No. 19-60027

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MMR CONSTRUCTORS, INCORPORATED;
ZURICH MUTUAL INSURANCE COMPANY
Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
HENRY T. FLORES,
Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.3, the Director, OWCP, requests oral argument, which she believes would assist the Court.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
HENRY T. FLORES,

Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal involves Henry Flores's claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or LHWCA). The administrative law judge (ALJ) had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919(c) and (d). The ALJ's Decision and Order on Remand was issued on December 13, 2017, Petitioners' Record Excerpts (ER) Tab 5, and became effective when filed in the office of the District Director on

December 18, 2017, *id*. at 11; 33 U.S.C. § 921(a). Flores's employer, MMR Constructors, Inc., filed a notice of appeal with the Benefits Review Board (Board) on January 16, 2018, within the thirty-day period provided by § 921(a). ER Tab 1a (Certified List) at 2. That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On November 29, 2018, the Board issued its Decision and Order affirming the ALJ's decision. ER Tab 3.

Under 33 U.S.C. § 921(c), any party aggrieved by a final decision of the Board can obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. MMR filed its Petition for Review with this Court on January 9, 2019, within the prescribed sixty-day period. The Board's order is final pursuant to § 921(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). This Court has geographic jurisdiction because Flores was injured in Texas.

STATEMENT OF THE ISSUES

I. Under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983), workers injured while on the actual navigable waters of the United States are covered by the Longshore Act. Flores was injured while he was working on what would become Chevron's *Big Foot* tension leg platform while it was under

construction. At the time, the *Big Foot* was floating in the navigable waters of Corpus Christi Bay, temporarily secured to a dock.

The question presented is whether Flores's injury is covered by the Longshore Act under *Perini*?

STATEMENT OF THE CASE

I. Statutory Background

The Longshore Act "establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death." *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 96 (1994); *see also Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 96 (2012). Prior to 1972, the Act covered only injuries that occurred on the actual navigable waters of the United States, or on a dry dock. *See* 33 U.S.C. § 903(a) (Act of March 4, 1927, c. 509, 44 Stat. 1424), ("Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)"); *Perini*, 459 U.S. at 299.[1]

[1] Like the Court in *Perini*, we use the phrase "actual navigable waters" to describe the situs requirement as it existed prior to 1972, which is to say injuries that occurred seaward of the land (or in a dry dock). *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

Congress amended the Act in 1972 to fundamentally change the basis for coverage, moving from a solely situs-based inquiry to one that required both that the injury occur on a covered situs, and that the worker have status as a maritime "employee." *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977). In doing so, it broadened the definition of "navigable waters" to include adjoining lands that are commonly used for maritime purposes (the situs requirement). *Perini,* 459 U.S. at 299; 33 U.S.C. § 903(a).[2]

To offset the landward expansion of coverage, Congress added a requirement that injured employees must be engaged in "maritime employment" to be covered (the status requirement). *Id.; see* 33 U.S.C. § 902(3) (defining "employee" as "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").[3]

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[2] Specifically, Congress added piers, wharves, terminals, building ways, marine railways, and other adjoining areas "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel[.]" 33 U.S.C. § 903(a).

[3] In the original Act, employee was defined only by who did not qualify: masters or members of a crew, and persons engaged by a master or member of a crew to load, unload or repair a small vessel. 33 U.S.C. 902(3) (effective July 1, 1927). In addition, § 903(a)(2) excluded from coverage any officer or employee of the United States.

Despite adding the "status" requirement, Congress did not intend 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." *Perini*, 459 U.S. at 315; *accord Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1045 (5th Cir. 1982)(en banc) ("We can find no sign in the legislative history or purpose that the Congress intended by the 1972 amendments to change the prior well-accepted understanding that an injury on navigable waters was compensable as being in 'maritime employment.'"). Thus, any worker who would have been covered by the Act prior to 1972 – that is, any worker injured on actual navigable waters – remains covered.

II. Statement of the Facts

Flores, an electrician, worked for MMR as a quality control and assurance technician. Tr. 17; CX 37 at 47. He worked at the Kiewit fabrication yard in Ingleside, Texas, where off-shore oil rigs and platforms are constructed. Tr. 17-18. MMR had the subcontract to install all electrical wiring on the *Big Foot*, which amounted to between eight and ten percent of the entire building project. Tr. 57-58, 60-61. Flores worked on the *Big Foot* from October 2013 until he was injured on January 20, 2014, when his foot got caught on a door, severing his Achilles tendon. Tr. 21; EX 35 at 78. At the time of his injury, the *Big Foot* was floating in

Corpus Christi Bay, secured to the dock. Tr. 20, 62-63; CX 37 at 75-77; EX 35 at 78.

III. Decisions Below

In a decision dated November 5, 2015, the ALJ found that "there is no question that Claimant was on navigable waters at the time of his work injury on a floating hull, upon which the *Big Foot* was being constructed." ER Tab 6 at 19. He also noted that Flores's "presence on the water at the time of injury was neither fortuitous nor transient." *Id.* (citing *Bienvenu v. Texaco, Inc*., 164 F.3d 901 (5th Cir. 1999) (en banc)).[4] Despite these findings, the ALJ concluded that Flores was not covered by the Longshore Act under *Perini*. He based this conclusion on his finding that the *Big Foot* was not a vessel, and that MMR was not a statutory employer. *Id*. at 20-21[5]; 33 U.S.C. § 902(4) (defining "employer" as one that has

[4] It is not disputed that Mr. Flores's presence on the *Big Foot* was required as part of his regular work duties and was of significant duration. ER Tab 6 at 19; Tr. 74-75; EX 35 at 81.

[5] The ALJ also considered Flores's coverage under the post-1972 Act, as well as the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1301 *et seq*. He found that the *Big Foot* did not qualify as an "other adjoining area" under § 903(a) because it was not customarily used to load or unload vessels, ER Tab 6 at 21; that Flores did not have status as a shipbuilder under § 902(3), *id*. at 22; and that he was not covered by OCSLA because his injury did not have a "substantial nexus" with extractive operations on the shelf under *Pacific Operators Offshore, LLP v. Valladolid*, 566 U.S. 207 (2012), *id*. at 22-27. Because the Board found Flores covered under *Perini*, it did not address these issues. ER Tab 4 at 10 n.12.

any employees employed in maritime employment on a covered situs).[6] As to the latter, the ALJ found that MMR's employees were not engaged in loading or unloading of vessels, but in electrical work. He concluded that this was not maritime employment, and thus found that MMR was not an employer. ER Tab 6 at 19.[7]

Flores appealed, and the Board reversed. ER Tab 4. It found that Flores was covered under *Perini* because he was injured on the navigable waters of the United States. The Board held that coverage under *Perini* did not hinge on whether the *Big Foot* was a vessel:

> Under *Perini*, coverage is based not on whether an employee sustained his injuries while on a "vessel," but whether he was afloat upon, over, or in actual navigable waters. *Morganti v. Lockheed Martin Corp.*, 37 [Ben. Rev. Bd. Serv.] 126 (2003), *aff'd,* 412 F.3d 407, 39 [Ben. Rev. Bd. Serv.] 37 (CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006) (barge anchored in lake was afloat on navigable waters; injury thereon covered unless specific exclusion applies); *Caserma v. Consolidated Edison Co.*, 32 [Ben. Rev. Bd. Serv.] 25

[6] The full definition of "employer" is "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)." 33 U.S.C. § 902(4).

[7] The ALJ also ruled that Flores's injury was not covered by the Longshore Act as extended by the Outer Continental Shelf Lands Act (OCSLA). ER Tab 6 at 22-27. Flores appealed this ruling, but the Board did not address it because it found Flores to be covered by the Longshore Act directly under *Perini.* ER Tab 4 at 10; ER Tab 3 at 2.

> (1998) (injury while working on a stationary barge used for electrical equipment located on navigable waters covered); *Walker [v. PCL Hardaway/Interbeton]*, 34 [Ben. Rev. Bd. Serv.] 176 [(2000)](injury on crane on a jack-up vessel used to secure pilings to a bridge under construction covered because on navigable waters).

ER Tab 4 at 5.

The Board also rejected the ALJ's finding that Flores was excluded from coverage because MMR was not an employer as defined in the Act. It recognized that the Act's definition of "employer" requires at least one of the company's employees to be engaged in maritime employment. But it found that Flores was engaged in maritime employment under *Perini* because he was working on the navigable waters. *Id*. at 9. It also cited this Court's case law, which holds that, where a worker is engaged in maritime employment, his employer's status as a statutory employer is not a "second independent prerequisite" to coverage. *Id*. at 8. Rather, if the claimant is a maritime employee, his employer automatically qualifies as a statutory employer. *Id*. (citing *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 758 (5th Cir. 1982); *Miller v. Central Dispatch, Inc*. 673 F.2d 773, 779 n.14 (5th Cir. 1982)). The Board remanded for the ALJ to address the remaining issues raised by the parties.[8] ER Tab 4 at 10.

[8] MMR petitioned this Court for review of Board's decision. ER Tab 2. The Court dismissed the petition because the Board's decision was not a final order. *MMR Constructors, Inc. v. Director, OWCP*, No. 16-60842 (Jan. 19, 2017).

On remand, the ALJ determined Flores's average weekly wage and resulting compensation rate. ER Tab 5. MMR appealed to the Board, but did not challenge either of those determinations. Instead, it again argued that Flores was not covered by the Longshore Act under *Perini*. ER Tab 3 at 4-5. The Board found that its earlier decision on that issue was law of the case, reaffirmed that decision, and affirmed the ALJ's decision on remand. *Id*. at 5-6. In doing so, it rejected MMR's reliance on *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513, U.S. 527 (1995), because the Supreme Court in that case "was addressing the scope of federal courts' admiralty tort jurisdiction and not jurisdiction under the Longshore Act." *Id*. at 5 n.4. It reiterated *Perini's* conclusion that there was nothing in the 1972 Amendments to suggest "that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered." *Id*. (quoting *Perini*, 459 U.S. at 318-19.)

SUMMARY OF THE ARGUMENT

As the ALJ found, "there is no question that Claimant was on navigable waters at the time of his injury on a floating hull . . . [nor that] Claimant's presence on the water at the time of injury was neither fortuitous nor transient." ER Tab 6 at 19. His injury, therefore, is covered by the Longshore Act under *Perini.*

None of the arguments MMR offers overcomes the straightforward application of *Perini*. The fact that the *Big Foot* is not a vessel is irrelevant because the Longshore Act applies to injuries on navigable waters, not merely injuries on vessels. The company next claims that the *Big Foot* was an extension of land or an artificial island while it was being constructed on Corpus Christi Bay. But that is not so, because the *Big Foot* was not permanently affixed to land or the seafloor. MMR is a Longshore Act "employer" because it employs people (including Flores) to work on navigable waters. Finally, contrary to MMR's suggestion, applying the Longshore Act to Flores's injury is entirely consistent with Article III's Admiralty Clause. The decisions below should be affirmed.

STANDARD OF REVIEW

This Court's review of Benefits Review Board decisions "is limited to considering errors of law, and making certain that the BRB adhered to its statutory standard of review of factual determinations, that is, whether the ALJ's findings of fact are supported by substantial evidence and consistent with the law." *Miller*, 673 F.2d at 778.

Because questions of coverage require "the application of a statutory standard to case-specific facts," they are "ordinarily [] mixed question[s] of law and fact." *New Orleans Depot Servs., Inc. v. Director, OWCP*, 718 F.3d 384, 387 (5th Cir. 2013). Where the ALJ has "resolved the factual disputes presented by the

parties," coverage under the Longshore Act is a question of law, subject to *de novo* review. *Id*. at 387, 388.

ARGUMENT

I. The Board correctly found Flores covered under *Perini* because he was injured while working on the navigable waters of the United States.

As the Supreme Court explained in *Perini*, when Congress added the "status" requirement to the Longshore Act in 1972, it did not intend 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." *Perini*, 459 U.S. at 315. Rather, the Court held that employees "injured on the actual navigable waters in the course of [their] employment on those waters" *are* "'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." *Id*. at 324. Such workers need not establish that they meet 33 U.S.C. § 902(3)'s "maritime employment" status requirement added in 1972. *Id.* at 318-19 (in enacting the "status" requirement, Congress did not intend to require those working on the navigable waters to show their employment had a direct or substantial relation to navigation or commerce to be covered).[9]

[9] *See also Caputo*, 432 U.S. at 264-65 (explaining that the 1972 amendments changed what had been solely a situs test of eligibility for compensation to one

Even before *Perini*, this Court, sitting en banc, reached the same conclusion in *Boudreaux*, 680 F.2d 1034 (1982). There, the Court stated:

> [T]he term "maritime employment" includes even in a non-technical, general sense, employment upon the navigable waters..... We can find no sign in the legislative history or purpose that the Congress intended by the 1972 amendments to change the prior well-accepted understanding that an injury on navigable waters was compensable as being in "maritime employment."

Id. at 1045. And it has repeatedly applied this principle. *See, e.g.*, *Bienvenu*, 164 F.3d at 906-07 ("In light of Bienvenu's injury on navigable waters, ... [he] need not establish that he was engaged in maritime employment as that term is used in § 2(3) of the Act [33 U.S.C. § 902(3)]"); *Fontenot v. AWI, Inc*., 923 F.2d 1127, 1130 (5th Cir. 1991) ("if the employee was injured while on actual navigable waters, in the course of his employment, then he is engaged in maritime employment and satisfies the status test under *Perini*"); *Anaya v. Traylor Bros*., 478 F.3d 251, 254 (5th Cir. 2007) (carpenter injured while on barge building a bridge found covered).

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requiring both situs and status); *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 340-42 (1953) (holding, in pre-1972 case, that a worker injured performing his duties on navigable waters is covered "irrespective of whether he himself can be labeled 'maritime.'"); *Parker v. Motor Boat Sales*, 324 U.S. 244 (1941) (janitor killed during test ride of boat on which he was temporarily assigned as lookout is covered by the Longshore Act).

MMR does not dispute that Flores was injured while working on the *Big Foot* when it was floating on a hull in the navigable waters of Corpus Christi Bay. Under the straightforward logic of *Perini*, Flores was engaged in maritime employment, and is thus covered by the Longshore Act.

II. None of MMR's arguments against *Perini* coverage are persuasive.

MMR raises a host of arguments in an attempt to escape the logic of *Perini*, including that the *Big Foot* is not a vessel, that the *Big Foot* is an extension of land, that it is not a Longshore Act "employer," or that applying the Act to Flores's injury would be unconstitutional. All of these arguments are undermined by the Act and controlling case law and should be rejected on that ground.

A. *Perini* coverage does not require that the worker be injured on a vessel, and there is no assertion that the *Big Foot* is a vessel.

MMR spends a great deal of time arguing that the *Big Foot* is not a vessel. OB 24-25, 30-31. But that fact is not in dispute. Both the Board and this Court determined, in an earlier case, that the *Big Foot* is not a vessel. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 Ben. Rev. Bd. Serv. 45 (2015), 2015 WL 4873133 at *5 (holding that a worker injured on land while building a housing unit for the *Big Foot* was not a covered shipbuilder because the *Big Foot* was not a vessel), *aff'd by Baker v. Director, OWCP*, 834 F.3d 542, 546-47 (5th Cir. 2016).

The problem for MMR is that this fact is irrelevant. Flores's coverage under *Perini* does not depend on the *Big Foot* being a vessel. As the Board explained, "Under *Perini*, coverage is based not on whether an employee sustained his injuries while on a 'vessel,' but whether he was afloat upon, over, or in actual navigable waters." ER Tab 4 at 5. The United States Court of Appeals for the Second Circuit has explicitly held as much in *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 407 (2005).

The *Morganti* claimant worked on the Paganelli, a research barge that had been moored for 18 years on Cayuga Lake in New York. 412 F.3d at 409.[10] It had no means of propulsion, and was attached to two mooring buoys, each secured to a 30-ton anchor and a 4-ton sinker. *Id*. Like MMR here, the employer in *Morganti* argued that the claimant was not covered under *Perini* because his floating workplace was not a vessel. Rejecting that argument, the court explained that "the question of whether the Paganelli is a vessel is simply irrelevant. The Act, *Perini, Herb's Welding,* and even *Bienvenu* all look to whether the injured employee was on navigable water, not whether he was on a vessel." *Id*. at 415 (citing 33 U.S.C. § 903(a); *Perini,* 459 U.S. at 299; *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 416

[10] The *Morganti* court ruled that Cayuga Lake is part of the navigable waters of the United States because it is connected to the Erie Canal (and thus to interstate and international commerce) and physically capable of supporting commercial water traffic. 412 F.3d at 412-13.

n.2 (1985); *Bienvenu,* 164 F.3d at 908. Even though the Paganelli was not a vessel, it was floating on Cayuga Lake, which compelled the conclusion that "Morganti's time on the Paganelli was time on actual navigable waters." *Id.* So too with Flores's time on the *Big Foot* when it was floating on Corpus Christi Bay.

This focus on navigable waters rather than vessel status is why the Longshore Act has always applied to injuries on gangplanks and skids – which are clearly not vessels, but temporary structures over water that bridge the space between land and vessel – whether the gangplank is considered part of the ship's equipment or the stevedore's. *See O'Keeffe v. Atlantic Stevedoring Co*., 354 F.2d 48, 50 (5th Cir. 1965) (injury on gangplank considered part of ship's equipment is covered); *Michigan Mut. Liability Co. v. Arrien*, 344 F.2d 640, 644 (2d Cir. 1965) (injury on gangway that was stored on wharf when not in use found covered); *Caldaro v. Baltimore & Ohio R.R. Co*., 166 F.Supp. 833, 836 (E.D.N.Y. 1956) (injury on gangplank that was not part of ship's equipment, but was kept on shore, found covered). Notably, Flores testified that he had to cross a plank to reach the *Big Foot*. Tr. 20-21. This means that, if MMR's argument is accepted, the counterintuitive result will be that Flores would have been covered while crossing the plank, but not once he stepped onto the *Big Foot*.

In arguing that the *Big Foot* must be a vessel for Longshore coverage to apply, OB 25, MMR relies on a series of case that do not arise under the

Longshore Act, but under other causes of action where vessel status *is* relevant. *Cope v. Vallette Dry-Dock Co.,* 119 U.S. 625, 625 (1887) (denying salvage claim because the dry dock petitioner repaired was not a vessel, and "no structure that is not a ship or vessel is a subject of salvage"); *Chahoc v. Hunt Shipyard,* 431 F.2d 576, 577 (5th Cir.1970) (denying unseaworthiness claim because the dry dock Chahoc was injured on was not a vessel); *Manuel v. P.A.W. Drilling & Well Service, Inc.,* 135 F.3d 344, 346 (5th Cir. 1998) (examining whether barge was a vessel for purposes of Jones Act claim)[11]; *Leonard v. Exxon Corp*., 581 F.2d 522, 524 (5th Cir. 1978) (denying Jones Act claim because the floating work platform petitioner was injured on was not a vessel); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973) (same); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co*., 271 U.S. 19 (1926) (wharfboat not a "vessel" for purpose of statute limiting shipowner's liability for lost cargo to the vessel's value).

Unlike the causes of action at issue on those cases, the Longshore Act is not limited to injuries suffered on vessels. Rather, it applies to injuries suffered "upon the navigable waters[.]" 33 U.S.C. § 902(2). As the Second Circuit explained in

[11] Under the Jones Act, "[t]he existence of a vessel is a 'fundamental prerequisite to Jones Act jurisdiction' and is at the core of the test for seaman status." *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990) (quoting *Bernard v. Binnings Constr. Co.,* 741 F.2d 824, 828 (5th Cir. 1984)).

Morganti, cases "demonstrating that not all floating structures are vessels" are "inapposite" to Longshore Act coverage issues for this very reason. 412 F.3d at 415 and n.2 (listing, *inter alia*, *Cope*, *Chahoc*, and *Manuel* as cases that are irrelevant because they involve "contexts where vessel status is relevant"). The fact that *Cope* and *Chahoc* addressed whether a dry dock is a vessel further underscores their irrelevance to the Longshore Act, which has always treated injuries in dry docks as injuries on navigable waters. 33 U.S.C. § 903(a) (Act of March 4, 1927, c. 509, 44 Stat. 1424) (covering injuries "occurring upon the navigable waters of the United States (*including any dry dock*).") (emphasis added).

Indeed, two of the cases MMR relies on – *Chahoc* and *Cook* – actively undermine the company's argument. In both cases, the Court noted that, although the site of each claimant's injury was not a vessel, Longshore Act benefits were paid. *Chahoc*, 431 F.2d at 577 (seaman's claim "seeking recovery in addition to that allowed under the Longshoremen's and Harbor Workers' Compensation Act."); *Cook,* 472 F.2d at 1000 (Jones Act plaintiff "[s]eeking recovery in excess of the compensation provided by the Longshoremen's and Harbor Worker's Compensation Act."). It was only the claimed non-Longshore remedies that the Court denied for the absence of a vessel. 431 F.2d at 577-78, 472 F.2d at 1000. *See also Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279, 280, 281 (5th Cir.

1969) (although dry dock was not a vessel for breach of warranty of seaworthiness claim, plaintiff was "clearly within the compensation provisions of the Longshoremen's Compensation Act" and had already "received compensation under the Act").

In short, it simply does not matter that the *Big Foot* is not a vessel. The relevant question under *Perini* is whether Flores was injured on navigable waters. Because the *Big Foot* was floating on a hull in the navigable waters of Corpus Christi Bay when the injury occurred, the answer is yes.

B. The *Big Foot* is not an extension of land, and was not, at the time of Flores's injury, a fixed platform.

MMR alternately argues that, if the *Big Foot* is not a vessel, it must be an extension of land. OB 24-31. This argument also misses the mark. It relies on the assumption that any floating structure secured to the shore while under construction must be deemed "an extension of land." But that assumption has no basis in law.

The case law MMR cites stands only for the more limited proposition that floating structures "*permanently* affixed to land, are extensions of the land[,]" and therefore not "upon the navigable waters." *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 (1969) (finding that the pier where the worker was injured was not covered); *Travelers Insurance Co. v. Shea*, 382 F.2d 344, 345, 347, 349 (5th Cir. 1967) (pier "permanently anchored to the shore" and river bottom for 18 years

was "affixed permanently to shore" and thus "an extension of land"); *Dobrovich v. Hotchkiss*, 14 F.Supp.2d 232, 234-35 (D. Conn. 1998) (ramp permanently affixed to land); *Cookmeyer v. Louisiana Dept. of Highways*, 309 F.Supp. 881, 882 (E.D. La. 1970) (pontoon bridge assemblies "were permanent structures attached to the shore," and "the barge-pontoons remained permanently attached to the pivot structure"); *Atlantic Stevedoring Co. v. O'Keeffe*, 220 F.Supp. 881 (S.D. Ga. 1963) (dock constructed on and attached to land);[12] *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 206 (1972) (stating generally that piers and docks were consistently deemed extensions of land before 1972); *see Peytavin v. Government Emps. Ins. Co*., 453 F.2d 1121, 1125 (5th Cir. 1985) (floating pontoon "securely fastened to shore" with cables not an "extension of land").

In *Shea*, the Court found the relevant question to be "whether the water beneath the structure has been permanently removed from navigation[,]" as it is when a pier or wharf is built over it. *Id*. at 347 (citing *Michigan Mutual*, 344 F.2d at 644); *see also Arrien*, 344 F.2d at 644 (injuries on "extensions of land permanently covering navigable waters" are not covered by the Longshore Act).

[12] *Rev'd by O'Keeffe v. Atlantic Stevedoring Co., Inc.,* 354 F.2d 48 (5th Cir. 1965) (on grounds that, although employee was working on dock, he was picked up by a crane and over navigable waters at time of his injury).

The *Big Foot*, unlike a pier or dock, was not permanently affixed to the land, and the water under it was not permanently removed from navigation. Rather, the fulfillment of the *Big Foot's* sole purpose – extracting resources from beneath the Outer Continental Shelf – required that it be removed from the dock upon completion and taken out to sea. Thus, its attachment to the dock was clearly intended to be, and in fact was, temporary.[13]

MMR's attempt to contrive a Fifth Circuit rule that anything used as a "work platform" cannot be covered under *Perini, see* OB 20, 26-31, fails for at least three reasons. First, most of the cases it cites for the proposition do not arise under *Perini*, or even the Longshore Act more generally. *See Leonard*, 581 F.2d 522 (Jones Act); *Manuel*, 135 F.2d 344 (same); *Cook*, 472 F.2d 999 (Jones Act and general maritime law). They cannot, therefore, establish any rule regarding Longshore Act coverage. Second, the one Longshore case MMR does cite, *Shea*, 382 F.2d at 349, denied coverage because the worker's injury occurred on a pier – which was not covered before 1972 – that was *permanently* affixed to shore, and which the Court never described as a "work platform." Finally, the sole question

[13] Indeed, the *Big Foot* was originally moved offshore in March 2015, and again in February 2018 (the 2015 installation failed). *See Baker*, 834 F.3d at 545 n.2; https://www.offshoreenergytoday.com/photo-chevrons-big-foot-platform-heading-to-gulf-of-mexico/. It is currently in place, and began extracting oil in November 2018. https://www.workboat.com/ news/ offshore/chevrons-big-foot-platform-finally-goes-into-production/.

in determining *Perini* coverage is whether the structure where the injury occurred is floating on navigable waters (i.e., not permanently affixed to the shore or seabed). The structure's use at the time of a worker's injury has no bearing on whether it is afloat, so its use as a work platform is simply irrelevant under *Perini*.[14] That the *Big Foot* was being used as a platform for construction while afloat and moored, then, is no bar to coverage.

MMR's reliance on *Herb's Welding*, 470 U.S. 414, and *Munguia v. Chevron USA, Inc.*, 999 F.2d 808 (5th Cir. 1993), is also misplaced, for two reasons. First, the workers in those cases were denied compensation because they did not qualify as maritime employees under the post-1972 status requirement. *Herb's Welding*, 470 U.S. at 424-25; *Munguia,* 999 F.2d at 813-14; *see* 33 U.S.C. § 902(3). As discussed above, *supra* at 9, *Perini* does not require maritime employee status, but

[14] Indeed, ships under construction or repair in navigable waters are also being used as work platforms for their own completion, but injuries on them have always been covered by the Longshore Act. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 115 n.2 (1962) (welders working on oil drilling barges in navigable waters while their construction was completed); *Simpson v. Director, OWCP*, 681 F.2d 81, 82 (1st Cir. 1982) (welder injured on vessel under construction in marine railway). Even in *Perini*, the crane barge on which the worker was injured was being used as a work platform, and not even for its own construction, but for the construction of a sewage disposal plant. *Perini*, 459 U.S. at 300 and n.4 (employee injured on a barge giving directions to a crane operator when injured); *see* Petitioner's Brief to Supreme Court, 1982 WL 608536 at 3 (employees worked on construction project from barges).

merely that the worker's injury occur "upon the navigable waters." *See Munguia*, 999 F.2d at 811.

Second, because the workers in both cases were injured on fixed platforms – which are considered artificial islands, *Herb's Welding*, 470 U.S. at 421-22 and n.6; *Munguia*, 999 F.2d at 811 n.5 – they could not have recovered under *Perini* because they were not "upon the navigable waters." *Munguia*, 999 F.2d at 811 (finding that work on a fixed platform is not on the navigable waters, and is thus not covered under *Perini*); *Cf. Rodrigue v. Aetna Cas. & Sur. Co*., 395 U.S. 352, 360 (1969) (accidents on artificial islands have no more connection to admiralty than do accidents on piers). When Flores was injured, the *Big Foot* was not fixed to the seafloor and therefore was not an artificial island. *Herb's Welding* is, however, instructive, as it specifically distinguishes between fixed and floating structures, stating that workers on floating structures, if not covered as seamen, "are covered by the LHWCA because they are employed on navigable waters." 470 U.S. at 416 n.2.

In *Morganti*, the Second Circuit agreed that "'fixed' means, at a minimum, 'not floating.'" 412 F.3d at 414. It reasoned that the moored research barge Paganelli was not fixed because, unlike the legs of a fixed platform, the chains and ropes that connected the Paganelli to the lake bed would not prevent it from sinking, "the prototypical maritime hazard." *Id*. at 415. "This is precisely the

distinction that prevents any boat from becoming a fixed platform the moment that it is anchored or moored." *Id*. The court thus held that "a person on any object floating in actual navigable waters must be considered to be on actual navigable waters." *Id*. at 416. And at the time of Flores's injury, the *Big Foot* was floating, and thus on navigable waters. That injury is therefore covered by the Longshore Act under *Perini.*

C. Because MMR has workers in maritime employment, it is a statutory "employer."

MMR next argues that Flores's injury is not covered by the Longshore Act because MMR is not a statutory "employer." OB 33-36. Notably, MMR cites no case where a worker injured on navigable waters was denied Longshore Act benefits on the ground that their employer was not a Longshore Act employer. Nor has the Director's research uncovered any such decision. The absence of such authority is unsurprising, because being a statutory "employer" requires only that an employer have at least one worker engaged in maritime employment. 33 U.S.C. § 902(4); *see supra* at 6 n.6 (full current definition).[15] As noted above, Flores and his coworkers on the *Big Foot* were engaged in maritime employment because they

[15] Prior to 1972's expansion of situs to include shoreside areas, "employer" was defined as "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 dry dock)." Pub. L. 92-576, § 2(b), 86 Stat. 1251 (Oct. 27, 1972).

performed their work on navigable waters. *Supra* at 11-13; *see Perini*, 459 U.S. at 324 (workers who are "required to perform their employment duties upon navigable waters" are "engaged in maritime employment"). And because MMR had employees engaged in maritime employment, it meets the Act's definition of an "employer."

MMR claims that it is not an employer because it "has no employees who load, unload, or move cargo between a vessel and the dock." OB 36 ("MMR). But the requirement that a worker be involved in such "longshoring operations" is part of the 1972 status requirement of § 902(3), which does not apply here. As the Supreme Court explained in *Perini*, "the consistent interpretation given to LHWCA before 1972 by the Director, the deputy commissioners, the courts, and the commentators was that (except for those workers specifically excepted in the statute), *any* worker injured upon navigable waters in the course of employment was 'covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury.'" 459 U.S. at 312 (quoting G. Gilmore & C. Black, The Law of Admiralty 429-430 (2d ed. 1975)); *accord Bienvenu*, 164 F.3d at 907 (workers injured on the navigable waters are not required to perform the tasks described in § 902(3) to be covered).

Thus, prior to 1972, if a worker was injured in the course of his or her employment while on navigable waters, the employer necessarily had an employee

engaged in "maritime employment" as required by section 2(4).[16] As the Court explained in *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 131 (1930), "[t]he term ['employer'] is not defined . . . with respect either to the nature or the scope of the enterprises in which the employer is engaged," and "is manifestly broad enough to embrace a railroad company[.]" If the definition is broad enough to embrace a railroad company whose employee is injured over navigable waters, it is also broad enough to include an electrical contractor whose employee is injured over navigable waters.

In short, the fact that MMR's employees (including Flores) were not loading and unloading vessels is no bar to their coverage under the Longshore Act. They were required to perform their duties on the navigable waters, and are therefore deemed as a matter of law to be engaged in maritime employment. And because MMR had employees in maritime employment, it is an "employer" under the Act's definition.[17]

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[16] There is a possible exception to this rule that is not relevant to this case. Before 1972, a company that did not have any employees who regularly worked on navigable waters might not be liable as a statutory "employer" if one of their workers was injured while fortuitously on navigable waters. *See O'Rourke*, 344 U.S. at 339; *Perini*, 459 U.S. at 311 n.21, 314 n.24, 324 n.34. But Flores was not transiently or fortuitously on navigable waters while he was injured. Working on the *Big Foot* while it floated on Corpus Christi Bay was his primary work assignment.

[17] MMR also ignores *Hullinghorst Industries,* 650 F.2d at 758, in which this Court addressed the definition of "employer" after 1972, when the separate "status"

D. MMR's Constitutional arguments are meritless.

Finally, MMR attempts to escape liability for Flores's injury on the *Big Foot* by arguing that it does not fall within federal maritime jurisdiction under the Constitution. OB 37-43; *see* U.S. Const. Art. III § 2 ("The judicial power shall extend . . . to all Cases of admiralty and maritime jurisdiction[.]"). For the most part, this is merely a different gloss on MMR's coverage argument. MMR's constitutional claim can succeed only if this Court accepts MMR's earlier argument that the *Big Foot*, while floating in Corpus Christi Bay, was an extension of land. For the reasons discussed above, that argument should be rejected. If the Court agrees with the Board and Director, then Flores's injury occurred on the navigable waters – clearly within maritime jurisdiction – and MMR's constitutional argument has no basis. If the Court disagrees and holds that the *Big Foot* was an extension of land when the injury happened, it is not covered by *Perini* (or the Longshore Act at all, because it is not among the landward areas

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requirement was added to the Act. 33 U.S.C. § 902(3). The Court held that, where a worker meets the status requirement, he is engaged in maritime employment, and his employer thus automatically qualifies as a statutory employer because it has an employee in maritime employment. Section 902(4)'s definition of "employer" is not a "second independent prerequisite" to coverage. Thus, after 1972, the focus shifted to the status requirement. If the injured worker did not have status, he was not covered even if the employer had other employees working over navigable waters. If the injured worker did have status, then the employer was a statutory employer by virtue of that fact.

expressly covered under 33 U.S.C. § 903(a)), and MMR's constitutional argument is irrelevant.

MMR nevertheless argues that, even if Flores was injured on navigable waters, his injury does not fall within federal maritime jurisdiction. OB 36-37.[18] In making this counterintuitive claim, MMR admits that the Supreme Court's "pre-1972 cases" affirmed Longshore Act awards "to workers not engaged in maritime employment solely because they died or were injured in or on navigable waters[.]" OB 38. But MMR claims that those cases have been effectively overruled by a combination of *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972), and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). On the company's theory, those maritime tort cases stand for the

[18] Indeed, the issue in this case is not subject matter jurisdiction, but coverage under the Longshore Act. The cases MMR cites for the proposition that jurisdiction, rather than coverage, is at issue, OB 18, actually say the opposite. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1100-01 (9th Cir. 1982) (reversing the Board's characterization of maritime situs as jurisdictional rather than coverage question); *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353 (9th Cir. 1981) (reversing the Board's characterization of maritime status as jurisdictional rather than coverage question); *Mellin v. Marine World-Wide Services*, 32 Ben. Rev. Bd. Serv. 271, 273 n.4 (1998) (treating situs as coverage question). There is, therefore, no jurisdictional issue presented here. *Cf. Calbeck*, 370 U.S at 125-26 (Longshore Act coverage does not "expand and recede in harness with developments in constitutional interpretation" regarding line between state and federal coverage).

proposition that admiralty jurisdiction extends to injuries on navigable waters only if the incident giving rise to the injury had a substantial connection to traditional maritime commerce. OB 39. In short, MMR argues that *Perini* was overturned *sub silentio* 24 years ago, and nobody noticed until now.

The first problem with this argument is that the Supreme Court reserves to itself "the prerogative of overturning its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls[.]"). The Supreme Court precedent that "directly controls" this case is *Perini*, which squarely held that workers "injured on the actual navigable waters in the course of [their] employment on those waters" are "'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." 459 U.S. at 324. That rule remains the law until the Supreme Court holds otherwise. In any event, *Executive Jet* and *Grubart* do nothing to undermine *Perini*.

The question presented by *Executive Jet* was whether federal admiralty jurisdiction existed over an aviation tort when an airplane flying "within the continental United States . . . principally over land," crashed into a river. *Id*. at

266. But, as the Supreme Court recognized in *Perini*, the decision in *Executive Jet* is irrelevant to Longshore coverage. *Perini*, 459 U.S. at 320 n.29.

To begin with, *Perini* noted that *Executive Jet* did not arise under the Longshore Act, but rather an assertion of admiralty jurisdiction under 28 U.S.C. § 1331(1), which gives federal district courts original jurisdiction over civil cases within admiralty jurisdiction. *Id*. In dismissing *Executive Jet's* application to the Longshore Act, the *Perini* Court stated that the Act and § 1331(l) "are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.'" *Id*. (quoting *Boudreaux,* 680 F.2d at 1035, 1050).

It also recognized that the airplane's fall into navigable waters was "wholly fortuitous," while the *Perini* claimant's presence on a barge at the time of his injury was in the regular course of his duties. *Id*. Flores's presence on the *Big Foot*, like the *Perini* claimant's on the barge, was not fortuitous, as he had been working there regularly for approximately 4 months when he was injured. *See supra* at 5 and n.4.

In short, *Executive Jet* stands merely for the common-sense proposition that tort claims resulting from the crash of an airplane flying primarily over land does not fall under maritime jurisdiction merely because it happens to fall into a river. That is a far cry from the situation here, where Flores was injured on navigable

waters, on a floating hull that was his regular place of work. Put simply, while airplanes are not typically maritime, hulls afloat in navigable waters are.

MMR's reliance on *Grubart,* 513 U.S. 527, is equally misplaced. *Grubart*, like *Executive Jet*, involved a tort claim asserted under 28 U.S.C. § 1333(1), and thus has no application under the Longshore Act. 513 U.S. at 534.[19]

Grubart also interprets the bounds of the Extension of Admiralty Jurisdiction Act, 46 U.S.C.A. § 30101 (formerly 46 U.S.C. App. § 740), which expands admiralty tort jurisdiction to injuries that occur on land if they were caused by a vessel on navigable waters. *Grubart*, 513 U.S. at 532. But the Supreme Court held that the Extension Act is irrelevant to claims under the Longshore Act in *Nacirema Operating Co.* In *Nacirema* – decided in 1969, when coverage under the Longshore Act was still based solely on the worker's injury occurring on navigable waters – the Court found "no evidence that Congress [in

[19] In fact, § 905(a) of the Act precludes an employer's liability in tort if it has secured the payment of compensation. 33 U.S.C. § 905(a). Moreover, this Court recognized in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 545 (5th Cir. 1976), that Congress was not constrained by "traditional admiralty tort and contract jurisdiction" when defining coverage under the Longshore Act. "No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a 'contract' or 'tort' peg upon which to hang its legislation. .....[I]n defining 'maritime' concerns, we will not be limited by the rules which apply to tort and contract litigation." *Id*. It thus held that Congress' 1972 expansion of coverage to areas beyond traditional maritime jurisdiction was constitutional. That said, no such expansion is necessary here, as Flores was injured on navigable waters, and thus within a traditional maritime area.

passing the Extension Act] thereby intended to amend or affect the coverage of the Longshoremen's Act," and concluded that the Extension Act "has no bearing whatsoever on [a claimant's] right to a compensation remedy under the Longshoremen's Act." 396 U.S. at 222-23.[20] Put simply, cases limiting admiralty jurisdiction under 28 U.S.C. § 1333(l), or applying the Extension Act, are not relevant to coverage under the Longshore Act. Consequently, MMR's arguments based on *Grubart* and *Executive Jet* should be rejected. *Perini* controls here.

In sum, Flores was injured on the *Big Foot* while it was floating on the navigable waters of the United States. The Board properly recognized this as a textbook example of *Perini* coverage, and correctly held that the Longshore Act applied. This Court should affirm that holding.[21]

[20] *See also id*. at 223 n.18 (adopting the conclusion of the district court that "[t]he two statutes do not deal with the same subject matter, are inherently inconsistent with each other, and cannot be read as being in pari materia.")

[21] MMR devotes much of its brief to arguing that Flores's injury is not covered by the Longshore Act as extended by OCSLA. OB 43-50. But there is no need to consider the issue at this time. If the Court affirms direct LHWCA coverage under *Perini*, coverage via OCSLA is irrelevant. If the Court disagrees, the case should be remanded for the Board to pass on the OSCLA issue.

CONCLUSION

The Court should affirm the award of Longshore Act benefits to Flores.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically filed the foregoing Response through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that:

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