expansion has come from litigation pressures as well as legislative action. The federal system traditionally has granted higher payments to injured workers. While Congress has sought to protect those exposed to the hazardous nature of maritime work, litigators have sought to bring injured workers within the ambit of more generous federal protection.

HISTORICAL BACKGROUND:
"A page of history is worth a volume of logic."²

Because admiralty and maritime jurisdiction form the anchor that fixes the reach of federal compensation coverage, we begin with an historical review of the jurisdictional concept.

The principal basis for federal jurisdiction is, of course, article III, section 2: "[T]he judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."³ However, the commerce and

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2. Justice Holmes' famous quote from New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) is appropriate here. To appreciate the need for an expansive reading of the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act, one should be cognizant of the historical development of compensation for injured maritime workers.
necessary and proper clauses have been suggested as additional jurisdictional fronts. Traditionally, the words "admiralty and maritime jurisdiction" have been interpreted to fix exclusive jurisdiction in the federal government over areas, persons, and things considered to be of an admiralty or maritime nature. However, the actual areas, persons, and things covered, as well as the lines marking the boundaries of coverage have ebbed and flowed with the development of the law. The Constitution expressly vested control of admiralty and maritime affairs in the federal government to achieve uniformity of treatment and thus encourage the then all-important colonial water commerce.

The Founders sought to create a uniform jurisprudence instead of permitting state-by-state adjudications to develop haphazard coverage. The Constitution attempted to accomplish this objective by permitting Congress to create a system of courts which would exercise exclusive maritime jurisdiction.

From the beginning the Supreme Court eschewed the English law because England had developed its admiralty jurisprudence in a way which cabined that country's maritime courts. The earliest cases declared an affinity for the broader maritime views of other nations, particularly countries on the European continent.

Traditionally, admiralty deals with two types of matters: (1) acts occurring on navigable waters, and (2) contracts and transactions connected with shipping. For years, location alone fixed jurisdiction over acts on navigable waters, while the subject matter of contracts and transactions connected with admiralty determined whether admiralty jurisdiction was present.

Executive Jet Aviation, Inc. v. City of

5. Id. at 646.
6. Congress did this by passing section nine of the Judiciary Act of 1789, in which district courts were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."
7. E. Corwin, supra note 4, at 646.
8. G. Gilmore & C. Black, supra note 1, at 9-10. The authors stated: The common law judges... began issuing writs of prohibition against proceedings in admiralty except within absurdly narrow limits. In a nutshell, the construction of the words of the statutes that limited the Admiral's court to things "done upon the sea" was extremely literal, so that, e.g., contracts having a maritime subject-matter but made on land (as most were) were held outside the jurisdiction of the Admiralty.
9. See, e.g., The Octavia, 14 U.S. (1 Wheat.) 20 (1816); The Samuel, 14 U.S. (1 Wheat.) 9 (1816); United States v. The Schooner Betsey, 8 U.S. (4 Cranch) 442 (1808); United States v. The Schooner Sally, 6 U.S. (2 Cranch) 406 (1805); United States v. La Vengeance, 3 U.S. (3 Dall.) 297 (1796); The Seneca, 21 F. Cas. 1081 (C.C.E.D. Pa. 1829) (No. 12,670).
10. E. Corwin, supra note 4, at 649.
11. Id.
Cleveland changed this. There the Court held that the crash into navigable waters of a land-based plane flying between points within the continental United States would not be covered in admiralty jurisdiction. Executive Jet laid down the general definition of maritime-tort jurisdiction—the wrong must bear "a significant relationship to traditional maritime activity." The Court rejected location alone as the proper test, basing its reasoning upon a finding that technology had outstripped the original concept and since airplanes and other conveyances crossed water in ways entirely disassociated from normal maritime activity, the single locality requirement had become too mechanistic a test. Although the Supreme Court early on articulated a desire to leave the restrictive ambit of English admiralty law, it initially followed English precedent by restricting territorial jurisdiction to the high seas and to only that portion of the rivers which was affected by the ebb and flow of the tide. The Court then moved admiralty jurisdiction inland to a point 95 miles above New Orleans. Finally, in The Propeller Genesee Chief v. FitzHugh, the Court extended admiralty jurisdiction to all navigable waters of the United States. This expansion has been retained to the present.

Accommodations between state and federal courts "wrought to correspond to the realities of power and interest and national policy" have resulted in a not-always consistent jurisprudence. However, Supreme Court holdings have reflected a willingness to allow state law to function in all areas except those where it might disrupt a

13. Id. at 272. The flight was to be from Cleveland, Ohio to White Plains, New York, with an intermediate stop in Portland, Maine. Cf. Ward v. Director, Office of Workers' Compensation, 684 F.2d 1114 (5th Cir. 1982), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-566).
14. 409 U.S. at 268.
15. Id.
16. Id. at 268-71.
18. Waring v. Clarke, 46 U.S. (5 How.) 441 (1847). In Waring, the Supreme Court sustained admiralty jurisdiction over a Mississippi River collision. The location was infra corpus comitatus, that is, within the body of a country. Id. at 462.
19. 53 U.S. (12 How.) 443 (1851). The case involved the Lake Ontario collision of the schooner Cuba and the Propeller Genesee Chief. Id. at 450.
20. The Court noted in The Propeller Genesee Chief:
Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same.
Id. at 454.
uniform application of federal maritime law.\textsuperscript{22} For example, for many years, federal courts borrowed state wrongful death remedies for use in state territorial waters to provide a parallel remedy to that created offshore by the Death on the High Seas Act.\textsuperscript{23}

\textbf{The Beginnings of Maritime Compensation}

The first judicially significant line between state and federal compensation remedies was drawn by \textit{Southern Pacific Co. v. Jensen}.\textsuperscript{24} The division, known as the \textit{Jensen} line, was drawn at the edge of the navigable waters of the United States. \textit{Jensen} held that a New York compensation statute was unconstitutional in its application to maritime workers. The Court found that the state had legislated in a way that would destroy the uniformity of federal maritime and admiralty jurisdiction.\textsuperscript{25} To the water's edge states could go, but no farther. The navigable water was the federal realm, within which the nation's admiralty jurisdiction held exclusive sway. When Congress, in 1917, enacted a statute giving maritime suitors a right to use state compensation statutes,\textsuperscript{26} \textit{Knickerbocker Ice Co. v. Stewart}\textsuperscript{27} held it to be an unconstitutional delegation of power to the states. In 1922, Congress sought to moderate its 1917 enactment by providing that those in maritime pursuits, other than masters and crews of vessels, could resort to state compensation laws.\textsuperscript{28} Again, the Court struck down the act, in \textit{Washington v. W.C. Dawson & Co.}\textsuperscript{29} In the course of that decision, the Court suggested that a federal compensation remedy should be legislated.\textsuperscript{30} Congress followed the suggestion in 1927, passing the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), which created a federal compensation remedy for nonseamen who could not "validly" be covered by state compensation laws.\textsuperscript{31} While that act created a precise and discernible line dividing

\begin{itemize}
\item \textsuperscript{22} Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).
\item \textsuperscript{23} See, e.g., The M/V Tungus v. Skovgaard, 358 U.S. 588 (1959).
\item \textsuperscript{24} 244 U.S. 205 (1917).
\item \textsuperscript{25} Id. at 216.
\item \textsuperscript{26} Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.
\item \textsuperscript{27} 253 U.S. 149 (1920).
\item \textsuperscript{28} Act of June 10, 1922, ch. 216, 42 Stat. 395.
\item \textsuperscript{29} 264 U.S. 219 (1924).
\item \textsuperscript{30} Id. at 227-28.
\item \textsuperscript{31} Act of March 4, 1927, ch. 509, 44 Stat. 1424 (codified at 33 U.S.C. §§ 901-950).
\item \textsuperscript{33} U.S.C. § 903(a) provides:
\begin{itemize}
\item (a) 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—
\end{itemize}
the state and federal remedies, it also appeared to create a severe and rigid limitation. In an effort to ease this rigidity, the Supreme Court interpreted the statute to permit state compensation coverage in areas defined vaguely as "maritime and local." This effort to delineate a boundary between state and federal jurisdiction turned out to be more confusing than helpful. The Court then introduced the "twilight zone" in Davis v. Department of Labor. This case changed compensation concepts from a bright line separation to overlapping coverages which permitted state compensation for the survivor of a bridge worker drowned in navigable waters. The next major decision was Calbeck v. Travelers Insurance Co. It interpreted the coverage phrase in the federal act ("if recovery . . . may not validly be provided by State law") to merely fill in coverage where state acts were forbidden to go. Calbeck authorized payment of LHWCA compensation to two harbor workers injured after the vessels they had been welding on ashore were moved into navigable waters. LHWCA compensation was allowed despite the fact that state compensation remedies also were available. The Court thus sought to eliminate the guesswork as to which act applied and the consequent possible loss of all coverage by maritime workers in this area. But, in a later return to rigidity, the Court, in Nacirema Operating Co. v. Johnson, construed the federal statute to deny coverage to those longshoremen whose work took them shoreside of the Jensen line during the course of the loading and unloading process. In 1980, Sun Ship, Inc. v. Pennsylvania summarized the situation as follows:

Before 1972, then, marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furthest extreme, Jensen commanded that nonlocal maritime injuries fall under the LHWCA. "Maritime but local" injuries "upon the

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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. 317 U.S. 249 (1942). The Court noted that there is "clearly a twilight zone in which the employees must have their rights determined case by case." Id. at 256.
34. 370 U.S. 114 (1972).
35. Id. at 135-36.
37. The Court stated that while Congress had the power to extend the coverage of the LHWCA to coincide with the limits of admiralty jurisdiction, "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." Id. at 224. Congress acted upon this suggestion in 1972 and amended the LHWCA to extend coverage to some shoreside injuries.
navigable waters of the United States,” 33 U.S.C. § 903(a), could
be compensated under the LHWCA or under state law. And in-
juries suffered beyond navigable waters—albeit within the range
of federal admiralty jurisdiction—were remediable only under state
law.\textsuperscript{39}

Nacirema’s check on judicial expansion led to congressional action.

**THE 1972 AMENDMENTS**

In 1972, Congress amended the 1927 Act\textsuperscript{40} to extend federal com-
penstation coverage to all persons, except the master and crew of any
vessel,\textsuperscript{41} who were “engaged in maritime employment” and were on
navigable waters.\textsuperscript{42} An additional purpose of the amendments was to
extend shoreside coverage under the federal scheme to maritime
employees.\textsuperscript{43} The precise language of the statute is as follows:

Sec. 902(3). The term “employee” means any person engaged in
maritime employment, including any longshoreman or other per-

\textsuperscript{39} Id. at 719.
\textsuperscript{40} 33 U.S.C. §§ 901-950 (1976), as amended by Longshoremen’s and Harbor Workers’
Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. For discus-
sions of the 1972 amendments, see Gorman, The Longshoremen’s and Harbor Workers’
Compensation Act—After the 1972 Amendments, 6 J. MAR. L. & COM. 1 (1974); Robert-
son, Jurisdiction, Shipowner Negligence and Stevedore Immunities Under the 1972 Amend-
ments to the Longshoremen’s Act, 28 MERCER L. REV. 515 (1977); Robertson, Negligence
Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the
Longshoremen’s and Harbor Workers’ Compensation Act, 18 B.C. INDUS. & COM. L. REV. 135
(1976); Comment, Shoreside Coverage under the Longshoremen’s and Harbor Workers’ Compen-
sation Act, 7 J. MAR. L. & COM. 447 (1976); Comment, The Longshoremen’s and Harbor Workers’
Compensation Act: Coverage After the 1972 Amendments, 55 TEX. L. REV. 99 (1976); Comment,

\textsuperscript{41} H.R. REP. No. 1441, 92d Cong., 2d Sess. 10, reprinted in 1972 U.S. CODE CONG.
& AD. NEWS 4698, 4708. The House Report also noted:
The Committee does not intend to cover employees who are not engaged in loading,
unloading, repairing, or building a vessel because they are injured in an area
adjoining navigable waters used for such activity. Thus, employees whose respon-
sibility 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.

NEWS 4708. The legislative history of the amendments will not be extensively
examined in this article because of the thoroughness with which it is covered in several
Fifth Circuit opinions. See, e.g., Boudreaux v. American Workover, Inc., 680 F.2d 1034,

\textsuperscript{42} H.R. REP. No. 1441, supra note 41, at 10, reprinted in 1972 U.S. CODE CONG.
& AD. NEWS 4708.

\textsuperscript{43} Id. at 10, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4707-08.
son 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.\textsuperscript{44}

Sec. 902(4). The term “employer” means an employer any of whose employees are employed in maritime employment, in whole or in part, 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).\textsuperscript{45}

Sec. 903(a). Compensation shall be payable under this chapter in respect of disability or death of an employee but only if 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).\textsuperscript{46}

The language of the amendments and their legislative history reveal that the amendments’ principal design was to increase benefits\textsuperscript{47} and broaden compensation coverage for federal maritime employees.\textsuperscript{48} However, there was a legislative trade-off. While workers received more expansive rights, employers gained the elimination of the Sieracki-Ryan liability that courts had placed upon stevedoring companies and vessels.\textsuperscript{49} The compromise eliminated covered workers’ use of the unseaworthiness remedy against vessels, thus also cancelling warranty of workmanlike performance claims brought by vessels against stevedores.\textsuperscript{50} The amendments expressly left intact, however, a worker’s tort remedy for a vessel’s own negligence, as distinguished from a claim based on the negligence of a stevedore or a fellow longshoreman.\textsuperscript{51}

44. 33 U.S.C. § 902(3).
48. Id.
51. Id.
The "Situs" and "Status" Requirements

Determining whether a worker is covered under the LHWCA is a matter of knowing where the line falls, and to know where that line is drawn, all one needs to know is "situs" and "status." This is, as they say, easier said than done. Briefs piled higher than the waves on a stormy sea have attempted to define these terms. Ten years have passed since these terms proclaimed the boundary markers, and despite some clarification, precisely where situs and status draw the line is still awaiting final location. A recent Supreme Court decision, though, goes a long way toward clarifying the situation.

Situs means that the accident must occur "upon the navigable waters of the United States" or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used in loading, unloading, repairing, or building a vessel.


53. The courts of the Fifth Circuit litigate most of the nation's maritime compensation cases. The largest number of maritime appeals occur in the Fifth Circuit. The most recent statistics available show that of the 295 marine injury cases pending in the circuit courts of appeals, 211 of the cases are in the Fifth Circuit. ADMINISTRATIVE OFFICE, UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR A-12 (1981). The Second Circuit had the second highest total with 22 pending cases. Id. The United States District Courts in the Fifth Circuit also had the highest number of pending marine personal injury cases of any of the circuits. Of the 5,074 cases docketed nationwide as of June 30, 1981, 2,996 cases were in district courts in the Fifth Circuit. Id. at A-19. It is therefore nationally significant from the standpoint of quantity, if not quality, that this circuit liberally construes the LHWCA's situs and status requirements in response to the amendments' remedial nature. This liberal construction is articulated in the following recent decisions on the amendments: Ward v. Director, Office of Workers' Compensation, 684 F.2d 1114 (5th Cir. 1982), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-566); Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982) (en banc), aff'g 664 F.2d 463 (1981), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-605); Miller v. Central Dispatch, Inc., 673 F.2d 773 (5th Cir. 1982); Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981); Gilliam v. Wiley N. Jackson Co., 659 F.2d 54 (5th Cir. 1981), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 81-1039); Hullinghorst Indus. v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Alford v. American Bridge Div., 642 F.2d 807 (5th Cir.), on reh'g, 655 F.2d 86 (1981), cert. denied, 455 U.S. 927 (1982); Mississippi Coast Marine Co. v. Bosarge, 637 F.2d 994 (5th Cir. 1981); Howard v. Rebel Well Serv., 632 F.2d 1348 (5th Cir. 1980); Boudloche v. Howard Trucking Co., 632 F.2d 1346, cert. denied, 452 U.S. 915 (1981); Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc), cert. denied, 452 U.S. 903 (1981); Trott & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980); Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977), cert. denied, 434 U.S. 903 (1977); Ingalls Shipbuilding Corp. v. Morgan, 551 F.2d 61 (5th Cir. 1977), cert. denied, 434 U.S. 966 (1977); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976).

The conjunctive status requirement mandates that a covered worker be a person engaged in whole or in part in maritime employment, including any longshoreman or harbor worker. "Harbor worker" includes ship repairmen, shipbuilders and shipbreakers, but not masters or members of a crew of any vessel or a person engaged by a master or crew to unload a small vessel.55 Both House and Senate Reports accompanying the legislation emphasized that the definitions given in the amendments were intended to be precise.56 They even expressly negated coverage for those who only picked up stored cargo for transshipment.57

The Situs Requirement

The situs requirement is the easier of the two to grasp. It comes from the section 902(4) definition of an employer as a person whose employees are engaged in whole or in part in maritime employment upon the navigable waters of the United States.58 Navigable waters are defined to include areas which commonly abut the waterfront or any "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."59 The purpose of this change, Congress noted, was to extend coverage landward to longshoremen and other shoreside, yet, maritime workers.60 From both statutory language and legislative history, it is obvious that this situs requirement expanded the geographic area in which the LHWCA could be applied.

The decisions of this circuit have implemented the spirit of Congress in attempting to expand coverage to those injured workers Congress intended be covered61 by the Act. The intent was to create uniform coverage62 and shoreside protection for maritime workers.63

55. 33 U.S.C. § 902(3).
57. Id. See note 41 supra.
59. 33 U.S.C. § 902(4). The same language is repeated in § 903(a), which states that compensation will be paid if death or disability results from an injury which occurs upon navigable waters.
Therefore, as the Fifth Circuit stated in *Jacksonville Shipyards v. Perdue,* a narrow, technical construction of the LHWCA traditionally has been disfavored. *Jacksonville Shipyards* held that the amendments are to be liberally construed in favor of injured employees because of the Act’s remedial nature. In the en banc decision in *Texports Stevedore Co. v. Winchester,* the Fifth Circuit gave the phrase “adjoining area customarily used” an expansive definition. It said in *Texports:*

Although “adjoin” can be defined as “contiguous to” or “to border upon,” it is also defined as “to be close to” or “to be near.” “Adjoining” can mean “neighboring.” To instill in the term its broader meanings is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee’s injury can come within the LHWCA.

For the Fifth Circuit to restrict the territorial area of coverage to lands abutting the water’s edge would be to retreat to the harshness of the *Jensen* line. Narrow coverage would recreate the congressionally condemned situation in which maritime workers frequently walked in and out of coverage as they performed their work.

The facts of *Texports* are helpful in showing how the decision has affected coverage under the Act. Winchester was a “gear man” for Texports Stevedore Co. The company had, within the vicinity of the Houston Shipping Canal docks, three “gear rooms” for the storage and maintenance of longshoremen’s gear. However, because warehouse space was not available around the docks, the third gear room was five blocks from the gate of the nearest dock. Winchester reported there every day for his assignment. Although he sometimes worked dockside or aboard ships, he was working at the gear room on the day he was injured. A strict interpretation of the language of the Act would have made Winchester’s compensation depend on the availability of rental space in the area contiguous to the docks. His employer’s inability or refusal to rent a facility directly touching the docks, the Fifth Circuit decided, should not necessarily be dispositive of Winchester’s right to be compensated for his injury.

66. *Id.* at 540 n.21 (citing *Voreis v. Eikel,* 346 U.S. 328, 333 (1953)).
68. 632 F.2d at 512.
69. *Id.* at 514.
70. *Id.* See also P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 83 n.18 (1979); G. Gilmore & C. Black, supra note 1, at 424.
71. The facts of *Texports* are reported at 632 F.2d at 506-07.
The decision warned that the site of the injury must have a tight geographic nexus with the waterfront. The dissenters' exaggerated suggestion that the decision could be extended to the stevedore's downtown Houston offices was bluntly rejected.

Labels are not dispositive in determining situs. For example, in Alford v. American Bridge Division, the Fifth Circuit found an 86-acre former shipyard along the Sabine River in Orange, Texas to be a maritime situs. The workers were injured there while constructing ship modules which were to be assembled elsewhere into a complete vessel. The court found that the work at this Sabine River plant was part of modern-day shipbuilding. In former times, ships were constructed from stem to stern in one shipyard. Today, specialized manufacturers, spread across the country, frequently manufacture different sections of the craft for final assembly in some distant location. If a ship was completely constructed alongside a pier in a shipyard, all of the pier-side workers engaged in such construction clearly would be covered by the Act. Simply because the manufacture of certain parts is now geographically diverse, the coverage afforded those same dispersed maritime workers should not be diluted.

The importance of the situs requirement is two-fold. First, it is a less harsh equivalent of the Jensen line. There must be some limitation on how far inland coverage can extend under an act which is maritime in nature. The situs/nexus requirement supplies that limitation. Second, the situs requirement notifies an employer of the area in which a worker may be covered. As the Fifth Circuit noted in Odom Construction Co. v. United States Department of Labor, "the phrase 'customarily used by an employer . . .' was inserted to ensure that an employer could be liable only when it had real or constructive notice that an area was used for maritime purposes and was therefore likely to be a covered situs." Analysis of the situs require-

72. Id. at 514. The court noted that "the outer limits of the maritime area will not be extended to extremes." Id.
73. Id.
74. Id. at 513.
75. 642 F.2d 807 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982).
76. Id. at 809-10. The Benefits Review Board (BRB) had denied compensation for three workers in the case—Alford, Buller, and Cantu. The Fifth Circuit panel reversed the BRB's findings as to Alford and Buller, but it affirmed the denial of benefits to Cantu. On rehearing, the panel decided that Cantu also was a covered employee and reversed the BRB holding. Alford v. American Bridge Div., 655 F.2d 86 (5th Cir. 1981).
77. 642 F.2d at 815.
78. Id.
79. Texports, 632 F.2d at 518.
ment makes it clear that the Fifth Circuit continues to liberally construe the Act in a manner consistent with its remedial nature. Labels are not critical to the analysis; nexus is. If a close link can be established between the site of the injury and the waterfront, it is inconsequential that there are non-maritime buildings between the two locations or that the site is removed from the water's edge.

The Status Requirement

The Fifth Circuit, as most others, has had difficulty defining and delineating the status element in the LHWCA test, as is evidenced by the volume of "judicial ink" which has been spilled over it. On its face, the requirement that a worker be in maritime employment does not appear to involve a difficult inquiry. Application to real cases is the rub. The courts of the Fifth Circuit have had to determine whether the following persons were working in maritime employment: (1) an airplane pilot who flew above the Mississippi Sound spotting fish for fishing boats; (2) a maritime service agency truck driver who was exposed to noxious fumes aboard a ship while delivering a detained seaman to a ship’s captain; (3) a man injured while erecting a scaffold beneath a pier extending over the Mississippi River; (4) a carpenter who repaired 30-foot pleasure boats in his employer’s waterfront boatyard; (5) a wireline operator working on a drilling barge located in Louisiana territorial waters; (6) a land-based construction worker injured while involved in a two-day project moving four large concrete blocks from beneath the water near a river bank.

In all of these instances, the Fifth Circuit found the workers to

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84. Professor Robertson contends that the meaning of “maritime employment”—the status requirement of LHWCA—is “ambiguous.” *Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973 (1977). He suggests that the “lack of clarity on the meaning of the status limit is the primary difficulty in defining coverage of the Act.” *Id.* at 980 n.56.

85. *Alford*, 642 F.2d at 811.


87. *Miller v. Central Dispatch, Inc.*, 673 F.2d 772 (5th Cir. 1982).


be involved in maritime employment. The reasoning involved is critical. It can best be extracted from three recent Fifth Circuit decisions: Boudreaux v. American Workover, Inc.,92 Ward v. Director, Office of Workers' Compensation,93 and Hullinghorst Industries v. Carroll.94

The cases suggest that a distinction must be made between land-based workers performing maritime tasks and maritime workers injured while upon navigable waters. Let us look first at the Fifth Circuit's approach to workers who ordinarily work upon navigable waters, exemplified in Boudreaux and Ward. Boudreaux held that maritime employment status included workers in the offshore oil industry. This was based on a reading of the 1972 amendments to cover all persons in maritime employment, not merely longshoremen and the types of harbor workers expressly mentioned in the Act.95 The Fifth Circuit more broadly interpreted the term "maritime," which had initially been used to connote shipping or navigation, to mean located on or near the sea.96 Maritime employment no longer was limited to employment involving the movement of goods by traditional ships or the navigation of those ships on the high seas. Boudreaux's holding departed from some predictions. Robertson, in his thorough 1977 analysis of the rights of offshore oil industry workers, had agreed with Gilmore and Black that the meaning of "maritime employment" was ambiguous and might not cover such workers.97 The holding led the Boudreaux dissenters to say that the Fifth Circuit's definition of "maritime employment" was so broad that status was eliminated as a coverage requirement distinct from situs.98 They took the position that the majority had erroneously proclaimed that any person injured on the sea was covered.99

Less than a month and a half after the Fifth Circuit en banc opinion in Boudreaux, a three-judge panel, in Ward v. Director, Office of Workers' Compensation,100 said that Boudreaux held that "an employee

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95. 680 F.2d at 1054.
96. Id. at 1048.
97. Robertson, supra note 84, at 980.
98. 680 F.2d at 1054 (Gee, J., dissenting).
99. Id. The extended coverage does not confer a benefit without burden. By bringing offshore oil workers into the compensation act fold, the Act granted them access to a speedy, certain compensation remedy for minor injuries. At the same time, though, it deprived them of the more remunerative remedy for unseaworthiness and, through indemnity, of recovery for stevedore negligence.
100. 684 F.2d 1114 (5th Cir. 1982), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-566).
injured in the regular course of his employment on the navigable
waters of the United States automatically meets both the status and
situs tests.” Ward’s key restriction, however, is that the employee
must be on those navigable waters within the normal course of his
employment. The panel expressly reserved the question of whether
coverage extended to a person whose employment brought him “trans-
iently or fortuitously” onto the waters. This interpretation affirms
that the status requirement has not been abandoned by this circuit
in every instance in which a worker is injured while on navigable
waters. His presence there must be regular as well as in the course
of his employment and logically must be of a maritime nature. “Status”
is liberally interpreted, as it should be under the Act, but it is not
abandoned.

While Boudreaux and Ward solve the puzzle for injured workers
who regularly perform maritime tasks on the navigable waters, Hull-
inghorst points to the Fifth Circuit’s position on land-based workers
injured while working within the expanded maritime situs. In
Boudreaux, this court favorably cited Hullinghorst for its summariza-
tion of some of the “jurisprudential criteria” used in determining
whether or not shoreside workers come under the Act. In Hull-
inghorst, Carroll was injured while erecting a scaffold beneath a pier
extending over the Mississippi River. The court found that he was
covered under the Act. His work was “an integral part of an indis-
tutable maritime pier repair project, an essential and indispensable
step in the repairs to be effected.” The Fifth Circuit noted that the
work was “not incidental,” nor was it the type of job “peripherally
related to maritime matters that Congress said was not to be covered
by the LHWCA.” The court found that the project directly furthered
the goals of the loading facility involved and it clearly bore a
“realistically significant relationship to ‘traditional maritime activity
involving navigation and commerce on navigable waters’.” It was
immaterial that the skills being used by Carroll were not solely

101. 684 F.2d at 1116. This is consistent with the Supreme Court’s decision in Calbeck,
which held that prior to 1972, any worker who in the course of his duty was obliged
to go on navigable waters, however briefly or sporadically, and who suffered an in-
jury while in that historically maritime locality was covered by the pre-1972 LHWCA.
102. 684 F.2d at 1116.
103. Id. at 1116 n.3.
104. 680 F.2d at 1049 n.30.
105. 650 F.2d at 752-53.
106. Id. at 756.
107. Id.
108. Id.
The "realistically significant relationship" test is now used in determining whether shoreside workers are within the protective cover of the compensation act. But the analysis does not stop there. To determine that the employment is maritime, the court must find that the worker was regularly engaged in maritime work at the time of the injury\textsuperscript{116} or that at least "some portion" of the employee's overall work assignment involved maritime employment.\textsuperscript{111} Earlier in 1982, in Miller \textit{v. Central Dispatch},\textsuperscript{112} this court extended coverage to a truck driver who was transporting a foreign seaman detained by American immigration officials. The driver transported the seaman to a vessel docked nearby.\textsuperscript{113} While aboard that ship, the driver was exposed to noxious fumes which later resulted in an illness. The court found that Miller was engaged in maritime employment since more than just "some portion" of her work was devoted to traditionally maritime work.\textsuperscript{114} The guarding and transportation of detainees was found to be essential to maritime commerce.\textsuperscript{115}

The test is "some portion" and not a "substantial portion." The Benefits Review Board attempted in 1980 to make the standard stricter by using the "substantial portion" test, but the Fifth Circuit disallowed this interpretation in \textit{Howard v. Rebel Well Services}\textsuperscript{118} and \textit{Boudloche v. Howard Trucking Co.}\textsuperscript{117} Relying upon language from the Pfeiffer decision, the Fifth Circuit said that only "some portion" of the employee's work need be maritime in nature. The amount of time that a worker must spend in maritime employment has been liberally interpreted by the Fifth Circuit. In \textit{Boudloche}, the claimant did longshoring-type work as little as 10 percent of his time.\textsuperscript{118} In \textit{Odom},

\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Ward}, 684 F.2d at 1117 (citing Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 844 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979) ("an employee could satisfy the status test in two ways: he might, at the time of injury, be engaged in an activity properly classified as maritime employment, or he might be engaged in an occupation considered maritime employment") (emphasis in original). See also Gilliam v. Wiley N. Jackson Co., 659 F.2d 54, 57 (5th Cir. 1981), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 81-1039); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d at 539-40.
\textsuperscript{111} \textit{Howard v. Rebel Well Serv.}, 632 F.2d 1348, 1350 (5th Cir. 1980); \textit{Boudloche v. Howard Trucking Co.}, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).
\textsuperscript{112} 673 F.2d 773 (5th Cir. 1982).
\textsuperscript{113} The facts of the case are reported at 673 F.2d at 774-75.
\textsuperscript{114} \textit{Id.} at 781.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} 632 F.2d 1348 (5th Cir. 1980).
\textsuperscript{117} 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981).
\textsuperscript{118} 632 F.2d at 1347.
no employee worked in the maritime area for more than 10 percent of his work hours. In each instance, there was enough maritime employment to meet the "some portion" requirement.

THE VIEW FROM OTHER CIRCUITS

The status and situs requirements have been briefed and argued in all of the maritime circuits in this country. The Second Circuit, which also has a heavy volume of LHWCA cases, was recently faced with an interesting case. A self-styled "historical ironworker and shiprigger" was injured while working on a ship moored at the South Street Seaport Museum in New York City. The ship had been towed to the museum. Prior to the towing, it was rendered unseaworthy when its rudder was fastened in one position. The worker was injured while working in a bosun's chair suspended from the riggings. Although the situs requirement was met, the Second Circuit rejected the claimant's bid for compensation under the LHWCA, questioning whether work on an unseaworthy museum piece was truly maritime employment.

The critical LHWCA issue now, however, is whether or not those workers engaged in employment upon navigable waters who were covered under the Act prior to the 1972 amendments are still necessarily covered today. The affirmative position is frequently argued and always supported by the Director of the Office of Workers' Compensation. Unfortunately, the

119. 622 F.2d at 114.
121. 676 F.2d at 45 n.5.
122. Id. at 45-46.
123. Boudreaux, 680 F.2d at 1037.
125. The Court noted in Boudreaux that the Director supports the view that the
circuits have come down on both sides of the issue. The Fifth Circuit has taken the lead in supporting continued coverage of those covered prior to 1972. In Boudreaux, this circuit addressed the issue directly and decided in favor of expansive coverage.

The Ninth Circuit, on the other hand, decided in Weyerhauser Co. v. Gilmore that Congress did not necessarily intend to continue to cover those who were protected under the pre-1972 wording of the Act. The Ninth Circuit chose to apply the "realistically significant relationship to traditional maritime activity" test to all injured workers, on either side of the beach.

The Second Circuit adopted the same view in Churchill v. Perini North River Associates when the court affirmed an administrative law judge's denial of benefits for a dock building foreman. Churchill was injured on a crane barge on navigable waters while supervising the unloading of caissons at a pollution control project construction site. The Second Circuit rejected his argument that both Davis and Calbeck rendered it unnecessary to apply the status and situs test amendments do not change the coverage afforded under Calbeck. "The Director has filed amicus briefs to this effect in a number of cases, including this one, and he once proposed published guidelines that would accord with this conclusion." 680 F.2d at 1046 n.22.

126. Compare Boudreaux, 680 F.2d at 1029; Brown & Root, Inc. v. Joyner, 607 F.2d 1087, 1090 (4th Cir. 1978), cert. denied, 446 U.S. 961 (1980) ("for we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 Amendments."); and Stockman v. John T. Clark & Son of Boston, 539 F.2d 264, 274 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977), with Churchill v. Perini N. River Assocs., 652 F.2d 255, 258 (2d Cir. 1980), rev'd sub nom. Director, Office of Workers' Compensation Programs v. Perini N. River Assocs., 51 U.S.L.W. 4074 (U.S. Jan. 11, 1983) (No. 81-897) (rejected the position that Calbeck makes it unnecessary to apply the situs and status test when the injury occurs on navigable waters); Fusco v. Perini N. River Assocs., 622 F.2d 1111, 1113 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); and Weyerhauser Co. v. Gilmore, 528 F.2d 957, 960 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976) ("Congress clearly did not intend to broaden the class of covered employees to include anyone injured in an adjoining area."). The Eleventh Circuit was confronted with the issue and opted not to decide it in Browning v. B.F. Diamond Constr. Co., 676 F.2d 547, 549 n.2 (11th Cir. 1982), cert. denied, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-4).

127. 528 F.2d 957 (9th Cir. 1975).
128. Id. at 960.
129. Id. at 961.
131. Churchill was working on a dock over navigable waters at the time of his injury. A caisson, a hollow circular tube used for construction in water, was being unloaded when a line snapped. The line hit Churchill's legs and threw him into the air. He suffered injuries to his head, leg, and thumb.
whenever an injury occurred upon navigable waters. The Supreme Court granted certiorari on the case. Its recent reversal of the Second Circuit's decision confirms that the Fifth Circuit's course is a proper one.

The Court held that when a worker is injured on "actual navigable waters" in the course of his employment on those waters, he satisfied the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is an employee of a statutory 'employer,' and is not excluded by any other provisions of the Act." In so holding, the Court rejected the approach taken by the Second and Ninth Circuits and implicitly upheld the Fifth Circuit's position in Boudreaux. Justice O'Connor reviewed the Supreme Court's interpretations of the 1927 Act and then examined the legislative history of the 1972 amendments to the Act. She wrote that the Court was "unable to find any congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972." The legislative history was found to exhibit a congru-
sional intent to move federal compensation coverage landward of the Jensen line, but showed no corresponding intent to withdraw coverage from those employees traditionally covered by the Act. Likewise, there was no indication in the legislative history that in moving compensation coverage landward, Congress added the status requirement to mandate that an employee injured upon navigable waters must show that his employment possessed a direct (or substantial) relation to maritime commerce or navigation.

The Court's opinion makes it clear that the status test is not erased for workers injured upon navigable waters in the course of their employment. It does require a court to view injuries on land and upon navigable waters in two separate analytic modes. The land-based worker injured in an area adjoining the waterfront must meet both the status and situs tests. The worker who is injured while upon "actual navigable waters," to meet the status test, must show that he was injured in the course of his employment, that he is an employee of a statutory employer, and that he is an employee "traditionally covered" by the pre-1972 LHWCA. That done, the worker is found to meet the maritime employment requirement of the status test. He must then fulfill the situs requirement, which given his presence upon actual navigable waters, should prove to be an automatic determination. The Fifth Circuit's view of the 1972 amendments as shown in Boudreaux agrees with Perini. Such an interpretation of the Act is consonant with the intent of Congress to expand the number of workers covered, favor injured workers, apply uniform coverage, and prevent a worker from walking in and out of coverage during his working day.

CONCLUSION

Where does this reading of the situs and status requirements cause the line to be drawn? Fortunately for me, my office requires that I take the judicious approach and say that its precise location depends

139. Id. at 4079 n.27.
140. Id. at 4079. Justice O'Connor noted that Congress is presumed to "know the law." Id. at 4080 (citing Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979)). Therefore in passing the amendments in 1972, Congress is presumed to know the extent of LHWCA coverage as interpreted by Calbeck. Congress failed to specifically overturn Calbeck, though it did, in the legislative history, show its clear intent to overrule two other cases, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). 51 U.S.L.W. at 4080.
141. Id. at 4081.
142. Id. at 4081 & n.34. The Court, as did the Fifth Circuit in Boudreaux, specifically reserved judgment as to the federal compensation coverage afforded a worker injured while transiently or fortuitously upon actual navigable waters. Id. at 4081 n.34.
143. See Pfeiffer, 444 U.S. at 83 n.18.
upon the outcome of future cases. For now, I can only assure readers that it takes in those workers who spend some portion of their worktime in maritime employment when they are injured within the situs area, the outer limit of which is clearly inland from the water's edge, but still this side of downtown Houston.