Section 20(a) Presumption

Digests

The Board rejects Director's assertion that the Section 20(a) presumption, 33 U.S.C. §920(a), applies to the issue of coverage under the Act. *Davis v. Doran Co. of California,* 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989).

The Section 20(a) presumption does not apply to the issue of situs. *Hagenzeiker v. Norton Lilly & Co.,* 22 BRBS 313 (1989).

The Section 20(a) presumption does not apply to the legal interpretation of the jurisdictional provisions of the Act. *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *George v. Lucas Marine Construction*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, No. 94-70660 (9th Cir. May 30, 1996).

In this case involving the question of whether a marine construction worker working on a bulkhead met the status and situs tests, the Second Circuit noted its agreement with claimant that the administrative law judge erred in not applying the Section 20(a) presumption to the issue of coverage. Although it based its ruling that claimant satisfied the requirements of the Act on undisputed facts of record, it stated it would reach the same conclusion even if it determined that the presumption did not apply as the issues before the court are legal issues. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998).

The issue of coverage under Section 3(a) in the instant case is a strictly legal one, as all of the facts are adduced and all that is required is application of law to these facts. The Section 20(a) presumption therefore is inapplicable to the issue of situs and thus the administrative law judge incorrectly relied on the holding in *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), to find that claimant did not satisfy his burden of proof under Section 3(a) on the ground that the evidence on that issue is, at best, in equipoise. Any error, however, is harmless inasmuch as the administrative law judge's conclusion that claimant's injury did not occur on a covered situs comports with applicable law. *Arjona v. Interport Maintenance Co.*, *Inc.,* 34 BRBS 15 (2000).

The Board states that it need not address the general scope of Section 20(a) in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provisions. In this case there is no dispute about the facts concerning claimant's job duties. The disputed issue involves the legal import of those duties. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002); *see also Southcombe v. A Mark, B Mark, C Mark Corp.,* 37 BRBS 169 (2003).

Subject Matter Jurisdiction

Digests

Where employer did not raise coverage under the Longshore Act or OCSLA before the administrative law judge, but obtained new counsel who sought to raise it for the first time on appeal, the Board refused to consider the issue. The Board stated that employer's reliance on Ramos v. Universal Dredging Corp., 10 BRBS 368 (1979), rev'd, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981), was misplaced. Moreover, the uncontradicted testimony of claimant supported the administrative law judge's finding that claimant was covered under OCSLA. Hite v. Dresser Guiberson Pumping, 22 BRBS 87 (1989).

In a footnote in a decision affirming the administrative law judge's finding that claimant was not injured on a covered situs, the Board noted that employer attempted to stipulate to this issue, but the administrative law judge did not accept the stipulation. Even if there was a stipulation, the administrative law judge was neither required nor permitted to accept it. Silva v. Hydro-Dredge Corp., 23 BRBS 123 (1989).

The parties may not stipulate to coverage under the Act, and employer's voluntary payments may not be viewed as a waiver of employer's right to contest coverage. *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

The Board affirmed the administrative law judge's denial of benefits inasmuch as claimant was injured in a car accident on a public road that is not a covered situs. The Board affirmed the administrative law judge's finding that employer was not somehow estopped from contesting Longshore coverage based on the state's denial of his state claim on the ground that his remedy was under the Longshore Act. The Board held that the action of the state cannot be imputed to employer as there is no identity of interest. Moreover, the employer could not have stipulated to coverage under the Act had it so desired, and jurisdiction cannot be conferred by consent, collusion, laches, waiver or estoppel. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem.,* No. 00-2463 (4th Cir. Aug. 14, 2001).

Pre-1972 Amendment Jurisdiction

Digests

Contrary to the Board's position, the Ninth Circuit holds that the Supreme Court's ruling in Calbeck v. Travelers Ins., 370 U.S. 114 (1962), did not eliminate the requirement under the pre-1972 Act that injuries must occur on navigable waters or on a dry dock in order to be covered by the Act. Thus, consistent with the Ninth Circuit's decision in O'Leary, 349 F.2d 571 (9th Cir. 1963), the court reversed the Board's holding that claimant's injury on a building way occurred on a pre-1972 Act covered situs. The court, however, went on to hold that coverage under the Act is determined with reference to the law in effect at the time the injury becomes manifest. Thus, even though claimant was last exposed to asbestos while engaged in covered employment in 1942, he is covered under the Act as amended in 1972 because his occupational disease did not become manifest until 1980, and because Section 3(a) as amended in 1972 includes a "building way" as a covered situs. The court notes that this is consistent with the trend in occupational disease cases holding that the time of manifestation is the time of injury. SAIF Corp./Oregon Ship v. Johnson, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990).

Pursuant to the holding of the Ninth Circuit in SAIF Corp./Oregon Ship, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990), the Board holds that jurisdictional provisions in effect on the date the employee's occupational disease becomes manifest govern. This is contrary to prior precedent which held that a cases is governed by the jurisdictional provisions in effect at the time of the event that caused the injury. Thus, although decedent was last exposed to asbestos while engaged in covered employment in the 1940's, the instant claim must be considered under the Act as amended in 1972, as his work-related lung cancer was not diagnosed until 1976. Martin v. Kaiser Co., Inc., 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board decided to follow the decision in SAIF Corp./Oregon Ship, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990), in all circuits. Thus, the Board held that the issue of coverage is determined with reference to the law in effect at the time an injury becomes manifest, not at the time of the event that caused the injury, thereby overruling Paul v. General Dynamics Corp., 16 BRBS 290 (1984) and its progeny. As manifestation of decedent's injury did not occur until he was diagnosed with lung cancer in Nov. 1984, the Board held that the Act as amended in 1972 and 1984 applies to this case. The Board further held that Sections 2(3) and 3(a) are satisfied in this case. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom Ins. Co. of N. Am. v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1253 (1993).

The Court of Appeals for the Second Circuit affirmed the Board's holding that the issue of coverage in occupational disease cases is determined with reference to the law in effect on the date the disease becomes manifest, not the date of last exposure. Thus, where decedent was last exposed to asbestos in 1967, but where manifestation of decedent's disease did not occur until 1984, the court held that benefits were properly granted under the Act as amended in 1972. *Ins. Co. of N. Am. v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *aff'g Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1253 (1993).

In light of the Board's decision in *Peterson*, 25 BRBS 71 (1991), the Board agreed that the administrative law judge erred in deciding the jurisdictional issues under the pre-1972 Act. Claimant is covered in this case based on application of *Perini*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983). *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

1984 Amendments

Digests

Since claimant's injury occurred after September 28, 1984, the 1984 Amendments exclusions apply, and she is not covered as her duties involve office clerical work excluded by Section 2(3)(A). Bergquist v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 131 (1989).

Claimant, who performed clerical duties relating to cargo removal and was subject to reassignment as a checker, was engaged in covered employment. Although his injury occurred after the effective date of the 1984 Amendment exclusion of "office clerical workers," this exclusion does not apply to checkers who have traditionally been considered to be maritime workers. Caldwell v. Universal Maritime Service Corp., 22 BRBS 398 (1989).

The Board holds that claimant is excluded from coverage under both the 1972 and 1984 versions of Section 2(3), as her employment as a keypunch operator is purely clerical in nature. See Caputo and Section 2(3)(A). Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990).

Claimant, who was classified as a joiner-helper and who worked in a trailer-office ordering material for shipbuilding, tracking material, filing, compiling work-station packages, researching budgets and acting as a liaison between the foremen and the planners, is not covered under the Act. The Board discussed the clerical exclusion set forth in Section 2(3)(A) and concluded that, although claimant's work may be integral to the shipbuilding process and she may otherwise be a maritime employee, she exclusively performs clerical work in an office. Thus, she is removed from coverage. *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996).

Claimant who, in addition to performing administrative functions in an office on a regular basis, checked in men on the dock for payroll purposes and ensured that work crews were fully manned is covered under the Act. Claimant spent at least some of his time performing functions which were maritime in nature and integral to the loading and unloading process, and thus was not exclusively engaged in office clerical work which would exclude him under Section 2(3)(A). *Jannuzzelli v. Maersk Container Service Co.,* 25 BRBS 66 (1991) (Clarke, J., dissenting).

The Board reversed the administrative law judge's finding of coverage for an office-bound reproduction clerk whose duties included copying documents and drawings. The Board held that these duties are purely clerical and that claimant is excluded from coverage under Section 2(3)(A), noting that claimant is not exposed to maritime hazards. *Williams v. Newport News Shipbuilding & Dry Dock Co.,* 28 BRBS 42 (1994), *vacated mem.,* 47 F.3d 1166 (4th Cir. 1995)(table).

The clerical employee exclusion at Section 2(3)(A) applies only to clerical work performed exclusively in a business office. The Board affirmed the administrative law judge's finding that claimant's duties were performed in a warehouse, which is not characterized by the presence of desks, chairs, computer terminals, copy machines, *etc*. Rather, the warehouse is a large open area where supplies are received, stored and dispensed. The administrative law judge rationally rejected employer's contention that claimant's work area, a cart, should be considered a "rolling business office." Thus, the Board affirmed the administrative law judge's finding that claimant is not excluded from coverage as an office clerical worker pursuant to Section 2(3)(A). *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003).

The Board affirmed the administrative law judge's finding that claimant was excluded from coverage by Section 2(3)(A). Claimant works in an office processing paperwork necessary to authorize the delivery of outbound cargo to truck drivers. The Board found the Third Circuit's decision in *Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), controlling. In *Farrell*, the court stated that a delivery clerk who works in an office is not covered because he is a clerical worker. Although the validity of *Farrell* could be questioned in light of subsequent Supreme Court law, the Third Circuit reaffirmed its validity in *Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992). Moreover, the Board states that claimant is not entitled to coverage by operation of Section 2(3)(A) which the *Rock* court found consistent with *Farrell*. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).

Delivery clerk, working exclusively in an office entering data into a computer, is not covered employment, pursuant to *Farrell*, 548 F.2d 476, 5 BRBS 392 (3^{d} Cir. 1977). *Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3^{d} Cir. 2003), *cert. denied,* 124 S.Ct. 957 (2003).

Observing that the instant case is analogous to *Stone,* 30 BRBS 209 (1996), the Board affirms the administrative law judge's findings that claimant's work as a production clerk is clerical in nature, that it is performed primarily in an office setting, and that claimant's forays outside the office are merely an extension of his office work. The administrative law judge rationally distinguished this case from *Jannuzzelli*, 25 BRBS 66 (1991), because claimant herein did not actually ensure proper manpower on the docks, but merely handled paperwork. Consequently, as the administrative law judge's decision comports with applicable law, her finding that claimant, through application of the clerical exclusion at Section 2(3)(A), is precluded from coverage under the Act, is affirmed. *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998).

In this case addressing the duties of an office clerk/checker, where the parties agreed claimant worked some of the time as a checker, the Board held that claimant did not work "exclusively" as an office clerk and was not excluded by Section 2(3)(A) of the Act. Therefore, the Board reversed the administrative law judge's decision to exclude claimant from coverage based on his office clerical work. *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), *aff'd sub nom. Maher Terminals, Inc. v. Director, OWCP,* 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied,* 540 U.S. 1088 (2003).

Decedent, who was employed as a test engineer, worked 30 percent of his time onboard a barge anchored in Cayuga Lake, New York. The Board reversed the administrative law judge's decision to exclude decedent from coverage pursuant to Section 2(3)(A), since 1) neither the barge itself nor decedent's work station onboard the barge can be deemed a business office, as is required by the plain language of Section 2(3)(A), and 2) the mere fact that the decedent utilizes a computer in his job does not convert him into a clerical worker. *Morganti v. Lockheed Martin Corp.,* 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006).

The Second Circuit affirms the Board's holding that decedent was not excluded from coverage by Section 2(3)(A) of the Act. The court accepted the Director's interpretation that for this subsection to apply the work must fit one of the enumerated positions, and the worker must perform that work exclusively. In this case, there is not substantial evidence that decedent exclusively performed data processing, and there is evidence that his duties as an engineer included analyzing data, which is beyond the scope of the job duties of a data processor as enumerated in the Dictionary of Occupational Titles. *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 126 S.Ct. 2319 (2006).

The Board affirmed the administrative law judge's finding that claimant, who worked as a clerk in an office setting and who primarily oversaw the computer documentation and recording of pipe hangers and joints installed by employer's employees, is excluded from coverage under the Act pursuant to Section 2(3)(A). Although claimant may have performed work that was integral to employer's shipbuilding process, her duties involved traditional office clerical and data entry work performed in an office setting, and her trips outside of the office were incidental to her clerical work and too sporadic to warrant coverage under the Act. *Stalinski v. Electric Boat Corp.,* 38 BRBS 85 (2005).

The Board affirmed the administrative law judge's finding that claimant, who worked as a senior engineering analyst, is not excluded from coverage pursuant to Section 2(3)(A). Claimant did not work "exclusively" in an office setting as required by the Act. Rather, claimant occasionally met with employer's engineers or inspected parts away from his office, and his duties included the reviewing of plan specifications, inspecting parts, verifying that the parts were correct, and consulting with engineers – work which the administrative law judge rationally deemed to require the exercise of judgment and expertise of a kind that goes beyond that typical of clerical work. Moreover, employer employed other specific employees to perform the exclusively traditional clerical functions in claimant's office. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 49 (2005).

The Board affirmed the administrative law judge's finding that claimant, a guard and watchman, is covered under the Act, and is not excluded by Section 2(3)(A). Claimant did not work exclusively as a security guard, as he performed fire and safety duties, and he regularly spent several hours a night on duty on submarines which is integral to the shipbuilding process. If claimant spends some of his time in indisputably covered activity, he is not engaged in *exclusively* security guard work, as it was not the intent of Congress to deprive traditional maritime employees who are exposed to hazards associated with shipbuilding of coverage by virtue of the 1984 Amendments. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

The Board holds that the administrative law judge erred in finding claimant excluded as a security guard under Section 2(3)(A) of the Act. Claimant was primarily a traffic officer, but also was an alternate marine patrol officer who had a reasonable expectation of being called upon to perform duties in a boat on navigable waters. Though claimant infrequently performed such duties, they nonetheless were a regular part of his overall job responsibilities. Moreover, the Board holds that the security guard exclusion does not apply to one who is subjected to traditional maritime hazards, even if, broadly speaking, the claimant is engaged in "security work." The legislative history to the 1984 Amendments makes clear that Congress intended to narrowly exclude those security guards who are exclusively land-based and who thus are not exposed to the dangers of work on navigable waters. *Dobey v. Johnson Controls*, 33 BRBS 63 (1999).

Claimant, who worked as a cook and watchman/maintenance man at a duck hunting camp, was found excluded from coverage under the club/camp exception of the Act, Section 2(3)(B), despite the fact that he was injured while assisting in tying up and unloading supplies and equipment from a vessel. *Green v. Vermillion Corp*., 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999).

The Board affirms the finding that claimant, the harbor master of a permanently moored vessel restaurant and its dock, is not excluded from coverage by Section 2(3)(B). Claimant's employment involved both the routine maintenance and significant repair of the dock, the supervision of commercial and pleasure vessels moored at the dock, the positioning of the dock and restaurant in relation to the height of the river, as well as the routine maintenance of the vessel, its gangway and its parking lot. Moreover, claimant at times engaged in work on or with other barges and tugboats owned by the parent corporation. This work is properly characterized as traditional maritime employment or harbor work, and the legislative history to the 1984 Amendments clarifies that not all employees of a restaurant are excluded from coverage. Rather coverage depends on whether the duties further maritime commerce and expose claimant to maritime hazards Citing *Green*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), the Board focused on whether the claimant's duties solely further the operation of a "restaurant" within the plain meaning of that term, and held that they do not, as claimant's day to day employment was on the dock. *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999).

Decedent's duties were performed prior to the vessel's being completed and placed into operation as a casino, and at the time of the injury and at all times prior, the vessel was under construction. Thus decedent was not employed by a recreational operation under Section 2(3)(B), but by a shipbuilding operation at all times when he worked on the vessel. Although decedent's duties included wiring the vessel for slot machines, data processing and security systems, electrical wiring is part of the vessel's construction, and there are no restrictions against coverage for a shipbuilder based on the area of the vessel in which he is working or its intended purpose. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 540 U.S. 814 (2003).

Decedent, who was employed as the chief engineer of employer's vessel casino, was found excluded from coverage under the recreational operation exception of the Act, Section 2(3)(B), despite the fact that he was injured while the floating casino vessel was under construction, and decedent's job duties, in part, furthered the construction of the vessel. The court holds that the applicability of Section 2(3)(B) turns solely on the nature of the employing entity and not on the job duties of the employee. The court notes that Section 2(3)(C) contains an exception to the marina exclusion, whereas Section 2(3)(B) contains no exceptions. Employer's casino is a recreational operation. Thus, decedent is not covered under the Act even if some of his duties expose him to hazards associated with maritime commerce. *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *rev'g* 35 BRBS 121 (2001), *cert. denied,* 540 U.S. 814 (2003).

The Board affirms the administrative law judge's finding that claimant is excluded from the Act's coverage by virtue of the "retail outlet" exclusion of Section 2(3)(B). Claimant was employed by a photography company to take photographs of tourists boarding a museum vessel. The Board holds that the word "retail" need not denote the sale of a variety of goods from a store or shop. Rather, it is sufficient for purposes of the exclusion that employer sells photographs from a stand on the pier. The nature of the employing enterprise is relevant to this determination and not necessarily the fact that the claimant is required to go aboard a vessel on navigable waters. In addition, claimant's actual duties have no traditional maritime nexus. *Peru v. Sharpshooter Spectrum Venture, LLC,* 39 BRBS 43 (2005), *aff'd and remanded,* 493 F.3d 1058*,* 41 BRBS 28(CRT)(9th Cir. 2007).

The Ninth Circuit affirms the holding that claimant, employed by a concession for historic naval ship, was employed by a "retail outlet." The court states that the Board reasonably defined "retail outlet" as "any place where items are sold directly to consumers." The court followed *Green,* 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), and *Huff*, 33 BRBS 179 (1999), and stated it is appropriate to look at both the identity of the employing business and the claimant's specific duties to see if they constitute traditional maritime activities. Claimant's work lacks a connection to traditional maritime activities and therefore is excluded from coverage, 33 U.S.C. §902(3)(B), unless she was not covered by a state workers' compensation law. The court remands the case for findings as to whether claimant is subject to coverage under Hawaii's workers' compensation law. If she is not, she is covered by the Act, as she was injured on the ship on navigable waters. *Peru v. Sharpshooter Spectrum Venture LLC,* 493 F.3d 1058, 41 BRBS 28(CRT) (9th Cir. 2007), *aff'g and remanding* 39 BRBS 43 (2005).

The Board initially stated that the issues presented by Section 2(3)(C) in the instant cases, as to whether the Titusville Marina is a "recreational" marina and whether claimants are "engaged in construction, replacement, or expansion of such marina," are largely questions of fact to be resolved by the administrative law judges. Upon review, the Board affirmed the administrative law judges' conclusions that claimants, as employees of a marina, are excluded from coverage under the Act pursuant to Section 2(3)(C), as they found the marina is for recreational purposes and is not a port, and that claimants were not engaged in the construction or repair of the marina. The Board further noted that the fact that claimants may have been injured on actual navigable waters does not compel a finding of coverage under the Supreme Court's decision in *Perini*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983), as claimants are specifically excluded by operation of Section 2(3)(C) of the Act. *Keating v. City of Titusville*, 31 BRBS 187 (1997).

Where claimant was transferred from a construction company to employer, a marina, both of which maintained common ownership, the Board held that in determining whether claimant was a covered maritime employee, the administrative law judge properly declined to consider the corporate relationship between the construction company and employer. Rather, the administrative law judge properly considered the nature of claimant's job responsibilities after he was transferred to employer, as the Act focuses on claimant's occupation at the time of his injury. As substantial evidence supported the administrative law judge's finding that claimant was not engaged in construction, replacement or expansion of the marina, the Board affirmed the administrative law judge's conclusion that claimant was excluded from coverage pursuant to Section 2(3)(C) of the Act as a marina worker. *Shano v. Rene Cross Construction*, 32 BRBS 221 (1998), *aff'd mem.,* 196 F.3d 1258 (5th Cir. 1999)(table).

The Board rejected employer's interpretation of Section 2(3)(D)'s exclusions from coverage. Claimant was held to be not "temporarily" on the site as project required his presence for six months; employer as a building contractor cannot be considered a vendor as employer provided a service, not a product, to the shipyard; and employer itself qualified as a statutory employer, rather than a supplier, transporter or vendor to a covered employer once it began the shipyard construction project. *Ripley v. Century Concrete Services,* 23 BRBS 336 (1990).

Although the Board held that the status test was not satisfied, the Board stated that claimant was not excluded from coverage by Section 2(3)(D). *Felt v. San Pedro Tomco,* 25 BRBS 362 (1992) (Stage, C.J., concurring on other grounds and dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165(CRT) (9th Cir. 1993).

The Board affirmed the administrative law judge's finding that claimant is precluded from coverage under the Act, as all of the requisite elements for the vendor exclusion at Section 2(3)(D) have been met. Specifically, the Board affirmed the administrative law judge's determinations: that employer is a vendor pursuant to Section 2(3)(D)(i), since claimant sold air time and cellular equipment to employer's customers; that the criterion at Section 2(3)(D)(ii) was met as the parties stipulated that claimant was temporarily doing business on the premises of Global Pipelines, a maritime employer within the meaning of 33 U.S.C. §902(4); that the criterion of Section 2(3)(D)(iii) was met, as claimant was not engaged in work normally performed by employees of Global Pipelines; and lastly that pursuant to Section 2(3) claimant is covered and has been receiving benefits under the Louisiana State Workers' Compensation Act for his work-related injuries in this case. *Daul v. Petroleum Communications Inc.*, 32 BRBS 47 (1998), *aff'd,* 196 F.3d 611, 33 BRBS 193 (CRT)(5th Cir. 1999).

The administrative law judge rationally distinguished the Board's decision in *Ripley* v. *Century Concrete Services*, 23 BRBS 336 (1990), wherein a building contractor working under a contract to complete a construction project on a pier at a shipyard was found to provide a service instead of a product, and thus, did not qualify as a vendor under Section 2(3)(D)(i), since claimant herein "sells goods" rather than provides services such as manual labor. *Daul v. Petroleum Communications Inc.*, 32 BRBS 47 (1998), *aff'd,* 196 F.3d 611, 33 BRBS 193 (CRT)(5th Cir. 1999).

The Fifth Circuit affirms the Board's holding that claimant, a communications consultant for a cellular telephone company who sells air time to customers, including maritime employers, is excluded from coverage under the vendor exclusion of Section 2(3)(D). *Daul v. Petroleum Communications, Inc.,* 196 F.3d 611, 33 BRBS 193(CRT)(5th Cir. 1999), *aff'g* 32 BRBS 47 (1998).

The Board holds that claimant, an airborne fish spotter, is not an aquaculture worker as defined by Section 2(3)(E). Claimant was not engaged in processing fish, nor did his duties involve the controlled cultivation and harvesting of fish. Claimant searched for menhaden, which are free-ranging fish. *Barnard v. Zapata Haynie Corp.*, 23 BRBS 267 (1990), *aff'd*, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991).

An airborne fish spotter is not an aquaculture worker excluded from coverage under Section 2(3)(E). Menhaden fishing is not a controlled cultivation or harvest, and a fish spotter is not involved with processing the catch. Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 24 BRBS 160 (CRT) (4th Cir. 1991), aff'g 23 BRBS 267 (1990).

The Board held that the administrative law judge rationally determined that claimant, a maintenance supervisor and mechanic for a fish cannery who spent 40 percent of his time maintaining unloading equipment and repairing docking facilities, is not an aquaculture worker pursuant to Section 2(3)(E). Consequently, as claimant spent "at least some of his time" in covered activity, claimant is not excluded from coverage as an aquaculture worker and satisfies the status requirement of Section 2(3). *Ljubic v. United Food Processors*, 30 BRBS 143, 145 (1996).

The Ninth Circuit affirmed the administrative law judge's finding that a forklift operator who moved fish from an area near a cannery's freezer entrance into a freezer was an "aquaculture worker" excluded from coverage under the Act, although he occasionally moved bins of fish on the dock when insufficient outside drivers were available, inasmuch as his outside work was infrequent, episodic, and discretionary. The court noted that a worker need not be engaged in canning or processing cultivated or harvested fish to be considered an excluded aquaculture worker. *Alcala v. Director, OWCP,* 141 F.3d 942, 32 BRBS 81(CRT) (9th Cir. 1998).

The Board held, for purposes of determining coverage under Section 2(3), that the length of a recreational vessel is measured from the foremost part of the vessel to the aftmost part, including fixtures attached by the builder. The Board rejected employer's contention that the definition of "length" under Section 701.301(a)(12)(iii)(F), the implementing regulation to Section 2(3)(F), should be interpreted the same as a Coast Guard regulation which defines the length of a vessel. The Board stated that, despite initial reliance on the Coast Guard regulation, the Department's exclusion from its regulation of the exceptions listed in the Coast Guard regulation indicates a conscious effort to distinguish the two. Moreover, the Board declined to read Section 701.301(a)(12)(iii)(F) *in pari materia* with other statutes and regulations because those laws were not created at the same time for the same purpose or by the same entity as the regulation under the Act. Consequently, the Board affirmed the finding that employer's longest recreational vessel measures 72 feet 7 inches and that claimants are not excluded pursuant to Section 2(3)(F). *Powers v. Sea Ray Boats*, 31 BRBS 206 (1998); *see also Redmond v. Sea Ray Boats*, 32 BRBS 1 (1998), *vacated in part on other grounds,* 32 BRBS 195 (1998).

Where employer raised the issue, but the administrative law judge failed to address it, the Board vacated its affirmance of the administrative law judge's conclusion that claimant is a covered employee and remanded the case to the administrative law judge for consideration of whether claimant worked on vessels exceeding 65 feet in length. *Redmond v. Sea Ray Boats*, 32 BRBS 195 (1998), *vacating in part on recon.* 32 BRBS 1 (1998).

THE 1972 AMENDMENTS-STATUS

Moment of Injury/Substantial Portion

Digests

Under Fifth Circuit case law, a claimant may satisfy the status test based either on maritime employment at the time of injury or on the nature of his overall employment. Overall employment is considered maritime if at least some portion of time is spent in maritime activities. In this case, claimant is covered under either test because he spent one day a week repairing vessels and was repairing a vessel at the time of injury. Clophus v. Amoco Production Co., 21 BRBS 261 (1988).

Employee is covered if some portion of his activities constitute covered employment, provided that such activities are not too episodic or momentary or incidental to non-maritime work. Coleman v. Atlantic Container Service, Inc., 22 BRBS 309 (1989), aff'd, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

The 11th Circuit affirmed the Board's holding that claimant's overall employment activities were essential to loading and unloading. Because the court held that all of claimant's activities were essential to loading and unloading, the court declined to address the Board's reliance on the holding in Boudlouche, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), that an employee who spends "at least some" of his time in indisputably maritime activities is covered. Atlantic Container Service, Inc. v. Coleman, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990), aff'g 22 BRBS 309 (1989).

The Board affirms finding of status in claim arising in Fifth Circuit. Claimant was injured performing an electrical repair estimate on board a ship. The Board holds that claimant is a covered employee under the rationale of both Perini (injury on navigable waters) and 5th Circuit's moment of injury test. Scott v. Tug Mate, Inc, 22 BRBS 164 (1989).

Claimant, who spent "at least some of [his] time" fabricating and repairing parts for vessels and loading and unloading component parts for fixed offshore oil-drilling platforms, was a "maritime employee" within the meaning of the Act, although he was also responsible for fabricating and repairing parts for offshore oil-drilling rigs. Smith v. Universal Fabricators, Inc., 21 BRBS 83 (1988), aff'd, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).

The United States Court of Appeals for the Fifth Circuit affirmed the Board's holding that claimant satisfied the status requirement where although he was engaged in nonmaritime activities on the day he was injured, he spent a significant portion of his time in indisputably longshore operations. An employee may establish status based either on the maritime nature of his activity at the time of his injury or upon the maritime nature of his work as a whole. Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990).

Claimant's regular participation on an as-needed basis in the load-out of completed offshore oil drilling platforms onto barges for transport offshore is sufficient to confer status under the Act. That claimant was not engaged in such work at the time of his injury does not divest him of coverage. While, pursuant to Herb's Welding, Inc. v. Gray, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), claimant's work in the construction of oil platforms cannot be considered maritime activity, that decision does not affect the holdings of the Fifth Circuit that an employee is covered if he is either engaged in maritime employment at the time of injury or regularly spends some of his time in maritime employment. Thornton v. Brown & Root, Inc., 23 BRBS 75 (1989).

Although an employee is covered if at least some portion of his activities constitute maritime employment, in this case claimant, whose work involved the repair of a seawall with no maritime purpose, did not have status as no portion of his work was maritime in nature. Silva v. Hydro-Dredge Corp., 23 BRBS 123 (1989).

The Board held that claimant satisfied the status test because his employment constructing a pier extending into navigable water was inherently maritime in nature, despite the fact that, at the moment of injury, claimant had temporarily departed from his construction work and was moving a sailboat across land. The Board rejected employer's argument that such employment was not covered under the Act because claimant was not specifically engaged in loading or unloading a vessel. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

The Eleventh Circuit does not apply the Fifth Circuit's moment of injury test, and affirms the U.S. District Court's summary judgment that claimant, a land-based journeyman electrician who had contracted to do wiring at a Marine Lab which was being built on an island off the Georgia coast, and who was injured on navigable waters of the intercostal waterway while traveling in a co-worker's boat, is not a covered employee under Section 2(3). Claimant's regular employment is land-based, and his connection to maritime employment is de minimis. Brockington v. Certified Electric, Inc., 903 F.2d 1523 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991).

Participation in a six-month project constructing an addition to a pier, where claimant's primary duties continuously involved marine construction, was held to be not too momentary or episodic to place claimant outside the coverage of the Act. Ripley v. Century Concrete Services, 23 BRBS 336 (1990).

Although the administrative law judge concluded that claimant's hand-loading of items and driving of his truck onto ships to deliver supplies was covered activity, the Board affirms the finding that claimant did not satisfy the status test, as these activities were episodic and not a regular part of claimant's duties. The Board noted that the time claimant spent personally loading merchandise onto vessels was minimal compared to his other responsibilities, and did not constitute some time regularly spent in longshoring operations. *Felt v. San Pedro Tomco,* 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT)(9th Cir. 1993).

The Board affirmed the administrative law judge's finding that claimant was not covered under Section 2(3) of the Act, as his duties, consisting of washing cars, and occasionally repairing, marking and loading cars for distribution to dealers, were not an integral part of the loading process, but related to the land transportation and preparation of cars for inland shipment. Maintenance of employer's car wash which occupied 90 percent of claimant's time does not qualify, as a car wash rack is clearly not loading equipment and washing cars does not further the loading process. Claimant's activities, occupying the remaining 10 percent of his time, comprising visual damage survey, marking cars for destination, and shuttling tractors from port to yard, cannot be considered the regular performance of maritime operation, as all were performed after unloading was completed. *Odness v. Import Dealers Service Corp.*, 26 BRBS 165 (1992).

The Board affirmed the finding of coverage for a decedent who was engaged in covered employment for only two percent of his overall employment because the record reflects that decedent assisted in unloading the ship every time one arrived at employer's facility. Moreover, decedent was engaged in maritime employment at the time of his death. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

The Fifth Circuit affirms the finding that claimant was engaged in covered employment as the administrative law judge rationally found that claimant's cargo handling duties were sufficiently regular so as not be episodic events excluded from coverage. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

On remand from the Ninth Circuit, 989 F.2d 1547, 26 BRBS 180(CRT), the Board addresses the status issue reserved in its initial decision, 24 BRBS 94. The Board affirms the administrative law judge's finding that claimant is covered under the Act by virtue of the overall nature of his employment. Ninety percent of claimant's time has been spent as a diver, which is inherently maritime employment, and claimant also worked as a pile butt on maritime projects. This employment history satisfies the requirement of *Caputo* that claimant "spend at least some of [his] time in indisputably longshoring operations." *Hurston v. McGray Construction Co.*, 29 BRBS 127 (1995) (decision on remand), *rev'd,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999).

The Ninth Circuit held that claimant, injured while engaged as a pile driver on an oil production pier, was not a covered employee by virtue of spending 90 percent of his career in the maritime employment of deep-sea diving and being hired out of a hall that served maritime employers, as he was injured while performing a non-maritime job. Citing *Papai,* 520 U.S. 548, 31 BRBS 34(CRT) (1997), the court held that the fact that an employee has been engaged in maritime employment in other jobs, and that he is hired out of a union hall that includes maritime workers, does not confer coverage if his current employment is non-maritime. The Ninth Circuit distinguished its decision in *Schwabenland v. Sanger Boats,* 683 F.2d 309, 16 BRBS 78(CRT) (9th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983), as the claimant herein was not engaged to perform both maritime and non-maritime work and thus would not be walking in and out of coverage. *McGray Constr. Co. v. Hurston,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g* 29 BRBS 127 (1995).

In this case, in which claimant spent 3 to 5 percent of his time on the pier supervising the unloading of ships and serving as the weighmaster, the Board reversed the administrative law judge's finding that claimant was not engaged in covered employment and held that as claimant was directed to regularly perform some portion of what was indisputably longshore work he was covered under the Act. The administrative law judge erred in requiring that claimant spend the majority of his duties in covered employment. Moreover, the administrative law judge erred in denying coverage on the basis that claimant was not engaged in covered employment at the time of injury. The Fifth Circuit's use of the "moment of injury" test is to expand coverage, not to defeat it. *McGoey v. Chiquita Brands Int'l,* 30 BRBS 237 (1997).

Where the factual findings made by the administrative law judge establish that claimant, a crane operator, spent some of his time performing undisputably maritime activities, and these duties were a regular portion of the overall tasks to which claimant could be, and actually was, assigned, the administrative law judge erred in finding that these duties were too episodic to confer coverage based simply on their frequency. A regular portion of claimant's overall duties involved covered activity and these duties, although infrequent, were neither "discretionary" nor "extraordinary." Claimant therefore is covered under the Act based on the overall nature of his work duties. *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

In this case involving an employee who worked as a mechanic in a sugar refinery, the Board affirms the administrative law judge's finding that any longshore work was momentary or incidental, and not a regular portion of the overall tasks to which decedent could be, and actually was, assigned, and, thus, was insufficient to confer status. Decedent's time cards and the testimony of a co-worker support the finding that decedent's assignments involving the repair of longshore equipment were so rare that they were outside the normal course of decedent's job. *Kilburn v. Colonial Sugars,* 32 BRBS 3 (1998).

The Board held that decedent, whose job involved maintaining and repairing conveyor belts used to unload bauxite from ships and transport it to employer's storage facility, worked in maritime employment. Initially, the Board held that the administrative law judge erred in establishing a boundary between the state's conveyor belt and employer's, as the unloading of bauxite is not complete until it is delivered to employer's storage facility. Additionally, the Board rejected the administrative law judge's conclusion that decedent's work on the conveyor system is analogous to a truck driver who merely carries the cargo for further transhipment over land, as the cargo at issue was still in the unloading process. Finally, because decedent's work on the conveyor belts constituted a regular, non-discretionary (albeit infrequent) portion of his job, it meets the *Caputo* requirement of "some" time and confers coverage under the Act. Consequently, the Board reversed the administrative law judge's finding that decedent was not a covered employee, and remanded the case for consideration of the remaining issues between the parties. *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997).

The Fourth Circuit holds that because, at the time of injury, claimant, a railroad worker, was performing his assigned work as a carman at the Seagirt Marine Terminal and because some of his duties as a carman were indisputably maritime, claimant was engaged in maritime employment as defined by the Act. In so holding, the Fourth Circuit rejected claimant's contention that because only 15% of his duties involved the loading and unloading of maritime freight, he was not engaged in maritime employment, as his maritime work was not "momentary or episodic." The Act focuses on the employee's occupation as a whole at the time of injury, and not on whether the particular duties performed at the time of injury are maritime in nature. Consequently, as claimant met both the situs and status tests, he is covered under the Act and thus, is preempted from pursuing a FELA claim. *In Re CSX Transportation, Inc. [Shives]*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied,* 119 S.Ct. 547 (1998).

The Board affirmed the administrative law judge's finding that claimant, a bulldozer operator, meets the status test as he was required, as a part of his regularly assigned duties, to assist in loading barges with oil rig sections, and this participation, although infrequent, was more than episodic, momentary, or incidental to non-maritime work. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

The Board affirmed the administrative law judge's determination that claimants in this consolidated case satisfy the status requirement. Although both employees work for a fertilizer production plant, both regularly engage in the maritime activities of unloading raw materials from barges and vessels and loading finished product onto out-going barges and vessels. The Board rejected employer's argument that neither employee should be covered because neither was engaged in maritime work at the time of his injury, as this argument attempts to narrow the Fifth Circuit's "moment of injury" test. *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999).

The Board rejected employer's assertion that the Supreme Court's standard of spending "at least some time" in maritime employment needed to be reconciled with the Supreme Court's standard under the Jones Act of having a "substantial" connection to a vessel. The Board held that these standards serve different purposes under different Acts and were not designed to work in conjunction with one another. Moreover, the Board stated that the Fifth Circuit, in *Boudlouche*, 632 F.2d 1346, 16 BRBS 78(CRT) (5th Cir. 1980), rejected the Board's "substantial portion" standard, and the Eleventh Circuit, within whose jurisdiction this case arises, has not overruled the Fifth Circuit's decision. Accordingly, the Board rejected employer's contention that decedent did not meet the status requirement, and it left intact its previous decision at 31 BRBS 130. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

In this case where a claimant worked as an office clerk/checker, but was injured while working as a clerk, the administrative law judge denied coverage because he found that claimant was not subject to reassignment as a checker during the same day he worked as an office clerk. After a thorough discussion of employer's arguments for affirming such a test and of the case precedent on the status issue, the Board rejected the creation of a "same day of injury" test. The Board held there is no precedent for such a test, the creation of such involved an incorrect interpretation of the Supreme Court's comments in *Caputo*, 432 U.S. 249, 6 BRBS 150, and the Third Circuit's comments in *Rock*, 953 F.2d 56, 25 BRBS 112(CRT), and the test is too similar to the discredited "moment of injury" theory. Further, the Board rejected the argument that the Supreme Court's decision in *Papai*, 520 U.S. 548, 31 BRBS 34(CRT), eliminated the occupational test established in *Caputo*, as *Papai* is a Jones Act case and is irrelevant to the issue of status under the Longshore Act, and that *McGray Constr.,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), supports the finding of no coverage. Because at least some portion of claimant's regular duties for employer included work as a checker, he is a covered employee; the administrative law judge's decision to the contrary is reversed. *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001) , *aff'd sub nom. Maher Terminals, Inc. v. Director, OWCP,* 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied,* 124 S.Ct. 957 (2003).

The Third Circuit affirmed the Board's holding that the claimant is entitled to coverage under the Act. The court reasoned that claimant spent half of his time in covered employment as a checker, notwithstanding the fact that he worked in non-covered employment as a delivery clerk on the day of his injury. The court held that it must look to the regular portion of the overall tasks to which the claimant could have been assigned as a matter of course to determine whether he spends at least some of his time in indisputably longshoring operations. The court rejected the contention that the claimant must be subject to transfer on the day of injury and also distinguished *McGray Constr.*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), on the ground that claimant while having different job assignments, worked only for one employer. *Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *aff'g Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), *cert. denied,* 124 S.Ct. 957 (2003).

The Board affirms the administrative law judge's finding that claimant, who worked as a railcar supervisor, is a covered employee, since his duties required him "at least some of the time" to attach hoses from railcar headers to ground headers, an activity which was necessary to commence the transfer of liquid product between railcars and vessels. Moreover, as claimant was injured while attaching such a hose, the Board notes that under the law of the Fifth Circuit, wherein this case arises, claimant also was covered since he was performing maritime employment at the moment of injury. *Schilhab v. Intercontinental Terminals, Inc.,* 35 BRBS 118 (2001).

In affirming the administrative law judge's finding of status, the Board rejected employer's assertion that claimant's work changing air conditioning filters in the fabrication shops in employer's shipyard cannot be considered essential to employer's shipbuilding process because it was performed by claimant only on an occasional basis. As claimant was regularly assigned to change filters and this work was neither momentary nor episodic, claimant's work changing filters in the fabrication shops could not be viewed as so *de minimis* as to defeat coverage. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

Where claimant loaded crude oil from a fixed platform onto transport barges, and he maintained and repaired the pipelines used in the loading process, the Board affirmed the administrative law judge's finding that claimant's work was essential to the loading process and, therefore, that he is a maritime employee. The Board distinguished claimant's loading activities from the activities of employees on fixed oil platforms who merely loaded personal tools or equipment needed to service oil production wells. As claimant's maritime work comprised 9.7 percent of his work time, the Board affirmed the administrative law judge's finding that this was more than momentary or episodic. Moreover, the Board noted that the status inquiry is occupational in nature, making it irrelevant that claimant was injured while he was performing non-maritime work. *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006).

Where the administrative law judge found that claimant spent approximately 11 percent of his time involved in unloading acid from barges and that claimant's work was not momentary or episodic, as it was a regular part of his assigned duties, the Board affirmed the finding that claimant spent "some of his time" in longshoring operations and is a covered employee. *Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

The Board reversed the administrative law judge's finding that claimant was not engaged in covered employment, as longshoring activities were part of his regular job assignments even though the majority of his time was spent in non-covered work. The administrative law judge erred in focusing on claimant's "primary duties" and on the fact that claimant did not work "exclusively" in the port, as claimant need only spend at least some of his time in covered activities. *W.B. v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007).

Covered Occupations-Generally

Digests

The Supreme Court held that employees injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Thus, railway workers whose work involves repairing and maintaining the machinery used to load coal onto vessels are covered because their work is essential to the loading and unloading process. In a concurring opinion, Justices Blackmun, Marshall and O'Connor express concern that the decision would bring back the problem of employees walking in and out of coverage, depending on the task performed at the time of injury and joining in the majority opinion with the express understanding that it would not affect the Court's ruling in *Caputo* regarding this problem. *Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 23 BRBS 96 (CRT) (1989).

Reversing the Board, the court held that claimant's responsibilities as a Labor Relations Assistant satisfy the status test since those responsibilities were significantly related to and directly furthered employer's ongoing shipbuilding and ship repair operations. Pursuant to §2(3), the Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel; additionally, §2(3) "extends coverage to occupations beyond those specifically named by the statute." The court noted that whether particular job skills are uniquely maritime is not dispositive in determining whether the status test is satisfied; rather, the proper focus should be upon whether the purposes served in applying the job skills directly relate to furthering the shipyard concerns of a covered employer. *Sanders v. Alabama Dry Dock & Shipbuilding Co.,* 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988), *rev'g* 20 BRBS 104 (1987). *But see Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990) (n. 5 suggests the validity of *Sanders* is questionable in light of *Schwalb*).

The Board affirmed that administrative law judge's finding that claimant, a shop steward, is a covered maritime employee under Section 2(3), as the administrative law judge properly applied the standard of *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), and his conclusion that claimant's duties as a shop steward were integral to the loading and unloading process as he removed interpersonal obstacles that might otherwise hinder employer's day-to-day operations was supported by substantial evidence. The finding is further supported by the Eleventh Circuit decision in *Sanders*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), wherein a labor relations assistant was held covered. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd,* 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2000).

The claimant in this case was a union shop steward. The Second Circuit affirmed the finding that claimant was covered under the Act as his duties were integral or essential to employer's operation of loading and unloading ships. The court rejected employer's contention that claimant is not covered because he was not continuously present on the docks, as inconsistent with *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT) (1989). Moreover, it is irrelevant that the work that claimant performed was the same as that performed in non-covered industries. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001), *aff'g* 34 BRBS 112 (2000).

The Fourth Circuit holds that claimant, a president of a union local, is not covered under the Longshore Act, because his function was not integral to the loading or unloading of cargo vessels. The court distinguishes *Marinelli,* 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), as the claimant in that case worked at the waterfront terminal and boarded vessels on a regular basis whereas the claimant in the instant case spent little time at the waterfront terminal and there was no indication from the record that he boarded vessels. The most compelling distinction between the two cases, the court held, was that the claimant in *Marinelli* was authorized to unilaterally order a work stoppage whereas the claimant in the instant case did not have such authorization. Because claimant's job with the union local was not maritime employment, the union could not be the responsible employer in this hearing loss case. *Sidwell v. Virginia Int'l Terminals, Inc.*, 372 F.2d 238, 38 BRBS 19(CRT)(4th Cir. 2004).

The Board affirms the administrative law judge's findings that the claimants' work as workers' compensation claims examiners was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), as there was a lack of persuasive evidence that their failure to perform their jobs would impede the shipbuilding process. The cases are distinguishable from *Sanders*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988) and *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), as the claimants did not interact with other employees and supervisors to the same extent. Rather, their work was more like that in *Coloma*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), and *Sea-Land Serv. Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), where the employees' work was helpful, but not indispensable, to the loading process. Board also cites *Neely*, 12 BRBS 859 (1980), as authority on this issue, although the case has been partly overruled. *Buck v. General Dynamics Corp./Electric Boat Div.,* 37 BRBS 53 (2003).

Section 2(3) addresses the nature of an employee's duties, rather than the site of their execution. Thus, the fact that claimant's office adjoined a shipyard warehouse used for maritime purposes is not relevant to her coverage. *Bergquist v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 131 (1989).

The Board holds that the administrative law judge erred in denying coverage based in significant part on factors related to the legal custody of the cargo. Factors regarding the transfer of legal custody are not determinative of the status inquiry, which is governed instead by the functional nature of the work activity to which an employee may be assigned. The Board holds that the administrative law judge erred in considering claimant's membership in the Teamsters' Union as a factor weighing against a finding of coverage. The Supreme Court stated in *Ford,* 444 U.S. at 82, 11 BRBS at 328, and *Caputo,* 432 U.S. at 268 n.30, 6 BRBS at 162 n.30, that the scope of maritime employment is not dependent on "the vagaries of union jurisdiction." *W.B. v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007).

The Fourth Circuit reverses the Board's finding of coverage for a pipe-fitter injured while building a power plant on the premises of the Norfolk Naval Shipyard. The court held that claimant is not entitled to coverage merely because the plant would eventually provide steam and electricity to shipbuilding and ship repair operations; the court seemingly distinguished between new construction and repair of existing shipyard structures. The court notes that claimant's job was not any different than it would have been if it were off the shipyard's premises. *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

The Board held that two employees of a power plant, whose duties involved the maintenance and operation of power plant equipment, met the status requirement under Section 2(3) of the Act. The Board reasoned that since all the steam and electricity the power plant generated went to the Norfolk Naval Shipyard, which owned the plant, the claimants' employment was essential to the shipbuilding and ship repair process. The Board distinguished this case from *Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT)(4th Cir. 1994), wherein the Fourth Circuit held that a construction worker injured while engaged in the construction of the same power plant did not meet the status requirement under the Act, as his construction work could not be converted into maritime employment merely by its location. As the claimants herein performed tasks related to operation and maintenance of a facility essential to shipbuilding and ship repair, their duties are unlike those of the claimant in *Prevetire*. *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.,* 135 F.3d 770 (4th Cir. 1998), *cert. denied*, 525 U.S. 816 (1998).

The Board affirmed the administrative law judge's determination that claimant, a construction worker for a contractor hired to build on a naval base a warehouse to be used to store spent nuclear fuel from submarines and ships, is not a covered employee. The Board held that the Fourth Circuit's decision in *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), is controlling: as in *Prevetire*, the building under construction was not a "uniquely maritime" structure and its use as a storage facility was a future, and not a present, one. Moreover, employer is a contractor hired by the Navy for the sole purpose of building the warehouse, and, unlike those employees hired by the shipyard to maintain and repair its facilities, claimant had only a temporary connection to the navy base which would terminate upon completion of his construction duties. *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001).

The Board affirms the finding that claimant was not engaged in maritime employment. Claimant was injured during the construction of a yacht facility on the Elizabeth River, and was employed by a subcontractor who supplied labor and equipment for the installation of the steel structure, siding, and roof deck of the buildings. Pursuant to *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT), and *Moon*, 35 BRBS 151, claimant was engaged to construct a building that would have a future maritime use, which is insufficient to confer coverage, and claimant's relationship to the facility was temporary, arguably lasting only until the construction was complete. *Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003).

The Board affirms the administrative law judge's finding that decedent was not engaged in maritime employment while renovating a ship shed. While the shed had been used for building ship components, it was under renovation and completely gutted while decedent was temporarily on the premises to engage in plumbing, heating and air conditioning installation. Pursuant to *Prevetire* and its progeny, the Board holds that decedent was not engaged in maritime work, as there is no evidence that decedent's failure to perform his job would impede the shipbuilding process, as not everyone on a covered site is intended to be covered, and as his work was not inherently maritime. The Board distinguishes *Graziano* regarding maintenance and repair of shipyard buildings, as the building was not in current use for shipbuilding. *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005).

The Seventh Circuit affirmed district court's grant of summary judgment dismissing claimant's Section 5(b) claim for lack of subject matter jurisdiction based on claimant's inability to demonstrate that he was engaged in maritime employment. Claimant suffered injuries while working as a director of safety training with regard to a casino vessel and did not establish that he had any connection with the loading or construction of ships. *Scott v. Trump Indiana, Inc.*, 337 F.3d 939, 37 BRBS 83(CRT)(7th Cir. 2003), *cert. denied,* 540 U.S. 1075 (2003).

The Board affirmed the administrative law judge's finding that claimant is not a covered employee as his work was not an essential element of the loading process. Claimant's work on a road project was directed at providing a helpful improvement in the ports' roadways rather than an indispensable aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project designed to improve the movement of the rail cars and trucks in land transportation in the future and the actual task of loading and unloading containers from ships on the docks or in moving cargo in intermediate steps within the port. *Terlemezian v. J.H. Reid General Contracting*, 37 BRBS 112 (2003).

The Board affirmed the administrative law judge's finding pursuant to Section 2(3) that claimant's bulldozing activities, in the furtherance of a beach renourishment project, were insufficient to confer coverage under the Act because claimant's bulldozing duties involved the movement of sand as part of the process of rebuilding the beach, rather than facilitating maritime commerce or any other longshoring activities enumerated in Section 2(3). *Nelson v. American Dredging Co.*, 30 BRBS 205, 208 (1996), *rev'd in pert. part,* 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

The Third Circuit held that claimant's job moving sand and pipes with a bulldozer as part of the process of rebuilding the beach, qualifies as maritime employment as he was a vital part of the process of unloading sand from employer's vessel onto the beach. The Third Circuit therefore reversed the Board's holding that claimant did not meet the status requirement. *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115 (CRT) (3d Cir. 1998), *rev'g in pert. part* 30 BRBS 205 (1996).

The Board affirmed the administrative law judge's finding that decedent's duties with employer, a company hired to dredge a ship channel, were sufficient to establish status under Section 2(3), as they were an integral part of the unloading process for he worked directly to ensure that the dredged material properly flowed from the dredge through the pipeline to the dump site. As in *Nelson,* 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998), the dredge and pipeline were involved in the collection, transportation and "unloading" of "cargo," *i.e.*, in this case the dredged debris. *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001).

The Board affirmed the administrative law judge's finding that claimant satisfied the status requirement under Section 2(3) of the Act, where supplying electricity to barges was a regular part of claimant's job as an electrician. Moreover, since employer's facility was a non-union shop, claimant was also required to perform welding and repair tasks aboard barges, and the administrative law judge rationally credited claimant's testimony that he performed these duties every other day up until the date of his injury. Thus, the Board held that the administrative law judge properly found that claimant spent at least some of his time engaged in clearly maritime employment. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

Citing to *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT)(1989), which supports the proposition that employees who perform general cleaning duties may be covered under the Act if those duties are integral to the overall ship construction process, as well as *Graziano,* 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), the Board held that the administrative law judge erred in focusing on the description of claimant's job duties as janitorial rather than on whether the duties themselves were integral to the shipbuilding process. The Board therefore vacated the determination that claimant was not covered under Section 2(3) since her general cleaning duties did not have a sufficiently strong nexus with loading, unloading, or shipbuilding, and remanded the case for consideration of whether claimant's work sweeping and disposing of waste from machinery was essential to the building and repairing of ships. *Ruffin v. Newport News Shipbuilding & dry Dock Co.,* 34 BRBS 153 (2000).

The Board holds that claimant was engaged in maritime employment pursuant to *Chesapeake & Ohio Ry. Co. v. Schwalb,* 493 U.S. 40, 23 BRBS 96 (CRT) (1989). For four hours everyday, claimant and her co-worker drove around the shipyard to empty large drums filled with debris created by the ship repair process, including welding rods and iron strips. The Board holds that the administrative law judge erred in failing to draw the inference mandated by *Schwalb*, namely that claimant's failure to perform her job would impede the ship repair process; it is not necessary, under *Schwalb*, that the claimant's contribution to the process be continuous. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002).

The Board reverses the administrative law judge's finding that claimant is not a covered employee. Claimant's work is integral to the shipbuilding and ship repair process, as she was required to sweep around machines to clear debris dropped from the machinery, to empty 55-gallon drums filled with waste products, and to stock eye safety supplies. She performed her job while the machinery was in operation and had to wear a hard hat and safety goggles. The administrative law judge failed to draw the rational inference that claimant's failure to perform her job would eventually impede the shipbuilding process. Pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), and *Watkins*, 35 BRBS (2002), it is not dispositive that claimant's contribution to the process is not continuous, or that the effects of her failure to perform her job would lead to an immediate impediment to the process. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002).

The Board affirms the administrative law judge's finding that claimant is a covered employee. Claimant's work changing air conditioning filters in buildings in employer's shipyard in which ship construction activity was performed was integral to the shipbuilding and ship repair process. Pursuant to *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT)(1989), *Ruffin,* 36 BRBS 52 and *Watkins,* 35 BRBS 21, claimant's work is considered essential if her failure to replace the filters would eventually impede the operation of the air conditioning system. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

The Board affirms the administrative law judge's finding that claimant's job of removing pilings from the bank of the bayou and placing them in dumpsters does not satisfy the status requirement. The job was not maritime work because it was not established that it was related to the loading, unloading, building, or repairing of vessels, or to building or repairing a harbor facility used for such activity. No evidence was adduced as to what was to be done to the area once the pilings were removed. *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).

Point of Rest

The Board affirms the administrative law judge's finding that claimant's employment duties, which involved checking and stripping containers, constituted intermediate steps in the movement of cargo between ship and land transportation which satisfies the status requirements pursuant to Section 2(3). The Board rejected employer's "point of rest" theory that longshoring operations ceased when the containers were loaded onto a truck for transportation to another pier where they would be checked and stripped *Childs v. Western Rim Co.*, 27 BRBS 208 (1993).

In this case, claimant drove a truck not to move cargo as part of the loading or unloading process, but between the Port and landward destinations. Whether picking up containers directly at ship side or from the storage yard, claimant trucked it overland away from the Port area or he delivered it from a landward site to the Port. The facts in this case therefore establish that claimant was involved in the land-based stream of commerce and that he was not involved in intermediate steps in the loading process, pursuant to the precedents set by the Supreme Court, and in light of the Ninth Circuit's holding in *Dorris,* 808 f.2d 1362, 19 BRBS 82(CRT). The containers were not simply at a "point of rest" but were ready to enter overland transportation. Consequently, the administrative law judge's conclusion that claimant is not covered by the Act is affirmed. *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (2002).

The Board reverses the administrative law judge's finding that, when engaged in three particular work activities, claimant was involved in the land-based stream of transportation, holding that the administrative law judge's analysis is incompatible with the Supreme Court's rejection of the "point of rest" theory. In performing these duties, claimant, a truck driver, transported containers between a marine terminal and 1) employer's adjacent warehouse; 2) other marine terminals within the same port; and 3) the port railhead. The primary basis for the administrative law judge's conclusion that these activities do not constitute an intermediate step in moving cargo between ship and land transportation is that the containers had already been unloaded from the vessel and placed in storage prior to claimant's involvement, a finding based on the rejected "point of rest" theory. *W.B. v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007).

Scope of Coverage

Steps in the Loading Process

Claimant, a core-driller, was not a longshoreman, and his work had no significant relationship to navigation or commerce on navigable waters. Claimant's activities involved construction of a sewage treatment plant and were therefore unrelated to navigation or maritime commerce. Further, his duties involving loading rods onto barges were for purposes of constructing the plant structure and did not involve longshoring operations under Fusco, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). Laspragata v. Warren George, Inc., 21 BRBS 132 (1988).

Truck driver transporting cargo from a berth at a dock to a berth in a different harbor is not engaged in longshore work when goods are unloaded from the ship and loaded aboard by other workers. Dorris v. Director, OWCP, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987), aff'g Dorris v. California Cartage Co., 17 BRBS 218 (1985).

Noting the Ninth Circuit's statement in *Dorris,* 808 F.2d at 1365, 19 BRBS at 84(CRT), that the facts presented in that case did not require the court to "decide whether moving cargo from berth to berth in the same harbor would be longshore work…," the Board held that claimant, a truck driver, was engaged in covered activity when he transported a container that had missed its intended shipping from one maritime terminal to another terminal within the same port so that the container could be shipped aboard another vessel. *W.B. v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007).

Claimant, who was a sheet metal worker installing dust collector on a grain elevator, was found to be a maritime employee pursuant to Section 2(3) because his activities directly related to the furtherance of maritime commerce, i.e., the loading and unloading of vessels. Furthermore, the question of whether skills utilized by claimant were uniquely maritime in nature is not dispositive of the status inquiry as long as his efforts relate to the furtherance of maritime commerce. Jackson v. Straus Systems, Inc., 21 BRBS 266 (1988).

Claimant's loading and unloading of equipment, material and debris related to employer's work on a breakwater satisfies the status requirement of the Act, since such work is analogous to unloading cargo from a vessel, which is a longshoring activity. Olson v. Healy Tibbits Construction Co., 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds).

Employee is covered if his work is integral to the transfer of cargo from sea to land transportation. Coleman v. Atlantic Container Service, Inc., 22 BRBS 309 (1989), aff'd, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

The 11th Circuit affirmed the Board's decision that the land-based work of a mechanic, which consisted primarily of making out-bound, loaded chassis roadworthy, constituted maritime activity, reasoning that the essential maintenance to make the rigs roadworthy is the last step necessary to complete the loading process. Atlantic Container Service, Inc. v. Coleman, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990).

Claimant, who was injured while building a housing superstructure used on an offshore drilling rig and who spent, at the most, eight hours during his entire four-month tenure with employer offloading such a superstructure was not covered under Section 2(3) of the Act as his loading activities were clearly incidental to his participation in the construction of such superstructures and not integral to the loading and unloading process. *Laviolette v. Reagan Equipment Co.,* 21 BRBS 285 (1988).

Claimant satisfied the status requirement where his job involved connecting and disconnecting hoses through which fuel was pumped to ships, and subsequently flushing those hoses, as this task is necessary to the loading of vessels. *Peter v. Hess Oil Virgin Islands Corp.,* 903 F.2d 935, *reh'g denied,* 910 F.2d 1179 (3d Cir. 1990), *cert. denied,* 498 U.S. 1067 (1991).

Claimant worked as an outside operator at an acid plant. As part of his duties, he was required to perform acid transfers which included setting valves to allow acid to flow in the pipelines from the barges to the proper tanks at the plant as well as monitoring the acid flow to check for leaks and prevent overflows. No transfer could commence without claimant's approval. The Board affirmed the administrative law judge's determination that claimant is a maritime employee, as the acid is "cargo," the acid was in the stream of maritime commerce until the unloading was complete, and as claimant's duties were regular and non-discretionary. *Allen v. Agrifos, LP*, 40 BRBS 78 (2006).

Where claimant loaded crude oil from a fixed platform onto transport barges, and he maintained and repaired the pipelines used in the loading process, the Board affirmed the administrative law judge's finding that claimant's work was essential to the loading process and, therefore, that he is a maritime employee. The Board distinguished claimant's loading activities from the activities of employees on fixed oil platforms who merely loaded personal tools or equipment needed to service oil production wells. As claimant's maritime work comprised 9.7 percent of his work time, the Board affirmed the administrative law judge's finding that this was more than momentary or episodic. Moreover, the Board noted that the status inquiry is occupational in nature, making it irrelevant that claimant was injured while he was performing non-maritime work. *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006).

Driver of a yard hustler used to transport cargo containers between the dockside storage facility of employer and the rail facility is an "employee" under the Act because he plays an integral role in the loading of cargo. Moreover, his "truck" is not a registered vehicle for use on public roads, though it is allowed on portions of a public road necessary to reach dockside, and, although not dispositive, claimant is a member of the Longshoremen's Assoc. *Triguero v. Consolidated Rail Corp.,* 932 F.2d 95 (2d Cir. 1991).

The Board affirms the administrative law judge's finding that claimant is not a covered employee. One of claimant's responsibilities was to make deliveries of cleaning supplies and equipment to commercial vessels 3 or 4 times a day. At the ship claimant would board to discuss the loading of the supplies. If the ship's crane was to be used, claimant would help put merchandise in the net and direct the crew to clear the net from his truck. Occasionally, claimant would hand-deliver items on board, and he testified that he sometimes drove his truck on board the ships to make deliveries. Although the administrative law judge concluded that this was covered activity, it was episodic and not a regular part of claimant's duties. The Board affirmed, noting that the time claimant spent personally loading merchandise onto vessels was minimal compared to his other responsibilities. *Felt v. San Pedro Tomco,* 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT)(9th Cir. 1993).

The Board affirmed the administrative law judge finding's that claimant was not covered under Section 2(3) of the Act, as claimant's duties consisting of washing cars, and occasionally repairing, marking and loading cars for distribution to dealers, was not an integral part of the loading process, but related to the land transportation and preparation of cars for inland shipment. Maintenance of employer's car wash which occupied 90 percent of claimant's time does not qualify, as a car wash rack is clearly not loading equipment and washing cars does not further the loading process. Claimant's activities, occupying the remaining 10 percent of his time, comprising visual damage survey, marking cars for destination, and shuttling tractors from port to yard, cannot be considered the regular performance of maritime operation, as all were performed after unloading was completed. *Odness v. Import Dealers Service Corp.*, 26 BRBS 165 (1992).

Following *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), the Fourth Circuit found that an employee engaged in assisting crane operators in unloading a ship's cargo onto railroad cars was engaged in "maritime employment" at the time he was injured and was thus limited to remedies available under the Longshore Act. The court found this case distinguishable from *Conti*, 566 F.2d 890 (4th Cir. 1977)(in which brakemen engaged in moving trains, and not in the loading and unloading process, were found not to be covered by the Act), since the employee's job involved directing the crane and fastening the cargo on flat-bed railroad cars, duties which the court found to be integral to the ship unloading process. *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993).

The Sixth Circuit, in a case brought under FELA, found that a locomotive engineer who positioned boxcars of coal at dockside to be unloaded by mechanical conveyors which took the coal to the holds of ships was not engaged in "maritime employment" pursuant to Section 2(3), and therefore was not covered under the Longshore Act. In distinguishing this case from *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), the court, relying on *Conti,* 566 F.2d 890 (4th Cir. 1977) (in which the employees were engaged in moving the train and not the loading and unloading process), found that there was a meaningful distinction between loading or unloading ships and loading or unloading rail cars; thus, the court determined that the engineer herein was engaged in the process of overland transportation. *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 26 BRBS 155 (CRT)(6th Cir. 1993), *cert. denied*, 510 U.S. 813 (1993).

The Fifth Circuit affirms the administrative law judge's finding that although a majority of claimant's duties were clerical in nature, he regularly was required to sort, pack and handle cargo destined for loading on ships. Thus, claimant was engaged in longshoring operations and is covered under the Act. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994).

The Board affirmed the administrative law judge's finding that claimant's job of bulldozing bauxite into piles (to flow through trapdoors to an underground conveyer belt) after the bauxite had been deposited on the floor of employer's storage building was not an integral part of the loading and unloading process because the unloading process was complete at the time claimant moved the ore. Claimant only bulldozed the bauxite when it was needed for manufacturing purposes, and the bauxite might rest on the floor for up to three months. The Board, however, agreed to remand the case for the administrative law judge to address claimant's testimony that he also removed debris from the conveyer belts leading from the ships, and restored bauxite which had fallen off them because that testimony, if credited, could establish that claimant performed covered work under the holding in *Schwalb*. *Garmon v. Aluminum Co. of America - Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.,* 29 BRBS 15 (1995).

The Board affirms the denial of coverage for a claimant who unloaded manufactured sugar from a conveyor belt at the sugar plant for land transportation. The product was fully manufactured by the time claimant came into contact with the product, and he did not unload sugar from the ships. As the consignee had taken control of the product by this time, claimant was not involved in the immediate steps between sea and land transportation. *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994).

The Board affirms the administrative law judge's finding that claimant's hearing loss was covered under the Act because some portion of his overall duties which exposed him to noise constituted maritime employment. Claimant at times unloaded barges as a crane operator. *Meardry v. Int'l Paper Co.*, 30 BRBS 160, 162 (1996).

The Board affirms the administrative law judge's finding that claimant's duties as a Cargo Operations Manager, which consisted of preparing for and supervising the loading of employer's barges and which ceased upon the completion of those tasks, is covered by the Longshore Act. The administrative law judge's finding that claimant is a land-based employee based on the totality of his employment is consistent with the Supreme Court's decision in *Chandris*, 115 S.Ct. 2172 (1995). The Board therefore rejects employer's contention that claimant excluded from coverage as a "seaman/member of a crew." *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The Board held that crane operator's work of transloading cargo from trailers, where they had been placed after being unloaded from a vessel, onto railroad cars for further transportation, was covered employment, as claimant was engaged in intermediate steps of moving cargo between ship and land transportation under *Ford,* 444 U.S. 69, 11 BRBS 320 (1979). To hold that claimant's work was not covered because the cargo he was handling had been unloaded five days previously and left on the pier, would revive the "point of rest" theory rejected by the Supreme Court in *Caputo*, 432 U.S. 249, 6 BRBS 160 (1977). Moreover, the determinative issue is the nature of the work a person is doing, rather than whether he is servicing the ship or working on behalf of a consignee. The Board also distinguished *Dorris,* 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987). *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

Where claimant works as a office clerk, and the administrative law judge found that claimant also occasionally works as a checker, the Board vacated the denial of benefits and remanded the case for further consideration using the standard espoused in *Caputo*. The Board held that, if claimant indeed occasionally works as a checker, he is not "exclusively" a clerical employee and is not excluded from coverage by Section 2(3)(A) because he spends "at least some time in indisputably" maritime employment. *Riggio v. Maher Terminals, Inc.,* 31 BRBS 58 (1997).

The Board affirmed the administrative law judge's decision that claimant's work as a truck driver picking up stored cargo at a covered situs lacked status necessary to confer coverage under the Act. Claimant's duties as a tanker-truck driver which required him to load petroleum products from a storage tank at employer's terminal facility into his tanker-truck for overland delivery to area service stations were found not to engage claimant either directly or indirectly in the loading or unloading of a vessel at the time of his injury nor were they intermediate steps in the movement of cargo from ship to shore. The facts of the case supported the administrative law judge's conclusion that claimant was involved in moving a product from its point of delivery to its point of consumption, which is not a maritime activity. *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem. sub nom. Zube v. Director, OWCP,* No. 97-3382 (3d Cir. July 31, 1998).

In this case, claimant drove a truck not to move cargo as part of the loading or unloading process, but between the Port and landward destinations. Whether picking up containers directly at ship side or from the storage yard, claimant trucked it overland away from the Port area or he delivered it from a landward site to the Port. The facts in this case therefore establish that claimant was involved in the land-based stream of commerce and that he was not involved in intermediate steps in the loading process, pursuant to the precedents set by the Supreme Court, and in light of the Ninth Circuit's holding in *Dorris,* 808 f.2d 1362, 19 BRBS 82(CRT). The containers were not simply at a "point of rest" but were ready to enter overland transportation. Consequently, the administrative law judge's conclusion that claimant is not covered by the Act is affirmed. *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (2002).

The Board reverses the administrative law judge's finding that claimant, a truck driver, is not a covered employee, holding that claimant's regular work assignments involving the transporting of containers between a marine terminal and employer's adjacent warehouse, other marine terminals and the railhead, all located within the same port, represent intermediate steps in the movement of cargo between ship and land-based transportation. *W.B. v. Sea-Logix, L.L.C.,* 41 BRBS 89 (2007).

The Board held that decedent, whose job involved maintaining and repairing conveyor belts used to unload bauxite from ships and transport it to employer's storage facility, worked in maritime employment. Initially, the Board held that the administrative law judge erred in establishing a boundary between the state's conveyor belt and employer's, as the unloading of bauxite is not complete until it is delivered to employer's storage facility. Additionally, the Board rejected the administrative law judge's conclusion that decedent's work on the conveyor system is analogous to a truck driver who merely carries the cargo for further transhipment over land, as the cargo at issue was still in the unloading process. Finally, because decedent's work on the conveyor belts constituted a regular, non-discretionary (albeit infrequent) portion of his job, it meets the *Caputo* requirement of "some" time and confers coverage under the Act. Consequently, the Board reversed the administrative law judge's finding that decedent was not a covered employee, and remanded the case for consideration of the remaining issues between the parties. *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997).

The Board affirmed the administrative law judge's decision that claimant satisfied the status requirement for coverage under the Act. First, the Board held that claimant's regular trucking duties, which involved delivering scrap metal from barges to a field 500 feet from the dock where it was stored for later shipment, involved an intermediate step in the process of moving cargo between ship and land transportation, and thus, sufficient to confer coverage under Section 2(3). In addition, the Board affirmed the administrative law judge's finding that claimant's other specific tasks which assisted in the unloading of barges, were not extraordinary or episodic, and formed the regular part of claimant's job assignments. As claimant performed these tasks with employer's tacit approval, the Board rejected employer's assertion that claimant was a gratuitous worker. *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999).

The Board held that claimant, who drove a truck to transport steel products between the ships and the storage facilities, was a covered maritime employee. His work driving a truck was distinguished from those truck drivers who haul cargo over land, as he never left the port area or went to the consignee's place of business. Thus, he performed intermediate steps in the unloading process. *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J., dissenting on other grounds), *aff'd on recon.,* 34 BRBS 127 (2000) (Brown, J., dissenting on other grounds).

The Board affirms the administrative law judge's finding that claimant, who worked at a railyard as a trainman, is a covered employee, as his duties included pinning barges to a "float bridge" which is used to load and unload railcars from barges, and operating the float bridge to facilitate the loading and unloading of rail cars from barges. The Board rejected employer's attempt to distinguish loading and unloading *railcars* and loading and unloading *cargo from railcars*. The Board stated that "cargo" has been held to be many different things and that the Fourth Circuit, in whose jurisdiction this case arises, has declined to adopt a specific "cargo requirement." *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

The Board affirms the administrative law judge's finding that claimant, who worked as a railcar supervisor, is a covered employee, since his duties required him "at least some of the time" to attach hoses from railcar headers to ground headers, an activity which was necessary to commence the transfer of liquid product between railcars and vessels. Moreover, as claimant was injured while attaching such a hose, the Board notes that under the law of the Fifth Circuit, wherein this case arises, claimant also was covered since he was performing maritime employment at the moment of injury. *Schilhab v. Intercontinental Terminals, Inc.,* 35 BRBS 118 (2001).

Mechanics and Repairmen

Container repair is covered employment because it is essential to containers' continued use. Repair and maintenance of equipment is integral to loading process and is, therefore, covered employment. *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

The Eleventh Circuit held that claimant's repair work involving preparing containers and chassis to leave the port in roadworthy condition is covered employment because it is essential to the loading and unloading process. *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990), *aff'g* 22 BRBS 309 (1989).

The Board affirmed the administrative law judge’s finding that claimant established the status requirement as it was undisputed that claimant repaired intermodal containers, some of which were used for maritime purposes. *Arjona v. Interport Maintenance Co., Inc.,* 31 BRBS 86 (1997).

The Supreme Court held that employees injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Thus, railway workers whose work involves repairing and maintaining the machinery used to load coal onto vessels are covered because their work is essential to the loading and unloading process. In a concurring opinion, Justices Blackmun, Marshall and O'Connor express concern that the decision would bring back the problem of employees walking in and out of coverage, depending on the task performed at the time of injury and joining in the majority opinion with the express understanding that it would not affect the Court's ruling in *Caputo* regarding this problem. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989).

The Board affirms the administrative law judge's finding that claimant is covered under the Act as a harbor-worker, or on the ground that he was engaged in maintenance of shipbuilding facilities, where he worked as part of a team involved in the construction and alteration of an area used in the repair or construction of ships as well as facilities used for the purpose of building and servicing nuclear submarines. *Hawkins v. Reid Associates*, 26 BRBS 8 (1992).

The Board held that decedent's employment removing and constructing bulkheads and cutting holes in the roof of employer's warehouse to accommodate the booms of the incoming ships was covered under the Act, noting that when performing this work, decedent was directly involved in the construction and alteration of employer's facility for the purpose of receiving self-unloading ships. Decedent's work in repairing the front end loaders used to load potash from the warehouse to rail or truck and in repairing the bucket elevator used to move potash within the facility also was covered employment as it involved the maintenance of machinery essential to the unloading process. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Where claimant, a welder, worked on replacing old pipelines in a trench that ran along a pier, the Board held that the administrative law judge properly found that claimant was an employee within the meaning of Section 2(3) because claimant was involved in repairing and maintaining equipment essential to the loading or unloading process pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), and he was a harbor-worker directly involved in the construction or alteration of a pier used in the loading and unloading of ships. Although the skills of a welder are not peculiarly maritime in nature, claimant is covered because the purpose of his work is maritime. Further, the fact that the pipes claimant worked on would be transporting non-traditional cargo--steam, fuel and water to the vessels -- does not remove claimant from coverage, where, as here, these products were needed to service the vessels and further their navigational mission. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

The Fourth Circuit affirms the finding that claimant was engaged in covered employment because he installed and repaired pipelines that transported steam, water and fuel -- supplies essential to the operation of a vessel -- from the storage facility through the pier to the ship. The court rejects the notion that claimant is not covered because the pipelines did not convey traditional cargo; steam, water and fuel cannot rationally be distinguished from cargo itself. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993).

<u>Clerical Employees</u> - see also 1984 Amendments

A night dispatcher's duties, requiring that he ensure that the work crews are fully manned to load and unload ships and function throughout the night, are not exclusively clerical, are integral to the longshoring process, and are not performed independently of actual longshoring operations. In addition, claimant's work requiring that he deliver dispatch slips to the foremen on the jobsites subjects him to the hazards associated with longshoring. He is therefore covered by the Act. *Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Association,* 22 BRBS 434 (1989).

Claimant, who performed clerical duties relating to cargo removal and was subject to reassignment as a checker, was engaged in covered employment. Although his injury occurred after the effective date of the 1984 Amendment exclusion of "office clerical workers," this exclusion does not apply to checkers who have traditionally been considered to be maritime workers. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989).

The Board holds that claimant is excluded from coverage under both the 1972 and 1984 versions of Section 2(3), as her employment as a keypunch operator is purely clerical in nature. *See Caputo* and Section 2(3)(A). *Hall v. Newport News Shipbuilding & Dry Dock Co.,* 24 BRBS 1 (1990).

Claimant who, in addition to performing administrative functions in an office on a regular basis, checked in men on the dock for payroll purposes and ensured that work crews were fully manned is covered under the Act. Claimant spent at least some of his time performing functions which were maritime in nature and integral to the loading and unloading process, and thus was not exclusively engaged in office clerical work which would exclude him under Section 2(3)(A). *Jannuzzelli v. Maersk Container Service Co.,* 25 BRBS 66 (1991) (Clarke, J., dissenting).

The Board affirmed the administrative law judge's finding that claimant was excluded from coverage by Section 2(3)(A). Claimant works in an office processing paperwork necessary to authorize the delivery of outbound cargo to truck drivers. The Board found the Third Circuit's decision in *Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), controlling. In *Farrell*, the court stated that a delivery clerk who works in an office is not covered because he is a clerical worker. Although the validity of *Farrell* could be questioned in light of subsequent Supreme Court law, the Third Circuit reaffirmed its validity in *Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992). Moreover, the Board states that claimant is not entitled to coverage by operation of Section 2(3)(A) which the *Rock* court found consistent with *Farrell*. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).

The Board reversed the administrative law judge's finding of coverage for an office-bound reproduction clerk whose duties included copying documents and drawings. The Board held that these duties are purely clerical and that claimant is excluded from coverage under Section 2(3)(A), noting that claimant is not exposed to maritime hazards. *Williams v. Newport News Shipbuilding & Dry Dock Co.,* 28 BRBS 42 (1994), *vacated mem.,* No. 94-1427 (4th Cir. Feb. 3, 1995).

The clerical employee exclusion at Section 2(3)(A) applies only to clerical work performed exclusively in a business office. The Board affirmed the administrative law judge's finding that claimant's duties were performed in a warehouse, which is not characterized by the presence of desks, chairs, computer terminals, copy machines, *etc*. Rather, the warehouse is a large open area where supplies are received, stored and dispensed. The administrative law judge rationally rejected employer's contention that claimant's work area, a cart, should be considered a "rolling business office." Thus, the Board affirmed the administrative law judge's finding that claimant is not excluded from coverage as an office clerical worker pursuant to Section 2(3)(A). *Boone v. Newport News Shipbuilding & Dry Dock Co*., 37 BRBS 1 (2003).

Claimant, who was classified as a joiner-helper and who worked in a trailer-office ordering material for shipbuilding, tracking material, filing, compiling work-station packages, researching budgets and acting as a liaison between the foremen and the planners, is not covered under the Act. The Board discussed the clerical exclusion set forth in Section 2(3)(A) and concluded that, although claimant's work may be integral to the shipbuilding process and she may otherwise be a maritime employee, she exclusively performs clerical work in an office. Thus, she is removed from coverage. *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996).

Observing that the instant case is analogous to *Stone,* 30 BRBS 209 (1996), the Board affirms the administrative law judge's findings that claimant's work as a production clerk is clerical in nature, that it is performed primarily in an office setting, and that claimant's forays outside the office are merely an extension of his office work. The administrative law judge rationally distinguished this case from *Jannuzzelli*, 25 BRBS 66 (1991), because claimant herein did not actually ensure proper manpower on the docks, but merely handled paperwork. Consequently, as the administrative law judge's decision comports with applicable law, her finding that claimant, through application of the clerical exclusion at Section 2(3)(A), is precluded from coverage under the Act, is affirmed. *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998).

The Board rejects claimant's contention that his work as an office-bound delivery clerk performing work related to loading and unloading is sufficient to confer status, citing *Sette*, 27 BRBS 224. Nonetheless, the denial of coverage is vacated and the case remanded because the administrative law judge stated several times that claimant occasionally works as a checker. If this is the case, claimant is not "exclusively" an office clerical worker and thus is not excluded under Section 2(3)(A). *Riggio v. Maher Terminals, Inc.,* 31 BRBS 58 (1997).

In this case addressing the duties of an office clerk/checker, where the parties agreed claimant worked some of the time as a checker, the Board held that claimant did not work "exclusively" as an office clerk and was not excluded by Section 2(3)(A) of the Act. Therefore, the Board reversed the administrative law judge's decision to exclude claimant from coverage based on his office clerical work. *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), *aff'd sub nom. Maher Terminals, Inc. v. Director, OWCP,* 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied,* 540 U.S. 1088 (2003).

Decedent, who was employed as a test engineer, worked 30 percent of his time onboard a barge anchored in Cayuga Lake, New York. The Board reversed the administrative law judge's decision to exclude decedent from coverage pursuant to Section 2(3)(A), since 1) neither the barge itself nor decedent's work station onboard the barge can be deemed a business office, as is required by the plain language of Section 2(3)(A), and 2) the mere fact that the decedent utilizes a computer in his job does not convert him into a clerical worker. *Morganti v. Lockheed Martin Corp.,* 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006).

The Second Circuit affirms the Board's holding that decedent was not excluded from coverage by Section 2(3)(A) of the Act. The court accepted the Director's interpretation that for this subsection to apply the work must fit one of the enumerated positions, and the worker must perform that work exclusively. In this case, there is not substantial evidence that decedent exclusively performed data processing, and there is evidence that his duties as an engineer included analyzing data, which is beyond the scope of the job duties of a data processor as enumerated in the Dictionary of Occupational Titles. *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 126 S.Ct. 2319 (2006).

The Board affirmed the administrative law judge's finding that claimant, who worked as a senior engineering analyst, is not excluded from coverage pursuant to Section 2(3)(A). Claimant did not work "exclusively" in an office setting as required by the Act. Rather, claimant occasionally met with employer's engineers or inspected parts away from his office, and his duties included the reviewing of plan specifications, inspecting parts, verifying that the parts were correct, and consulting with engineers – work which the administrative law judge rationally deemed to require the exercise of judgment and expertise of a kind that goes beyond that typical of clerical work. Moreover, employer employed other specific employees to perform the exclusively traditional clerical functions in claimant's office. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 49 (2005).

Shipbuilding, Ship Repair, Ship-Breaking

Digests

Shipbuilding

Claimant's work maintaining the physical plant, forklifts and cranes at a missile launching systems test facility is not "maritime employment" under the Act since there is no connection with the loading and unloading of ships, and since this work is not done in furtherance of "traditional" maritime activity. Moreover, claimant is not engaged in the building and repairing of submarines because a missile launching system has too tenuous a connection to navigation or maritime commerce, and is not necessary to the seaworthiness of a vessel. The administrative law judge did not err in stating that he found the 1984 amendments to Section 2(3), which are not applicable in this case, "instructive," since he did not rely on them to deny coverage. Wilson v. General Engineering and Machine Works, Inc., 20 BRBS 173 (1988).

A labor-relations assistant who investigated disciplinary problems and employee work-stoppages, represented management in labor disputes and grievances, explained labor contracts at staff meetings, and acted as a liaison between the union and the company, did not meet the status test under Section 2(3) because his function was not sufficiently connected to the employer's shipbuilding and ship-repair processes. Sanders v. Alabama Dry Dock & Shipbuilding Co., 20 BRBS 104 (1987), rev'd, 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988).

Reversing the Board, the court held that claimant's responsibilities as a Labor Relations Assistant satisfy the status test since those responsibilities were significantly related to and directly furthered employer's ongoing shipbuilding and ship repair operations. Pursuant to §2(3), the Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel; additionally, §2(3) "extends coverage to occupations beyond those specifically named by the statute." The court noted that whether particular job skills are uniquely maritime is not dispositive in determining whether the status test is satisfied; rather, the proper focus should be upon whether the purposes served in applying the job skills directly relate to furthering the shipyard concerns of a covered employer. Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988), rev'g 20 BRBS 104 (1987). *But see Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990) (n. 5 suggests the validity of *Sanders* in questionable in light of *Schwalb*).

The Board affirms the administrative law judge's finding that claimant's work as a general manager of employer's shipyard facility is covered under the Act as his work is necessary to the performance of employer's business of shipbuilding and ship repair, consistent with the holding in Sanders. Board rejects employer's contention that claimant's coverage turns upon the fact that he was injured on the gangway of a ship. Mackay v. Bay City Marine, Inc., 23 BRBS 332 (1990).

The Board reverses the administrative law judge and holds that claimant's job as a courtesy-van driver at employer's facility satisfies the status test of Section 2(3), as this employment directly relates to furthering the shipyard concerns of a covered employer. Claimant transports maritime personnel, customers and
customs officials. Rock v. Sea-Land Service, Inc., 21 BRBS 187 (1988), rev'd, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992).

The Third Circuit reverses the Board's holding that a courtesy-van driver is covered under the Act. After a comprehensive review of recent Supreme Court and circuit court cases, the court holds that this employment, although helpful to employer's business, is not indispensable to the loading and unloading process; claimant therefore is not covered under the Act. Sea-Land Service, Inc. v. Rock, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), rev'g 21 BRBS 187 (1988).

Pursuant to Section 2(3) of the 1972 Act, decedent's employment must be considered to be maritime, as employees engaged in any aspect of shipbuilding, including construction of component parts and maintenance of yard buildings are covered employees. There is no basis for concluding that claimant's work on the covered situs in the 1940's was not related to shipbuilding. Martin v. Kaiser Co., Inc., 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

As decedent's work in both the model and joiner ships consisted of building scale model components and battery wedges used in submarine construction is considered to be an aspect of shipbuilding, the Board holds that decedent is covered under Section 2(3) of the post-1972 Act. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom Ins. Co. of N. Am. v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1253 (1993).

Plaintiff, a mechanic at employer's shipyard, who was injured while substituting for a crewman on a barge owned by employer filed suit under the Jones Act. Upholding a district court's grant of summary judgment, the Fifth Circuit held that since a substantial amount of plaintiff's work contributed to the shipbuilding/repair process, he was a maritime employee covered under Section 2(3), and therefore was not covered under the Jones Act, and was excluded under Section 5(b) from bringing an action for negligence against employer or the vessel. *Easley v. Southern Shipbuilding Corp.,* 936 F.2d 839 (5th Cir. 1991), *vacated and remanded*, 503 U.S. 930 (1991), *decision on remand*, 965 F.2d 1 (5th Cir. 1992), *cert. denied,* 506 U.S. 1050 (1993).

Claimant, whose work involved the fabrication of gear box units which control the raising and lowering of legs of floating offshore drilling rigs, was found to be an employee pursuant to Section 2(3) because a floating offshore drilling rig is a vessel under the Act and the gear box was an essential aspect of the vessel as it acted as an anchoring device for it. Claimant was thus a shipbuilder. *McCullough v. Marathon Letourneau Co.,* 22 BRBS 359 (1989).

The Board held that decedent's work installing insulation on concrete barges is covered shipbuilding employment. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The Board affirmed the finding that claimant was engaged in covered employment where his duties included working on vessels over 70 feet in length, redesigning and rebuilding employer's fuel dock and gas house, and expanding employer's marine facilities. *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

Decedent’s duties were performed prior to the vessel’s being completed and placed into operation as a casino, and at the time of the injury and at all times prior, the vessel was under construction. Thus decedent was not employed by a recreational operation under Section 2(3)(B), but by a shipbuilding operation at all times when he worked on the vessel. Although decedent’s duties included wiring the vessel for slot machines, data processing and security systems, electrical wiring is part of the vessel’s construction, and there are no restrictions against coverage for a shipbuilder based on the area of the vessel in which he is working or its intended purpose. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev’d,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 124 S.Ct. 65 (2003).

Decedent, who was employed as the chief engineer of employer's vessel casino, was found excluded from coverage under the recreational operation exception of the Act, Section 2(3)(B), despite the fact that he was injured while the floating casino vessel was under construction, and decedent's job duties, in part, furthered the construction of the vessel. The court holds that the applicability of Section 2(3)(B) turns on the nature of the employing entity and not on the job duties of the employee. Employer's casino is a recreational operation. Thus, decedent is not covered under the Act even if some of his duties expose him to hazards associated with maritime commerce. *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *rev'g* 35 BRBS 121 (2001), *cert. denied*, 124 S.Ct. 65 (2003).

The Board held that a welding trainee who was injured during his probationary period at employer's welding school was not covered under the Act. The Board held that claimant's duties were not integral to shipbuilding as the projects worked on by the trainees do not leave the welding school, claimant could have been terminated for a variety of reasons during the training period, and the successful completion of the training program was not certain. The Board noted that its decision to the contrary in *Hemminger*, 13 BRBS 1099 (1981) was not persuasive authority in view of the intervening case law of *Schwalb* and circuit cases such as *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), and *Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992). *Taylor v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 22 (2005), (Hall, J., dissenting).

<u>Ship Repair</u>

Claimant's work as a propeller repairman was an integral part of the ship-repair process and the administrative law judge erred in denying coverage solely because claimant's work involved the repair of a ship part rather than an actual ship and because the repaired propeller might or might not at some future time again become part of a ship. *Davis v. Doran Co. of California,* 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989).

Claimant injured while repairing an amphibious military vehicle at a storage facility about a mile from the nearest water held to be covered. Since claimant's usual employment was repair of ships, which has been recognized as covered maritime employment, claimant satisfied status test of Section 2(3). *Stevens v. Metal Trades, Inc.,* 22 BRBS 319 (1989).

Decedent's work repairing and renewing a shipyard's boilers constitutes maritime employment, since maintenance of shipyard facilities is essential to the building and repairing of ships. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

The Board noted that the administrative law judge erroneously found the status test was not met on grounds that claimant's duties cleaning up a storage yard where materials used by employer in a variety of maritime and non-maritime construction projects constituted "support services" but affirmed the administrative law judge's ultimate determination that claimant was not a "harbor worker." Claimant's duties did not further maritime commerce in any way. Bazemore v. Hardaway Constructors, Inc., 20 BRBS 23 (1987).

Since a "pier" is commonly defined as "a structure (as a breakwater) extending into navigable water...to protect or form a harbor," claimant, a piledriver engaged in the repair of a breakwater located offshore of a nuclear facility, was covered under the Act as a harbor-worker. Olson v. Healy Tibbitts Construction Co., 22 BRBS 221 (1989) (Brown, J., dissenting).

The Board held that claimant satisfied the status test because his employment constructing a pier extending into navigable water was inherently maritime in nature, despite the fact that, at the moment of injury, claimant had temporarily departed from his construction work and was moving a sailboat across land. The Board rejected employer's argument that such employment was not covered under the Act because claimant was not specifically engaged in loading or unloading a vessel. Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

Claimant engaged in repairing a seawall, which was located by a highway and served no maritime purpose, held not covered by the Act. Silva v. Hydro-Dredge Corp., 23 BRBS 123 (1989).

Claimant's work as a form carpenter assisting in the modification of a pier was held to be maritime in nature and sufficient to establish status. Ripley v. Century Concrete Services, 23 BRBS 336 (1990).

Given that claimant's linesman's duties were the same whether on land or on the skiffs, that mooring vessels may rationally be viewed as part of the loading and unloading process, and that the services of a linesman have never been performed by a member of a crew, the Board affirmed the administrative law judge's finding that claimant was a land-based harborworker. Griffin v. T. Smith & Son Inc., 25 BRBS 196 (1991).

The Board affirms the administrative law judge's finding that claimant was covered under the Act as a harbor-worker, where he worked as part of a team involved in the construction and alteration of an area used in the repair or construction of ships as well as facilities used for the purpose of building and servicing nuclear submarines. *Hawkins v. Reid Associates*, 26 BRBS 8 (1992).

The Board held that claimant's employment removing and constructing bulkheads and cutting holes in the roof of employer's warehouse to accommodate the booms of the incoming ships was covered under the Act, noting that when performing this work, decedent was directly involved in the construction and alternation of employer's facility for the purpose of receiving self-unloading ships. Decedent's work in repairing the front end loaders used to load potash from the warehouse to rail or truck and in repairing the bucket elevator used to move potash within the facility also was covered employment as it involved the maintenance of machinery essential to the unloading process. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Where claimant, a welder, worked on replacing old pipelines in a trench that ran along a pier, the Board held that the administrative law judge properly found that claimant was an employee within the meaning of Section 2(3) because claimant was involved in repairing and maintaining equipment essential to the loading or unloading process pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989), and he was a harbor-worker directly involved in the construction or alteration of a pier used in the loading and unloading of ships. Although the skills of a welder are not peculiarly maritime in nature, claimant is covered because the purpose of his work is maritime. Further, the fact that the pipes claimant worked on would be transporting non-traditional cargo--steam, fuel and water to the vessels -- does not remove claimant from coverage, where, as here, these products were needed to service the vessels and further their navigational mission. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

The Fourth Circuit affirms the finding that claimant was engaged in covered employment because he installed and repaired pipelines that transported steam, water and fuel -- supplies essential to the operation of a vessel -- from the storage facility through the pier to the ship. The court rejects the notion that claimant is not covered because the pipelines did not convey traditional cargo; steam, water and fuel cannot rationally be distinguished from cargo itself. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993).

Because decedent's primary work duties as a diver related to pier and dock construction, the Board affirmed the administrative law judge's finding that decedent was a harbor worker and not a member of a crew despite the fact that he sometimes worked off barges. *Bundens v. J.E. Brenneman Co.,* 28 BRBS 20 (1994), *aff'd in pert. part,* 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

The Third Circuit affirmed the finding that decedent was a harbor worker where his primary duties were that of a dock builder and that his duties aboard the barge were in furtherance of this employment, despite the fact the employment involved other duties as well. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995), *aff'g in pert. part* 28 BRBS 20 (1994).

The Board affirmed the finding that claimant was engaged in covered employment where his duties included working on vessels over 70 feet in length, redesigning and rebuilding employer's fuel dock and gas house, and expanding employer's marine facilities. *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

On remand from the Ninth Circuit, 989 F.2d 1547, 26 BRBS 180 (CRT), the Board addresses the status issue reserved in its initial decision, 24 BRBS 94. The Board holds that claimant, a pile driver on a pier, is covered under the Act as a harbor worker. The fact that the pier does not have a maritime purpose is irrelevant as it is an enumerated situs under the Ninth Circuit's decision in this case, and claimant's work on this pier subjected him to the dangers of a marine environment. *Hurston v. McGray Construction Co.*, 29 BRBS 127 (1995) (decision on remand), *rev'd,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999).

The Ninth Circuit reverses Board's holding that claimant, a pile-driver injured on an oil production pier, is covered under the Act as a harbor worker. The pier in this case does not serve a maritime purpose in that the pier in no way accommodated ships; that the court held this "pier" to be a covered situs does not confer status. Claimant's task did not differ materially from the platform construction in *Herb's Welding,* 470 U.S. 414, (1985), which was held not to be covered employment. The court rejected the Board's reasoning that claimant should be deemed a harbor worker because he was exposed to a maritime environment, holding that this is relevant to situs, rather than to status. *McGray Constr. Co. v. Hurston,* 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g* 29 BRBS 127 (1995).

The Second Circuit held that claimant, a pile driver and laborer who constructed and repaired bulkheads, piers and floating docks, who was injured while repairing a bulkhead, satisfied the status requirements of the Act. Specifically, the court held that claimant's general employment of building piers and docks establishes the requisite connection to ships and qualifies him as a "harbor worker." *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 119 S.Ct. 444 (1998).

The Board affirms the finding that claimant, the harbor master of a permanently moored vessel restaurant and its dock, is not excluded from coverage by Section 2(3)(B). Claimant's employment involved both the routine maintenance and significant repair of the dock, the supervision of commercial and pleasure vessels moored at the dock, the positioning of the dock and restaurant in relation to the height of the river, as well as the routine maintenance of the vessel, its gangway and its parking lot. Moreover, claimant at times engaged in work on or with other barges and tugboats owned by the parent corporation. This work is properly characterized as traditional maritime employment or harbor work, and the legislative history to the 1984 Amendments clarifies that not all employees of a restaurant are excluded from coverage. Rather coverage depends on whether the duties further maritime commerce and expose claimant to maritime hazards Citing *Green*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), the Board focused on whether the claimant's duties solely further the operation of a "restaurant" within the plain meaning of that term, and held that they do not, as claimant's day to day employment was on the dock. *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999).

In a footnote, the Board states that decedent's job with employer, a company hired to dredge a navigable ship channel, is that of a "harbor-worker," a position explicitly covered by Section 2(3) of the Act. *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001).

The Board affirms the administrative law judge's finding that claimant's job of removing pilings from the bank of the bayou and placing them in dumpsters does not satisfy the status requirement. The job was not maritime work because it was not established that it was related to the loading, unloading, building, or repairing of vessels, or to building or repairing a harbor facility used for such activity. No evidence was adduced as to what was to be done to the area once the pilings were removed. *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).

The Ninth Circuit defers to the Director's reasonable interpretation of "harbor worker." A "harbor worker" includes persons directly involved in the construction of a maritime facility, even if their specific job duties are not uniquely maritime in nature. In this case, the decedent was engaged in digging trenches for utility lines as part of a contract to replace berthing wharves which accommodate submarines. The court affirmed the finding that decedent was a maritime employee. *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006).

General

Claimant's work maintaining the physical plant, forklifts and cranes at a missile launching systems test facility is not "maritime employment" under the Act since there is no connection with the loading and unloading of ships, and since this work is not done in furtherance of "traditional" maritime activity. Moreover, claimant is not engaged in the building and repairing of submarines because a missile launching system has too tenuous a connection to navigation or maritime commerce, and is not necessary to the seaworthiness of a vessel. The administrative law judge did not err in stating that he found the 1984 amendments to Section 2(3), which are not applicable in this case, "instructive," since he did not rely on them to deny coverage. Wilson v. General Engineering and Machine Works, Inc., 20 BRBS 173 (1988).

Claimant, a core-driller, was not a longshoreman, and his work had no significant relationship to navigation or commerce on navigable waters. Claimant's activities involved construction of a sewage treatment plant and were therefore unrelated to navigation or maritime commerce. Further, his duties involving loading rods onto barges were for purposes of constructing the plant structure and did not involve longshoring operations under Fusco, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). Laspragata v. Warren George, Inc., 21 BRBS 132 (1988).

A labor-relations assistant who investigated disciplinary problems and employee work-stoppages, represented management in labor disputes and grievances, explained labor contracts at staff meetings, and acted as a liaison between the union and the company, did not meet the status test under Section 2(3) because his function was not sufficiently connected to the employer's shipbuilding and ship-repair processes. Sanders v. Alabama Dry Dock & Shipbuilding Co., 20 BRBS 104 (1987), rev'd, 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988).

Reversing the Board, the court held that claimant's responsibilities as a Labor Relations Assistant satisfy the status test since those responsibilities were significantly related to and directly furthered employer's ongoing shipbuilding and ship repair operations. Pursuant to §2(3), the Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel; additionally, §2(3) "extends coverage to occupations beyond those specifically named by the statute." The court noted that whether particular job skills are uniquely maritime is not dispositive in determining whether the status test is satisfied; rather, the proper focus should be upon whether the purposes served in applying the job skills directly relate to furthering the shipyard concerns of a covered employer. Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085, 21 BRBS 18 (CRT)(11th Cir. 1988), rev'g 20 BRBS 104 (1987). *But see Atlantic Container Service, Inc. v. Coleman,* 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990) (n. 5 suggests the validity of *Sanders* in questionable in light of *Schwalb*).

Board reverses the administrative law judge and holds that claimant's job as a courtesy-van driver at employer's facility satisfies the status test of Section 2(3), as this employment directly relates to furthering the shipyard concerns of a covered employer. Claimant transports maritime personnel, customers and customs officials. Rock v. Sea-Land Service, Inc., 21 BRBS 187 (1988), rev'd, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992).

The Third Circuit reverses the Board's holding that a courtesy-van driver is covered under the Act. After a comprehensive review of recent Supreme Court and circuit court cases, the court holds that this employment, although helpful to employer's business, is not indispensable to the loading and unloading process; claimant therefore is not covered under the Act. Sea-Land Service, Inc. v. Rock, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), rev'g 21 BRBS 187 (1988).

The Board affirms the administrative law judge's finding that claimant's work as a general manager of employer's shipyard facility is covered under the Act as his work is necessary to the performance of employer's business of shipbuilding and ship repair, consistent with the holding in Sanders. Board rejects employer's contention that claimant's coverage turns upon the fact that he was injured on the gangway of a ship. Mackay v. Bay City Marine, Inc., 23 BRBS 332 (1990).

The Eleventh Circuit affirmed the district court's summary judgment that claimant, a land-based electrician who had contracted to do work at a marine lab on an island off the Georgia coast, and who was injured on navigable waters in a co-worker's boat, is not covered under Section 2(3). Claimant's regular duties consisted primarily of wiring homes and commercial buildings; he had no connection to traditional loading or unloading activities' there was nothing inherently maritime about his electrician tasks; the maritime environment in which he was injured had no connection to the "general nature" of his employment but merely was his mode of transportation to this particular jobsite; and claimant's only connection with water was incidental to land-based employment. Brockington v. Certified Electric, Inc., 903 F.2d 1523 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991).

The Board affirmed the administrative law judge's conclusion that claimant, a messman/cook who worked in employer's crews' mess on the wharf, was not a maritime employee under Section 2(3). The Board held that claimant's work preparing and serving meals to the officers and seamen of employer's tankers failed to meet the status requirement since there was no connection with the loading and unloading of ships, and since the work was not done in furtherance of "traditional" maritime activity. On reconsideration, the Board affirmed its holding, rejecting claimant's argument that his work as a messman was directly linked to the loading and unloading of ships and that his work was in aid of employer's seafaring and navigational activities. Coloma v. Chevron Shipping Co., 21 BRBS 200 (1988), aff'd on reconsideration, 21 BRBS 318 (1988), aff'd sub nom. Coloma v. Director, OWCP, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), cert. denied, 498 U.S. 818 (1990).

The Ninth Circuit affirms the Board's decision holding that claimant was not engaged in maritime employment since his duties as a messman/cook were not essential elements of the loading and unloading process, and that, therefore, claimant was not covered under Section 2(3). The court refers to the Supreme Court's "essential elements of loading and unloading" test as more restrictive that the Weyerhaeuser "significant relationship" test and notes that the 11th Circuit's decision in Sanders uses a standard similar to Weyerhaeuser. Claimant's duties herein were not essential because after the Seagull Inn closed employer's longshoring operation continued. Coloma v. Director, OWCP, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), aff'g Coloma v. Chevron Shipping Co., 21 BRBS 200 and 21 BRBS 318 (1988), cert. denied, 498 U.S. 818 (1990).

Citing *Coloma*, 897 F.2d 394 23 BRBS 136(CRT)(9th Cir. 1990), and *Rock*, 953 F.2d 67, 25 BRBS 121(CRT) (3d Cir. 1992), the Board affirmed the administrative law judge's finding that decedent is not covered under the Act pursuant to Section 2(3) as his duties, which were strictly janitorial, were not integral to the loading, unloading, building or repairing of vessels. In rendering its holding, the Board distinguished the instant case from the decisions in *Spear,* 25 BRBS 132 (1991), and *Holcomb,* 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), inasmuch as the duties of the claimants in those cases were much more closely associated with and integral to the shipbuilding process. *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision in this case where claimant did not satisfy the Section 2(3) status requirement. It was undisputed that claimant was a janitor who cleaned bathrooms, offices, and the cafeteria. She did not clean shipbuilding equipment or production areas around the equipment, and her job thus is distinguishable from those in *Schwalb, Sumler, Ruffin,* and *Watkins*. The Board affirmed the administrative law judge's reliance on *Gonzalez*, 33 BRBS 146, and held that the undisputed facts lead to but one legal conclusion – claimant's janitorial job is not integral to employer's shipbuilding operation. *B.E. v. Electric Boat Corp.*, __ BRBS __ (2008).

The claimant in this case was a union shop steward. The Second Circuit affirmed the finding that claimant was covered under the Act as his duties were integral or essential to employer's operation of loading and unloading ships. The court rejected employer's contention that claimant is not covered because he was not continuously present on the docks, as inconsistent with *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT) (1989). Moreover, it is irrelevant that the work that claimant performed was the same as that performed in non-covered industries. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001), *aff'g* 34 BRBS 112 (2000).

The Board affirms the administrative law judges' findings that the claimants' work as workers' compensation claims examiners was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), as there was a lack of persuasive evidence that their failure to perform their jobs would impede the shipbuilding process. The cases are distinguishable from *Sanders*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988) and *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), as the claimants did not interact with other employees and supervisors to the same extent. Rather, their work was more like that in *Coloma*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), and *Sea-Land Serv. Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), where the employees' work was helpful, but not indispensable, to the loading process. Board also cites *Neely*, 12 BRBS 859 (1980), as authority on this issue, although the case has been partly overruled. *Buck v. General Dynamics Corp./Electric Boat Div.,* 37 BRBS 53 (2003).

The Seventh Circuit affirmed district court's grant of summary judgment dismissing claimant's Section 5(b) claim for lack of subject matter jurisdiction based on claimant's inability to demonstrate that he was engaged in maritime employment. Claimant suffered injuries while working as a director of safety training with regard to a casino vessel and did not establish that he had any connection with the loading or construction of ships. *Scott v. Trump Indiana, Inc.*, 337 F.3d 939, 37 BRBS 83(CRT)(7th Cir. 2003), *cert. denied,* 540 U.S. 1075 (2003).

The Board affirmed the administrative law judge's finding that claimant is not a covered employee as his work was not an essential element of the loading process. Claimant's work on a road project was directed at providing a helpful improvement in the ports' roadways rather than an indispensable aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project designed to improve the movement of the rail cars and trucks in land transportation in the future and the actual task of loading and unloading containers from ships on the docks or in moving cargo in intermediate steps within the port. *Terlemezian v. J.H. Reid General Contracting*, 37 BRBS 112 (2003).

Bridge Builders

While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. In this case, claimant was employed solely to paint an existing bridge. Accordingly, there is no evidence that claimant's employment aided navigation, as in LeMelle, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), or in any other way related to any of the above purposes, and the administrative law judge properly found that claimant did not establish status under the Act. Johnsen v. Orfanos Contractors, Inc., 25 BRBS 329 (1992).

Claimant's work involving the construction of concrete pile caps on top of already installed pilings on a bridge project is not covered employment. Unlike in *LeMelle*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), the bridge project in this case made the waterway less navigable because of the lower clearance. *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994).

Claimant's work as an ironworker repairing bridge structures carried on barges and loading and unloading construction material and bridge parts constitutes covered employment under the Act. The Board rejected employer's argument that these items do not constitute "traditional cargo," noting that neither *Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT), nor *Rock*, 953 F.2d 56, 25 BRBS 112 (CRT), restricts loading and unloading activities to "traditional cargo" but instead they hold that employees who are vital to the loading and unloading process are covered employees. Additionally, the Board cited agreement in the courts of appeals that the loading and unloading of construction materials is considered a traditional longshoring activity. *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996).

The Board affirms the alj's finding that claimant, a journeyman ironworker performing bridge construction, does not fall within the *LeMelle* exception allowing coverage of bridge workers under the Act because there is no evidence the bridge herein would aid navigation. Further, the Board held that claimant is not a covered employee, as the Second Circuit, pursuant to *Fusco*, 622 F.2d 1111, 12 BRBS 328, considers that a worker who unloads materials from a barge for the purpose of constructing a non-maritime structure is not engaged in maritime employment. The Board noted the differing opinions of other circuits. *Crapanzano v. Rice Mohawk, U. S. Construction Co., Ltd.*, 30 BRBS 81, 83 (1996).

The Board reversed the administrative law judge's finding that decedent, a bridge construction worker who was killed when he fell to the base of the bridge structure, was injured upon navigable waters. The Board relied on the precedent that bridges are extensions of land despite the flow of navigable waters beneath them, *Nacirema*, 396 U.S. 347 (1969). After thoroughly discussing and distinguishing those cases where bridge builders were covered because they worked on vessels upon actual navigable waters, and after distinguishing *LeMelle,* 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), which did not address the situs issue, the Board held that the evidence did not satisfy the pre-1972 Amendment requirement for situs. As the Eleventh Circuit previously held that the evidence in this case did not establish post-1972 Amendment coverage, the Board held that decedent's death is not compensable under the Act. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000).

The Board affirms the administrative law judge's finding that claimant is covered under the Act pursuant to *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), by virtue of his work on a crane on a jack-up vessel used to secure pilings to a bridge under construction. As the administrative law judge properly determined that claimant's injury occurred on navigable waters, there was no need for him to separately consider the issues of situs and status in this case. Moreover, the Board noted that employer's reliance on the Supreme Court's holding in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), and the Board's holdings in *Pulkoski*, 28 BRBS 298 (1994), and *Crapanzano*, 30 BRBS 81 (1996), are misplaced, as it is not the designation of claimant as a "bridge worker" or his work on a bridge itself which conveys coverage. Rather, it is his employment on actual navigable waters at the time of injury which determines the applicability of the Act. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

Support Services

General

The Board noted that the administrative law judge erroneously found the status test was not met on grounds that claimant's duties cleaning up a storage yard where materials used by employer in a variety of maritime and non-maritime construction projects constituted "support services" but affirmed the administrative law judge's ultimate determination that claimant was not a "harbor worker." Claimant's duties did not further maritime commerce in any way. Bazemore v. Hardaway Constructors, Inc., 20 BRBS 23 (1987).

Claimant, who performed clerical duties relating to cargo removal and was subject to reassignment as a checker, was engaged in covered employment. Although his injury occurred after the effective date of the 1984 Amendment exclusion of "office clerical workers," this exclusion does not apply to checkers who have traditionally been considered to be maritime workers. Caldwell v. Universal Maritime Service Corp., 22 BRBS 398 (1989).

Claimant's employment as a key machine operator at a shipyard does not constitute covered employment under amended Section 2(3). Claimant's duties involved word processing and generating labels and were thus office clerical work excluded by Section 2(3)(A). Although the definition of maritime employment in Section 2(3) contains broad inclusive language, Congress has now provided specific exclusions from its terms for persons falling with the categories enumerated in subsections (A) through (H). Bergquist v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 131 (1989).

Relying primarily on *Schwalb*, 493 U.S. 40, 23 BRBS (1989), the United States Court of Appeals for the Third Circuit reversed the Board's decision and found that a "courtesy van" driver who transported passengers primarily within his employer's marine terminal was not engaged in "maritime employment" under Section 902(3). The court concluded that land-based activity, other than those activities explicitly listed in Section 2(3), should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel. The fact that claimant may have occasionally transported longshoremen was not determinative as his job description did not include such services and separate buses existed to transport the longshoremen. The court indicated that it could not provide coverage for such infrequent activity. *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), *rev'g* 21 BRBS 187 (1988).

Citing to *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT)(1989), which supports the proposition that employees who perform general cleaning duties may be covered under the Act if those duties are integral to the overall ship construction process, as well as *Graziano,* 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), the Board held that the administrative law judge erred in focusing on the description of claimant's job duties as janitorial rather than on whether the duties themselves were integral to the shipbuilding process. To the extent the administrative law judge relied on the "support services" rationale, the decision is erroneous as that test has been disavowed. The Board vacated the determination that claimant was not covered under Section 2(3) since her general cleaning duties did not have a sufficiently strong nexus with loading, unloading, or shipbuilding, and remanded the case for consideration of whether claimant's work sweeping and disposing of waste from machinery was essential to the building and repairing of ships. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.,* 34 BRBS 153 (2000); *see also Sumler v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 97 (2000).

The Board reverses the administrative law judge's finding that claimant is not a covered employee. Claimant's work is integral to the shipbuilding and ship repair process, as she was required to sweep around machines to clear debris dropped from the machinery, to empty 55-gallon drums filled with waste products, and to stock eye safety supplies. She performed her job while the machinery was in operation and had to wear a hard hat and safety goggles. The administrative law judge failed to draw the rational inference that claimant's failure to perform her job would eventually impede the shipbuilding process. Pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), and *Watkins*, 35 BRBS (2002), it is not dispositive that claimant's contribution to the process is not continuous, or that the effects of her failure to perform her job would lead to an immediate impediment to the process. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002).

The Board affirmed the administrative law judge's grant of employer's motion for summary decision in this case where claimant did not satisfy the Section 2(3) status requirement. It was undisputed that claimant was a janitor who cleaned bathrooms, offices, and the cafeteria. She did not clean shipbuilding equipment or production areas around the equipment, and her job thus is distinguishable from those in *Schwalb, Sumler, Ruffin,* and *Watkins*. The Board affirmed the administrative law judge's reliance on *Gonzalez*, 33 BRBS 146, and held that the undisputed facts lead to but one legal conclusion – claimant's janitorial job is not integral to employer's shipbuilding operation. *B.E. v. Electric Boat Corp.*, __ BRBS __ (2008).

Security Guards

The Board affirmed the administrative law judge's finding that claimant, a guard and watchman, is covered under the Act, and is not excluded by Section 2(3)(A). Claimant did not work exclusively as a security guard, as he performed fire and safety duties, and he regularly spent several hours a night on duty on submarines which is integral to the shipbuilding process. If claimant spends some of his time in indisputably covered activity, he is not engaged in exclusively security guard work, as it was not the intent of Congress to deprive traditional maritime employees who are exposed to hazards associated with shipbuilding of coverage by virtue of the 1984 Amendments. Spear v. General Dynamics Corp., 25 BRBS 132 (1991).

The Board holds that the administrative law judge erred in finding claimant excluded as a security guard under Section 2(3)(A) of the Act. Claimant was primarily a traffic officer, but also was an alternate marine patrol officer who had a reasonable expectation of being called upon to perform duties in a boat on navigable waters. Though claimant infrequently performed such duties, they nonetheless were a regular part of his overall job responsibilities. Moreover, the Board holds that the security guard exclusion does not apply to one who is subjected to traditional maritime hazards, even if, broadly speaking, the claimant is engaged in "security work." The legislative history to the 1984 Amendments makes clear that Congress intended to narrowly exclude those security guards who are exclusively land-based and who thus are not exposed to the dangers of work on navigable waters. *Dobey v. Johnson Controls*, 33 BRBS 63 (1999).

Offshore Drilling

The Board hold that claimant, who was injured while building a housing superstructure used on an offshore drilling rig and who spent, at the most, eight hours during his entire four-month tenure with employer offloading such a superstructure was not covered under Section 2(3) of the Act as his loading activities were clearly incidental to his participation in the construction of such superstructures and not integral to the loading and unloading process. Laviolette v. Reagan Equipment Co., 21 BRBS 285 (1988).

Claimant, who spent "at least some of [his] time" fabricating and repairing parts for vessels and loading and unloading component parts for fixed offshore oil-drilling platforms, was a "maritime employee" within the meaning of the Act, although he was also responsible for fabricating and repairing parts for offshore oil-drilling rigs. Smith v. Universal Fabricators, Inc., 21 BRBS 83 (1988), aff'd, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).

The United States Court of Appeals for the Fifth Circuit affirmed the Board's holding that claimant satisfied the status requirement where although he was engaged in nonmaritime activities on the day he was injured, he spent a significant portion of his time in indisputably longshore operations. An employee may establish status based either on the maritime nature of his activity at the time of his injury or upon the maritime nature of his work as a whole. Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990).

The Fifth Circuit holds that claimant is not covered under Section 2(3) as his employment was in furtherance of the non-maritime function of offshore drilling, citing *Herb's Welding*. The fact that claimant loaded and unloaded supplies from his boat and repaired the boat are insufficient to confer coverage as these duties were performed to further the maintenance of the wells. *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1994), *aff'g on other grounds* 23 BRBS 180 (1990) and 25 BRBS 336 (1992) (decision on recon. *en banc*), *cert. denied*, 511 U.S. 1086 (1994).

Injury over Navigable Waters

Claimant, a core-driller for employer, a subcontractor of Perini North River Associates, which was building the sewage treatment plant extending over the Hudson River, was not injured over navigable waters when he was injured while moving machinery on a platform affixed to the bedrock of the Hudson River. Laspragata v. Warren George, Inc., 21 BRBS 132 (1988).

The Board affirms finding of status for claim arising in the Fifth Circuit. Claimant was injured performing an electrical repair estimate on board a ship. The Board holds that claimant is a covered employee under the rational of both Perini, 459 U.S. 297, 15 BRBS 62 (CRT) (1983) (i.e., injury on navigable waters), and the Fifth Circuit's moment of injury status test. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989).

A claimant satisfies both the status and situs tests if his injury occurs upon actual navigable waters. The Board follows Ward v. Director, OWCP, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982) to hold that claimant, an aircraft pilot injured performing work-related fish spotting duties "over" navigable water, was injured upon actual navigable waters. The Board rejects the argument that claimant's occupation as a fish spotter is not an occupation traditionally entitled to coverage under the Act before the 1972 Amendments. Barnard v. Zapata Haynie Corp., 23 BRBS 267 (1990), aff'd, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991).

The Fourth Circuit affirms the Board's holding that claimant, an airplane pilot engaged in fish spotting over actual navigable waters, is covered under the Act. Because he was engaged in a traditional maritime activity he would have been covered under the pre-1972 Act. It is not material that claimant did not come into contact with the water because he regularly flew over it and was not fortuitously over water when his injury occurred. Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), aff'g 23 BRBS 267 (1990).

Claimant contended his deep-vein thrombosis was caused by prolonged sitting during flights between Virginia and Hawaii where he was sent by employer to install sheet metal on a vessel. The Board held that claimant did not meet the situs requirement. Specifically, the Board held that the commercial plane in which claimant flew over the continental U.S. and the Pacific Ocean was not a covered situs prior to the 1972 Amendments, was not an enumerated area, and was not an “other adjoining area” within the meaning of Section 3(a). In holding that it was not an area covered prior to 1972, the Board distinguished this case from *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), which involved an injury to a fish-spotter who flew at low altitudes in a plane to direct fishing boats to large schools of fish. The Board held that the fish-spotting job was a traditional maritime job that required the employee to work over navigable waters. However, the purpose of claimant’s flight over navigable waters was merely to commute to a specific job – it was not a regular part of claimant’s work. *C.C. v. Tecnico Corp.*, 41 BRBS 129 (2007).

The Board affirms the administrative law judge's finding that claimant, who was injured on a pontoon in a flume containing water which circulated into and out of the heating and cooling system of the World Trade Center, was not injured on actual navigable waters. The water in the flume is not capable of supporting commerce and had been permanently withdrawn from the Hudson River. The Board also affirmed the finding that the flume could not be made navigable again with reasonable improvements. LePore v. Petro Concrete Structures, Inc., 23 BRBS 403 (1990).

The Board reverses the administrative law judge's finding that claimant, who was injured while diving into a reservoir tank in the basement of a paper factory was injured on actual navigable waters. The reservoir was surrounded by walls, was not designed to support commerce by water, and could not be navigated. The administrative law judge erred in focusing on the navigability of the river that flows into the tank. Moreover, as this area is not an enumerated site and is not an adjoining area, situs is not otherwise established. *Rizzi v. Underwater Construction Corp.*, 27 BRBS 273 (1994), *aff'd on recon.,* 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996).

The Sixth Circuit held that claimant, employed as a diver, did not meet the situs requirement as the reservoir located under the paper plant, where he was injured while working, was not a navigable waterway, and thus affirmed the Board's reversal of the administrative law judge's finding to the contrary. The court agreed with the reasoning of the Board that a navigable waterway ends where underground pipes and vents remove water from a river to a reservoir or tank for manufacturing or storage purposes. In addition, the court affirmed the Board's holding that claimant did not meet the situs requirement under Section 3(a) as the site is also not an enumerated site or an adjoining area. *Rizzi v. Underwater Construction Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *aff'g* 27 BRBS 273, *aff'd on recon.*, 28 BRBS 360 (1994), *cert. denied*, 519 U.S. 931 (1996).

Because claimant was injured while standing in navigable waters in the course of his employment as a dredgerman, the Board reverses the administrative law judge's finding that the status test was not met, following Perini. The Board notes that the Supreme Court recognized the continued validity of Perini in Herb's Welding. Center v. R & D Watson, Inc., 25 BRBS 137 (1991).

Claimant, a harbor pilot, was injured on actual navigable waters, and thus is covered under Perini, as it was the intent of the 1972 Amendments to expand coverage to shore-based workers, not to narrow coverage for those who would have been covered pre-1972. The court holds that seaward coverage under the Act does not depend on the nature of the workers' duties, and that an injury occurring on actual navigable waters satisfies both the status and situs tests (unless a specific exception applies). Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991), cert. denied, 503 U.S. 907 (1992).

Claimant, an oil production worker, who was injured while unloading equipment from a crewboat docked on navigable waters, was held to have met the status test as well as the situs test. Fontenot v. AWI, Inc., 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991).

The Fifth Circuit decides the issue left open in *Perini* and *Herb's Welding* regarding an employee who is injured while transiently or fortuitously on actual navigable waters, holding such a person covered under the Act. The court holds that such is result is compelled by its holding in *Fontenot*. *Randall v. Chevron U.S.A., Inc.,* 13 F.3d 888 (5th Cir. 1994), *cert. denied*, 513 U.S. 994 (1994).

Black-letter law on coverage under the Act prior to the 1972 Amendments, and the applicability of this law to cases arising under the 1972 and 1984 Amendments. In this case, the administrative law judge properly concluded that claimant was not injured on actual navigable waters and thus is not covered under the Act pursuant to the law in effect prior to the 1972 Amendments. Claimant was injured while painting an existing in-use bridge which was permanently affixed to land at both ends. The administrative law judge properly distinguished this case from LeMelle, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), as this bridge was not under construction. Johnsen v. Orfanos Contractors, Inc., 25 BRBS 329 (1992).

The Board affirmed the administrative law judge's finding that decedent's work on a dry dock constitutes work on actual navigable waters under *Perini*, as the pre-1972 Act definition of navigable waters includes a dry dock. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The Board affirms the administrative law judges' findings that claimants are not covered under *Perini*, as they rationally concluded that claimants were injured on dry land, and not on water. *Pulkoski v. Hendrickson Bros., Inc.,* 28 BRBS 298 (1994); *Eckhoff v. Dog River Marina & Boat Works Corp.,* 28 BRBS 551 (1994).

Claimant was injured on dry land next to the Columbia River. This land was not and never had been part of the river, but eventually the area was to become a navigational lock. The Board affirmed the administrative law judge's finding that claimant was not injured on actual navigable waters as the area was always dry land, and in the cases cited by claimant, the dry land had previously been submerged under navigable waters. The fact that the land would be submerged in the future does not render the site navigable at the time of injury. *Nelson v. Guy F. Atkinson Construction Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996).

The Board affirmed the administrative law judge's conclusion that claimant's injury, which occurred when he slipped on a gangplank and fell onto a dock, occurred over navigable waters and qualifies him as a maritime employee under *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT). Because a gangplank used for ingress and egress of a vessel is considered part of the vessel and because injuries occurring on gangplanks fall within the realm of admiralty law, the Board, after analyzing Supreme Court precedent and distinguishing *Nacirema*, 396 U.S. 212, determined that the place of the inception of an injury-causing incident is the critical element in ascertaining whether admiralty or state jurisdiction applies. Consequently, the Board held that an injury initiated on a vessel's gangplank over navigable waters falls within the jurisdiction of the Act. *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996).

The Board held that claimant was not injured over navigable waters where he tripped and fell while walking along girders of a bridge structure, landing on the shore 15-20 feet from the water. Because a bridge is permanently affixed to land and is considered an extension of land, pursuant to *Nacirema*, 396 U.S. 212 (which the Board held is still good law), and because the injury began and ended on land, *see Kennedy*, 30 BRBS 1, claimant's injury did not occur over navigable waters and would not have been covered by the pre-1972 Act. *Crapanzano v. Rice Mohawk, U. S. Construction Co., Ltd.*, 30 BRBS 81, 82 (1996).

The Board held that the administrative law judge applied an incorrect standard by finding that in order for claimant to be covered under the Act, his injury must have occurred on a vessel on navigable waters. Under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983), coverage is based not on whether employees sustained their injuries while on a vessel, but whether they were afloat upon, over, or in actual navigable waters. Where claimant suffered an injury while working on a stationary barge used for electrical equipment located on navigable waters, the Board held that pursuant to *Perini*, claimant has satisfied the situs and status elements of Sections 2(3) and 3(a), and is covered under the Act. *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998).

The Fifth Circuit held that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient or fortuitous. The presence, however, of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous. The court did not set an exact amount of work performance sufficient to trigger coverage, but offered guidance: the threshold amount must be greater than a "modicum of activity" in order to preclude coverage for those who commute from shore to work by boat. The routine activity of tying the vessel to the dock and loading and unloading one's personal tools and gear are not meaningful job responsibilities. In this case the court held that the 8.3 percent of time the claimant spent working on production equipment on navigable waters is sufficient to confer jurisdiction. The court overrules *Randall v. Chevron, USA*, 13 F.3d 888 (5th Cir. 1994), to the extent it is inconsistent with its holding in this case. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*).

In a case arising in the Fifth Circuit, claimant was injured while riding in a boat on a canal which was returning from a work site. The administrative law judge found that claimant was covered under the Act as he was injured on navigable water. The Board vacated the administrative law judge's finding, however, and remanded the case for the administrative law judge to determine whether claimant was "transiently and fortuitously" over navigable water at the time of his injury, in light of *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*). If claimant was found to be "transiently and fortuitously" over navigable water at the time of his injury, he would not be covered pursuant to *Perini*, but the administrative law judge would then have to consider whether claimant's overall employment duties independently satisfied the status requirement under Section 2(3). *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

It is consistent with *Bienvenu*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*), in light of Supreme Court decisions in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), *O'Rourke*, 344 U.S. 334 (1953), and *Parker,* 314 U.S. 244 (1941), to hold that an employee who is regularly assigned by his employer during the course of his employment to travel on navigable waters is covered under *Perini,* since such an employee is not "transiently or fortuitously" on navigable waters, but is there because it is a regular part of his job assignment. The Board added that specific "duties" on a vessel are not required in order for a claimant to be covered under *Perini*. Claimant was required, on 53 percent of his workdays, to travel by boat, 45 minutes each way, to specific job assignments during the course of his day and as part of his overall work and thus is covered under the Act for an injury sustained on navigable waters. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

Determinations as to whether a claimant's presence on navigable waters is "transient" or "fortuitous" must turn on factors such as whether claimant's presence on navigable waters is a regular part of his job assignments or a matter of chance, whether it happens frequently or is a rare occurrence, and whether it lasts for an extended period of time. In the instant case, claimant was required to regularly travel by boat, 45 minutes each way, to specific job assignments during the course of his day and as part of his overall work. Thus, claimant's presence on the boat involved a significant portion of his day and was a necessary part of his overall employment and was neither Atransient" nor "fortuitous." The Board distinguished *Brockington*, 903 F.2d 1523 (11th Cir. 1990), upon which the administrative law judge relied to deny coverage, since claimant was not merely commuting to work. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

The Board rejects claimant's contention that he is "automatically" covered under the Act by virtue of his injury on navigable waters. The holding in *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), does not apply if claimant is excluded under another provision of the Act. In this case, employer sought to have claimant excluded as a security guard under Section 2(3)(A). *Dobey v. Johnson Controls*, 33 BRBS 63 (1999).

The Board reversed the administrative law judge's finding that decedent, a bridge construction worker who was killed when he fell to the base of the bridge structure, was injured upon navigable waters. The Board relied on the precedent that bridges are extensions of land despite the flow of navigable waters beneath them, *Nacirema*, 396 U.S. 347 (1969). After thoroughly discussing and distinguishing those cases where bridge builders were covered because they worked on vessels upon actual navigable waters, and after distinguishing *LeMelle,* 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), which did not address the situs issue, the Board held that the evidence did not satisfy the pre-1972 Amendment requirement for situs. As the Eleventh Circuit previously held that the evidence in this case did not establish post-1972 Amendment coverage, the Board held that decedent's death is not compensable under the Act. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000).

The Board affirms the administrative law judge's finding that claimant is covered under the Act pursuant to *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), by virtue of his work on a crane on a jack-up vessel used to secure pilings to a bridge under construction. As the administrative law judge properly determined that claimant's injury occurred on navigable waters, there was no need for him to separately consider the issues of situs and status in this case. Moreover, the Board noted that employer's reliance on the Supreme Court's holding in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), and the Board's holdings in *Pulkoski*, 28 BRBS 298 (1994), and *Crapanzano*, 30 BRBS 81 (1996), are misplaced, as it is not the designation of claimant as a "bridge worker" or his work on a bridge itself which conveys coverage. Rather, it is his employment on actual navigable waters at the time of injury which determines the applicability of the Act. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

After discussing at length the concept of "navigability" under the Act, the Board rejects the economic viability test espoused by employer and affirms the administrative law judge's finding that Cayuga Lake, New York, is navigable water for purposes of establishing coverage under the Act since that lake is connected to the Erie Canal, can accommodate most of the vessels that travel through inland waterways, and in fact was recently used in interstate commerce. *Morganti v. Lockheed Martin Corp.,* 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

The Second Circuit holds that the appropriate test for navigability depends on the physical rather than the economic characteristics of the waterway in question. In this case, because Cayuga Lake is physically capable of supporting shipping, it is possible at any time for an interstate commercial vessel to enter the lake. The court therefore affirms the Board's conclusion that Cayuga Lake is navigable for purposes of establishing jurisdiction under the Act. *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 547 U.S. 1175 (2006).

Where the evidence of record established that a barge anchored in Cayuga Lake, New York, was not a fixed platform akin to an island as found by the administrative law judge but, rather was afloat upon the navigable waters of that lake, was not permanently connected to either the shore or the lakebed, and was fully capable of movement should such movement be required, the Board reversed both the administrative law judge's determination that the time (30%) spent by the decedent aboard the barge was not work time on navigable waters, and his subsequent finding that the decedent's presence on navigable water, during his commute by tugboat to the barge, was transient. Thus, pursuant to *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), the decedent is covered under the Act unless he is specifically excluded by another statutory provision. *Morganti v. Lockheed Martin Corp.,* 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

The Second Circuit holds that the vessel on which the decedent was employed was not a fixed platform, but an object, albeit moored, floating on actual navigable waters. Therefore, as decedent's employment required that he spend 30 to 40 percent of the time on navigable waters, he was not transiently or fortuitously on navigable waters, assuming, *arguendo*, such a test is even applicable. *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 547 U.S. 1175 (2006).

The Board reversed the administrative law judge's denial of coverage. Claimant's injury arose when he attempted to cross between two floating barges; therefore, his injury occurred on actual navigable waters. Moreover, the administrative law judge erred in denying coverage on the basis that claimant's job duties as a derrick man on a keyway barge were performed on a fixed platform. The administrative law judge erred in requiring that that the keyway barge meet the test for a "vessel in navigation" in order to confer coverage because coverage concerns whether the employee was upon, over, or in actual navigable waters at the time of his work injury. Additionally, the evidence does not support the administrative law judge's finding that the keyway barge is a fixed platform as it was not permanently affixed to the sea bed. Finally, the Board rejects employer's response that coverage should be denied on the alternate basis that the amount of time claimant spent working on navigable waters was minimal. The nature and location of claimant's work with previous employers or on other jobs with this employer are not relevant considerations. There is no evidence that any part of claimant's 12-hour work days at the time of his injury was land-based. *T. M. v. Great Southern Oil & Gas*, 42 BRBS __ (2008).

Worker killed in the course of his employment on navigable waters met the status test as his presence on the water at the time of his death was neither transient nor fortuitous. Decedent performed his construction duties on a barge located on navigable waters, and a boat carried decedent between the shore and his work site. The coverage of the Act therefore precludes state law damages remedy. *Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251 (5th Cir. 2007), *cert. denied,* 128 S.Ct. 68 (2007).

EXCLUSIONS FROM COVERAGE

Member of a Crew

Recently, the Supreme Court has decided two cases arising under the Jones Act, which effect changes in the law regarding "member of a crew" status. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991), the Court concluded that there is no requirement that a seaman/member of a crew "aid in the navigation of a vessel." The key to seaman status is an employment-related connection to a vessel in navigation. The Court stated that it is not the employee's particular job that is determinative of his seaman status, but his connection to a vessel. Thus, "the requirement that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." The Court, in effect, restated the test of the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and the three-part test used by the Board and other circuits no longer is valid.

The Court also decided *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991), in order to resolve a split between the Fifth and the Ninth Circuits on the issue of whether a person employed in an occupation enumerated in Section 2(3) limited the claimant to his Longshore Act remedy to the exclusion of the Jones Act. In *Pizzitolo v. Electro-Coal Transfer Corp*., 812 F.2d 977, 19 BRBS 76(CRT) (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), the Fifth Circuit held that a person in an enumerated occupation is limited to a Longshore Act remedy and may not seek benefits under the Jones Act. To the contrary, the Ninth Circuit held that a rigging foreman who worked on a floating platform supervising riggers who repaired ships was not necessarily precluded from bringing a cause of action under the Jones Act. The court stated that whether an employee is covered by the Longshore Act or the Jones Act should be determined by looking to the nature of the claimant's work and the intent of Congress, not by looking to the employee's job title, and that the issue should be presented to the jury in the Jones Act case. *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990).

In affirming the Ninth Circuit, the Supreme Court noted that determining who is a member of a crew is a mixed question of law and fact, and that the issue cannot be resolved as a matter of law merely because claimant's job title fits into an enumerated category; some Jones Act seaman may be performing a specifically enumerated job, such as ship repair, and should not be foreclosed from a Jones Act remedy if he can show he has a work-related connection to a vessel in navigation. *Gizoni*, 502 U.S. at 92, 26 BRBS at 47(CRT). As in *Wilander*, the court noted that the Jones Act and the Longshore Act provide mutually exclusive remedies.

In a Jones Act case, the court held that an individual hired to do repair work on a barge is covered under Section 2(3) of the Longshore Act and is not a seaman under the test established in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959). The court noted, however, that it was not necessary to reach the Robison test, because once a claimant is held covered by the Longshore Act, he is precluded from obtaining benefits under the Jones Act for his work injury, regardless of whether he meets the Jones Act's test for "seaman" status. Williams v. Weber Management Services, Inc., 839 F.2d 1039, 21 BRBS 8 (CRT)(5th Cir. 1987).

In a Jones Act case, the Fifth Circuit set out its 2 part test for seaman/member of a crew status. Claimant, a sandblaster/painter foreman who worked aboard vessels, rigs, and land based facilities owned by at least eight unrelated entities, did not work on an identifiable fleet and therefore did not perform a substantial part of his work on a vessel or fleet of vessels. New v. Associated Painting Services, Inc., 863 F.2d 1205 (5th Cir. 1989).

In a Jones Act case, the court held that where a wireline operator worked aboard 15 different vessels owned by 10 different owners, she did not work on vessels that were part of a "fleet." Thus, she was not a seaman, but a maritime worker covered by the Longshore Act. Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192 (5th Cir. 1987).

In a suit claiming breach of warranty of seaworthiness and, alternatively, negligence of the vessel under 33 U.S.C. §905(b), the 8th Circuit Court of Appeals affirmed the District Court's finding that a claimant who worked part-time on a barge was not a member of a crew and thus not excluded from coverage under the Longshore Act, where the record indicated that the claimant could have spent only one-third of his work time on water. Claimant was not permanently assigned to vessel and did not perform substantial portion of work on vessel. Miller v. Patton-Tully Transportation Co., Inc., 851 F.2d 202 (8th Cir. 1988).

A fishing-tool supervisor, assigned to fixed oil-drilling platform to retrieve drilling tools and broken pipe from the oil-well hole, failed to establish that he was a "seaman" under the Jones Act. Although the employee ate, slept, and performed incidental work on the vessel tethered to the platform, his assignment was to the platform, not the vessel, and he did not perform a substantial portion of his work on the vessel. Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987).

Claimant did not perform a substantial portion of his work for employer aboard a vessel or fleet of vessels; therefore, he was not a seaman within the meaning of the Jones Act under the two-part 5th Circuit test for seaman/member of a crew status. Lormand v. Superior Oil Co., 845 F.2d 536 (5th Cir. 1987).

The Court held that claimant was not a seaman under the Jones Act because his vessel had not been in navigation at the time of his injury and that the claim thus fell under LHWCA jurisdiction. Garret v. Dean Shank Drilling Co., Inc., 799 F.2d 1007 (5th Cir. 1986).

The Board affirms the administrative law judge's finding that claimant, a deckhand assigned to a dredge tender, did not have a more or less permanent connection to a vessel and thus was not a "member of a crew of any vessel" pursuant to Section 2(3) of the Act where claimant commuted daily, was paid by the hour, did not sleep on the barge, and was dispatched by a hiring hall which dispatches shoreside assignments. Thompson v. Potashnik Construction, 21 BRBS 59 (1988).

The Fifth Circuit held that a switcher was not a seaman for purposes of Jones Act coverage where the worker lived on a fixed platform, performed job duties at fixed locations, had contact with boats only when he moved from one job site to another and performed no job-related duties on the boat. Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc., 830 F.2d 1332 (5th Cir. 1987).

The Court of Appeals for the Fifth Circuit held that an electrical repairman who worked on vessels tied to the dock and on land-based machinery was not a member of a crew and therefore did not qualify as a seaman under the Jones Act. When an employee is injured at a covered situs under the Act, he is ineligible for Jones Act benefits if the employee is also engaged in one of the occupations enumerated in Section 2(3) of the Act. Under these circumstances a court need not analyze whether an employee engaged in a covered occupation is a seaman and therefore entitled to Jones Act benefits. The Longshore Act, as a matter of law, is the employee's sole remedy. Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 19 BRBS 76 (CRT) (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988).

The Fifth Circuit affirmed the District Court's finding of coverage under the LHWCA where the employee was loading and unloading cargo at the time of the injury and for all but two days of the preceding two months before the injury claimant was engaged on shore in ship repair, pursuant to Pizzitolo. Chauvin v. Sanford Offshore Salvage, Inc., 868 F.2d 735 (5th Cir. 1989).

The administrative law judge erred in relying on claimant's shipbuilding activities alone to find claimant was not a member of the crew and in failing to apply the proper three-part test to determine member of the crew status. Williams v. Nicole Enterprises, Inc., 19 BRBS 66 (1986).

The Board affirms the administrative law judge's finding that claimant was not a member of a crew pursuant to Section 2(3) of the Act where claimant was injured while assisting in the construction of a vessel on which he was to set sail after its completion, because at the time of the injury the vessel was not yet in navigation. Williams v. Nicole Enterprises, 21 BRBS 164 (1988), aff'd mem. sub nom. Jones v. Director, OWCP, 915 F.2d 1557 (1st Cir. 1990).

In determining whether claimant is a member of a crew, the Board will not apply the two-part test adopted by the Fifth Circuit, see, e.g., McDermott, Inc. v. Boudreaux, 679 F.2d 452, 14 BRBS 940 (5th Cir. 1982), rev'g 13 BRBS 992.1 (1981), in cases arising in the Ninth Circuit. Rather, the Board applies a three-part test, under which an employee is a member of a crew if 1) he has a more or less permanent connection 2) with a vessel in navigation and 3) he is on board primarily to aid in navigation. The permanent connection requirement is met if claimant has a permanent connection to an identifiable fleet of vessels. In this case, claimant was not a member of a crew as his principal duty was loading and unloading fuel on a fuel barge. Thus, he was not on board primarily to aid in navigation, even though he sometimes assisted in mooring a barge and maintained its running lights. Wilson v. Crowley Maritime, 22 BRBS 459 (1989).

Claimant, whose work aboard a floating offshore drilling rig involved gathering test data used in the evaluation of the site where the rig was situated, was not a member of the crew of the rig and was thus not excluded from coverage under Section 1333(c)(1) of the Lands Act, 43 U.S.C. §1333(c)(1), because he never sailed aboard the vessel nor was he involved in the handling or maneuvering of the rig. He therefore was not aboard the rig to aid in its navigation. Curtis v. Schlumberger Offshore Services, Inc., 23 BRBS 63 (1989), aff'd mem., 914 F.2d 242 (3d Cir. 1990).

The test for determining whether one is a member of a crew is the same as that used in determining whether one is a Jones Act seaman. The Fourth Circuit sets out the old three-part test, while noting the two-part test used by the Supreme Court in Wilander. Nonetheless, the decision is not inconsistent with Wilander because the claimant, a harbor pilot, did not have a permanent connection to a vessel, as he operated as an independent contractor, and piloted different ocean vessels as they entered the harbor. Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991), cert. denied, U.S. , 112 S.Ct. 1265 (1992).

The Board reversed the administrative law judge's determination that claimant, a rigger who was injured when he fell onto the deck of a barge 12 miles offshore, was a member of the crew and thus excluded from coverage under Section 2(3) under the modified two-part test adopted by the Fifth Circuit in Robison, 266 F.2d 769 (5th Cir. 1959), rather than the traditional three-part test, which has been adopted by the Ninth Circuit, in which this case arises. Because the record contained no evidence indicating that claimant performed any navigational functions, a prerequisite to seaman status under the traditional test, the Board reversed the administrative law judge's finding that claimant was a member of a crew. Ryan v. Alaska Constructors, Inc., 24 BRBS 65 (1990).

The Board holds that claimant, an airborne fish spotter, is not a member of a crew, since he is not on board a vessel. An airplane is not a vessel, citing Ward v. Director, OWCP, 684 F.2d 1114, 15 BRBS 7 (CRT) (5th Cir. 1982). Barnard v. Zapata Haynie Corp., 23 BRBS 267 (1990), aff'd, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991).

The Fourth Circuit affirms the Board's decision that an airplane pilot fish spotter is not a member of a crew of a vessel because he was not on board a vessel, as an aircraft is not a vessel under the Act, and as claimant was not attached to any particular vessel during his fish spotting duties. Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 24 BRBS 160 (CRT) (4th Cir. 1991), aff'g 23 BRBS 267 (1990).

Claimant was an employee of an independent contractor who worked aboard lift boats while performing construction and repair work for well platforms, primarily for ODECO. The Board held that claimant was not a member of a crew and thus not excluded from coverage under OCSLA, as he did not work aboard an "identifiable fleet of vessels." In rejecting employer's "general control" argument, the Board noted that each lift boat was independently owned, was chartered by its own crew which was responsible for the vessel's navigation and safety, and was free to contract with companies other than ODECO, and the boats did not act together under one control. Nix v. Hope Contractors, Inc., 25 BRBS 180 (1991).

The Fifth Circuit affirmed the district court's grant of summary judgment that claimant is not a seaman under the Jones Act because he was not permanently assigned to a vessel nor did he perform a substantial part of his work on a vessel. The court noted that this analysis is not affected by *Gizoni*, although its decision in this case at 936 F.2d 839 (5th Cir. 1991), *vacated and remanded*, 112 S.Ct. 1463 (1991) incorrectly held, in light of *Gizoni*, that those engaged in an enumerated position under Section 2(3) are excluded under the Jones Act. *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1 (5th Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 969 (1993).

Under Wilander, an employee is a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels; and (2) his duties contributed to the vessel's function or operation. Where claimant's assignment to a vessel was random, sporadic and transitory, lasting only for the duration of the particular job, the administrative law judge rationally determined that claimant was never assigned to nor did he perform a substantial part of his work aboard any vessel. The Board further determined that given that claimant worked not only on employer's launches but also aboard tugboats and ocean going vessels which employer contracted to moor, the administrative law judge properly determined that claimant lacked any permanent connection to a fleet of vessels. Griffin v. T. Smith & Son Inc., 25 BRBS 196 (1991).

The Board affirms the administrative law judge's finding that claimant's work satisfied both prongs of the test set out in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and that therefore claimant was a seaman precluded from coverage under Section 2(3)(G) of the Longshore Act as a member of a crew. Claimant, a wireline operator, was permanently assigned to a jack-up boat, performed a substantial part of his work on it and contributed to its function of providing oil and gas well service to oil rigs. *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992).

The Ninth Circuit affirmed the district court's grant of summary judgment in favor of employer on the ground that a floating fish processing plant was not a "vessel in navigation" for purposes of the Jones Act, as it had no independent source of propulsion, no means of navigation, and no transportation function whatsoever. The court distinguished *Estate of Wenzel v. Seaward Marine Serv., Inc.*, 709 F.2d 1326 (9th Cir. 1983) and *Gizoni* since the floating structures in those cases had some transportation function. The court also cites other circuit cases where floating structures were held not to be vessels in navigation for purposes of the Jones Act. *Katheriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992).

Because decedent's primary work duties as a diver related to pier and dock construction, the Board affirmed the administrative law judge's finding that decedent was a harbor worker and not a member of a crew despite the fact that he sometimes worked off barges. Although decedent performed some seaman's duties, such as tying lines, he did not have a permanent connection to a vessel in that he did not eat or sleep on the vessel, he returned home after his shift, he received his assignments on shore, and the nature of his duties were not different if he worked from shore or from a barge. *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd in pert. part*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995).

Although the administrative law judge erred in determining that the vessel on which decedent worked was not in navigation, the Third Circuit affirms the finding that decedent was not a member of a crew. The administrative law judge rationally determined that decedent's employment was primarily that of a dock builder which is a traditional longshore activity, and thus an employment-related connection with a vessel was absent. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995), *aff'g in pert. part* 28 BRBS 20 (1994).

The Ninth Circuit rejects employer's contention that the employee, a waysman and tugboat operator, is precluded from a Jones Act recovery because he also recovered under the Longshore Act. Under *Gizoni,* 502 U.S. 81, 26 BRBS 44 (CRT) (1991), an employee in an occupation enumerated in Section 2(3) may be a seaman, although double recovery is precluded. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995).

The Supreme Court addresses what "employment-related connection to a vessel in navigation" is necessary for seaman status under the Jones Act. The Court found that an inquiry under the Jones Act is fundamentally status based: land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore. The Court rejects the contention that the vessel must be on a voyage, but holds that a "seaman" is an employee whose duties contribute to the function of a vessel or to the accomplishment of its mission; such employees must have a connection to the vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration (*i.e.*, more or less a permanent connection) and nature. The Court adopts the Fifth Circuit's rule of thumb that a worker who spends less than about 30 percent of his time in the service of a vessel in navigation is not a seaman, but states that departure from this rule may be justified, where, for example, a worker's basic assignment changes before the injury. *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172 (1995).

The Supreme Court notes that, generally, a vessel does not cease to be a vessel when she is undergoing repairs or is at anchor or dockside. The question of whether repairs are sufficiently significant so that the vessel can no longer be considered to be in navigation is a question of fact for the jury in a Jones Act case. *Chandris, Inc. v. Latsis*, U.S. , 115 S.Ct. 2172 (1995).

In a Jones Act case, the court held that decedent, a barge welder/cleaner, is a maritime worker covered under the Longshore Act. Decedent did not have a permanent connection to a vessel or identifiable fleet of vessels. He was randomly assigned to work on a barge, did not eat or sleep on it and his allegiance was to his land-based employer. The barges were not a fleet as they were owned by various companies and were not under common control. *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995).

The Ninth Circuit held that it was error for the district court to grant summary judgment against employee, a deckhand, under the Jones Act on the ground that he was not a seaman, as issues of fact remained as to whether he did not have the necessary connection with a vessel or group of vessels. The inquiry is not whether plaintiff had a permanent connection with the vessel, but whether his relationship with a vessel (or group of vessels) was substantial in terms of duration of connection and nature of activities; this inquiry requires consideration of the total circumstances of the employment. A maritime worker who regularly performs seaman's work is entitled to seaman status whether he works for a single employer or is hired on a daily basis by a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall, especially as in this case plaintiff worked for a single employer on a dozen occasions over the two and a half month period preceding his injury. *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 29 BRBS 129 (CRT) (9th Cir. 1995), *rev'd,* 520 U.S. 548, 31 BRBS 34(CRT) (1999).

The Ninth Circuit rejects employer's contention that the employee, a deckhand, is precluded from a Jones Act recovery because he was awarded benefits under the Longshore Act. Under *Gizoni*, 502 U.S. 81, 26 BRBS 44 (CRT) (1991), an employee under the Longshore Act may be a seaman, because provisions against double recovery exist. Imposing such a bar could provide disincentives for employers to vigorously defend under the Longshore Act. *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 29 BRBS 129 (CRT) (9th Cir. 1995), *rev'd,* 520 U.S. 548, 31 BRBS 34(CRT) (1999).

The Supreme Court, in a Jones Act case, held that claimant, a boat painter, is not a seaman as he failed to establish that he has a substantial connection to a vessel or identifiable group of vessels as a member of a crew. The relevant inquiry is whether the vessels are subject to common ownership or control. This common ownership link is not established by the mere use of a common hiring hall which draws from the same pool of employees. Thus, claimant, who worked several jobs in two and a half months for three different employers in short term employment was held to have not established status under the Jones Act, as the only common link between these employers, *i.e.*, their practice of hiring from the same union hall, was insufficient to establish the requisite substantial connection to an identifiable group of vessels. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997), *rev'g* 67 F.3d 203, 29 BRBS 129(CRT)(9th Cir. 1995).

In a Jones Act case, the Supreme Court held that, in determining whether claimant has a substantial connection to a vessel, all work customarily performed by claimant must be considered, rather than just the work performed at the time of the injury. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997), *rev'g* 67 F.3d 203, 29 BRBS 129(CRT) (9th Cir. 1995).

The Ninth Circuit considered whether a claimant was a "seamen" under the Jones Act and held that he was not as he was a land-based worker aboard the vessel only to perform maintenance and repairs. *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 906-907 (9th Cir. 1996).

The Supreme Court held that the *Super Scoop*, a floating platform with a dredging bucket used to dig a trench beneath Boston Harbor, is a "vessel" under the Jones Act. The dredge has some characteristics of sea-going vessels such as navigational lights, ballast tanks and a crew dining area, but had limited means of self-propulsion. Under 1 U.S.C. § 3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. Dredges carry machinery, equipment and crew over water. Because the *Super Scoop* was engaged in maritime transportation at the time of claimant's injury, it was a "vessel" within the meaning of both the Jones Act and the Longshore Act, specifically, Sections 2(3)(G) and 5(b). *Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 39 BRBS 5(CRT)(2005).

On remand from the Supreme Court, 543 U.S. 481, 39 BRBS 5 (CRT)(2005), the First Circuit held as a matter of law that the plaintiff is a Jones Act seaman. The Supreme Court held that the dredge on which a marine engineer was working when he was injured in a collision with a scow in Boston harbor constitutes a "vessel" under the Jones Act and the Longshore Act. The court holds that the uncontradicted evidence establishes that plaintiff's duties contributed to the vessel's function or mission and that his connection to the vessel was substantial both in nature and in duration, and that employer had conceded as much before the Supreme Court. Moreover, employer waived its right to raise these issues as it initially raised only the issue of whether the SUPER SCOOP was a vessel. *Stewart v. Dutra Constr. Co.*, *Inc.*, 418 F.3d 321, 39 BRBS 54(CRT) (1st Cir. 2005), *on remand from* 543 U.S. 481, 39 BRBS 5(CRT) (2005).

The Eighth Circuit, reversing the grant of summary judgment to employer, held that claimant was a seaman under the Jones Act, as the cleaning barge on which he worked was a "vessel in navigation." The court stated that a vessel is not defined by its capability for self-propulsion, but that pursuant to *Stewart,* 543 U.S. 481, 39 BRBS 5(CRT) (2005), the focus should be on whether the barge was "used or capable of being used as a means of transportation on water." The barge in this case was not permanently moored or anchored to the river bed, and the barge had been moved from its mooring to travel across the river during the time claimant worked for employer. Although secured, the barge was not rendered incapable of maritime transportation. *Bunch v. Canton Marine Towing Co., Inc.,* 419 F.3d 868, 39 BRBS 59(CRT) (8th Cir. 2005).

The Fifth Circuit held that the Supreme Court's decision in *Stewart v. Dutra Constr. Co.,* 125 S.Ct. 1118, 39 BRBS 5(CRT) (2005), broadened the class of water-borne structures that are "vessels" for purposes of both the Jones Act and the Longshore Act. Consequently, it held that a floating dormitory is a "vessel" for purposes of the Jones Act because it is "practically capable" of transporting personnel, cargo and equipment necessary for feeding and housing members of the dredge crew, and it possesses some of the objective characteristics of a traditional vessel. In light of this decision, the court vacated the district courts' rulings and remanded the cases for consideration of whether claimant is a Jones Act seaman. *Holmes v. Atlantic Sounding Co., Inc.,* 437 F.3d 441, 39 BRBS 67(CRT) (5th Cir. 2006).

The Fifth Circuit held that an employee injured aboard a semi-submersible drilling rig still under construction in a floating shipyard could not bring suit under the Jones Act as that rig was not a “vessel in navigation” for the purposes of that Act. Although capable of self-propulsion, the structure was still a non-vessel as it was not completed, lacked equipment vital to making it fully operational, and was not certified by the Coast Guard as ready for duty upon the sea. The court reasoned that to be a seaman there must be a ship and, pursuant to long-standing precedent, an uncompleted vessel, not yet an instrumentality of private or public commerce, is not yet a ship. This does not conflict with the holding in *Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 39 BRBS 5(CRT) (2005), because, in *Stewart*, the Court did not address when a vessel-to-be becomes a vessel, only whether an already existing “special purpose craft” is a vessel. *Cain v. Transocean Offshore USA, Inc.,* 518 F.3d 295, 42 BRBS 4(CRT) (5th Cir. 2008).

Where the district court summarily decided that a barge is not a "vessel in navigation" under the Jones Act, the Second Circuit remanded the case for proceedings before a jury in light of its newly adopted test of whether a floating structure is a "vessel in navigation." The test considers: 1) whether the structure, during a reasonable period of time preceding the injury, was being used primarily as a work platform; 2) whether the structure was moored or secured at the time of the accident; and 3) if the structure is capable of movement, whether the movement/transportation was merely incidental to its primary purpose of being used as a work platform (*i.e.,* is it capable of more than just lateral and perpendicular movement?). *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 36 (2d Cir. 1996).

The Board discussed the test, derived by the Fifth Circuit in *Bernard,* 731 F.2d 824, and adopted by the Second Circuit in *Tonneson*, 82 F.3d 30, for determining when a floating structure is a “vessel in navigation.” In the instant case, the administrative law judge found that the dredge upon which claimant worked is a vessel in navigation since, although it could be considered a “work platform,” it is a platform that in operation must float and move along navigable water because its purpose is to dredge ships’ channels in waterways, and because its movement on water, *i.e*., navigation, is a function that is inherent, and not “merely incidental,” to its dredging purpose. The administrative law judge’s findings were affirmed as rational, supported by substantial evidence, and in accordance with law. *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff’d*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The Second Circuit concluded, based on the Supreme Court’s decision in *Stewart,* 543 U.S. 481, 39 BRBS 5(CRT) (2005), that the three-part test it developed for “vessel” status under the Act in *Tonnesen,* 82 F.3d 30, 36 (2d Cir. 1996), no longer applies. Applying the *Stewart* decision, the Second Circuit held that the bucket dredge to which decedent was assigned was a “vessel in navigation.” *Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005), *aff’g* 37 BRBS 45 (2003).

Claimant was injured aboard employer's oyster harvesting dredge. Finding that dredges are vessels within the meaning of the Jones Act and thus, the dredge was a "vessel in navigation," the administrative law judge determined that claimant was a "member of a crew" and therefore excluded from coverage under Section 2(3)(G) of the Act. The Board vacated the administrative law judge's summary conclusion, noting that recent decisions by the United States Courts of Appeals demonstrate that some floating structures may not be vessels but work platforms. The Board remanded the case for further findings consistent with the approach taken by the Fifth Circuit in *Bernard,* 741 F.2d 824 (5th Cir. 1984), and *Ducote,* 953 F.2d 1000 (5th Cir. 1992), in which the court considered the following factors to determine whether a structure was a vessel or a work platform: (1) whether the structure involved was constructed and used primarily as a work platform; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether the structure was capable of movement across navigable waters in the course of normal operations, and whether this transportation was merely incidental to its primary purpose of serving as a work platform. *Green v. C.J. Langenfelder & Son, Inc.*, 30 BRBS 77, 79 (1996).

The Board affirmed the administrative law judge's finding that most of decedent's work was as a welder and not as a mate trainee/deckhand, as supported by substantial evidence and consistent with the Supreme Court's holding in *Chandris*, 515 U.S. 347 (1995), that an employee must have a substantial and not a sporadic or transitory connection to a vessel in navigation. Decedent's employment therefore is not excluded from coverage by the member of a crew exclusion. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87, 89 (1996).

The Board affirms the administrative law judge's finding that claimant's duties as a Cargo Operations Manager, which consisted of preparing for and supervising the loading of employer's barges and which ceased upon the completion of those tasks, is covered by the Longshore Act. The administrative law judge's finding that claimant is a land-based employee based on the totality of his employment is consistent with the Supreme Court's decision in *Chandris*, 515 U.S. 347 (1995). The Board therefore rejects employer's contention that claimant excluded from coverage as a "seaman/member of a crew." *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The Ninth Circuit holds that an employee who was injured while working as a crane operator aboard a crane barge and was a land-based worker with only transitory or sporadic connection with the barge did not meet the substantial connection test and therefore was not a seaman under the Jones Act. Claimant was not hired to work as a crew member and only worked on one of the barge's projects. *Cabral v. Healy Tibbits Builders*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

The Board affirmed the administrative law judge's finding that claimant is a "seaman" under the Jones Act and thus excluded from coverage under the Longshore Act. Although the dredge upon which claimant worked had not been untied from its mooring from the beginning of claimant's employment until the time of injury, the administrative law judge properly applied the Supreme Court's decisions in *Senko,* 352 U.S. 370 (1957), and *Chandris,* 515 U.S. 347 (1995), to find that a vessel remains in navigation while moored, and that claimant's duties aided in the vessel's function pursuant to *Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

The Third Circuit reversed the district court's grant of summary judgment that claimant, a commercial diver, is not a seaman under the Jones Act, holding that the fact that claimant's relationship with a crane barge engaged in the construction of an artificial reef was scheduled to last only ten days (the duration of the project) did not compel a finding as a matter of law that the duration of claimant's connection to the vessel was insubstantial. The court, noting that inquiry into whether an employee's connection to a vessel is of substantial duration entails inquiry into the totality of circumstances, remanded for the district court to determine whether claimant's connection with the crane barge was of sufficient duration to confer seaman status. The court noted that claimant unquestionably contributed to the mission of the vessel. *Foulk v. Donjon Marine Co., Inc.,* 144 F.3d 252 (3d Cir. 1998).

In a Jones Act case, the court held that an employee's specific activity at the time of injury is not dispositive of status as a seaman. However, while an employee's assignments that are part of a continuous employment relationship between the employer and employee are relevant, an employee's entire work history should not be considered. The inquiry is on the nature of the employee's basic job assignments as they exist at the time of injury. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

In a Jones Act case, the court considered whether the employee had a substantial connection to a vessel or fleet of vessels owned or controlled by the same employer. The court holds that the employee cannot use evidence of a prior assignment with this employer to obtain coverage under the "Fleet Doctrine," if the assignments were not part of a continuous employment relationship. *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 33 BRBS 31(CRT) (3d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

The Fifth Circuit held that a rigger injured while working on a fixed drilling platform whose duties related to repair of the platform failed to establish that he was a "seaman" under the Jones Act. The fact that the employee ate, slept and may have performed minor duties on an adjacent jack-up vessel do not make him a crew member of the vessel. His sole reason for being on the jack-up vessel related to repair of the platform, and, thus, his duties did not contribute to the function of the vessel or the accomplishment of its mission. Moreover, the employee did not have a substantial connection to the jack-up vessel or to any identifiable group of vessels. *Hufnagel v. Omega Service Industries,* 182 F.3d 340, 33 BRBS 97(CRT)(5th Cir. 1999).

The Fifth Circuit held that the structure upon which claimant was injured was not a "vessel" under the Jones Act. While an unusual appearance will not suffice to preclude vessel status, the more the structure resembles conventional seafaring craft, the greater the likelihood of securing status. Factors used to determine the status of a structure are: (1) the primary purpose for which the structure was constructed; (2) whether the structure is moored or otherwise secured at the time of injury; and (3) whether the structure's movements are merely theoretical or occasional/incidental. In the instant case, the structure was designed as a work platform, there were no plans to move it for the next fifteen years, and the elaborate system which moored it to the ocean floor rendered its movement difficult, expensive, extremely limited and purely incidental. *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 33 BRBS 106(CRT) (5th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000).

The Ninth Circuit reversed the district court's grant of summary judgment in favor of employer, holding that claimant submitted sufficient evidence to establish a substantial question of fact as to his relationship to the vessel and his contribution to the barge's mission. Claimant submitted an affidavit stating that during his five-month employment, 90% of his responsibilities when the barge moved were those of a seaman (although the barge moved only four times during this period), and that 80% of his time was spent on the barge. Thus, the court held that these questions in his Jones Act claim must be submitted to a jury. *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916, 33 BRBS 55(CRT) (9th Cir. 1999).

Where claimant's work as a commercial diver required regular exposure to the perils of the sea, and he was aboard the vessel for approximately four weeks for the purpose of installing underwater cable, which was the vessel's mission, the Board affirmed the administrative law judge's finding the claimant's connection to a vessel was substantial in nature and duration. Thus, the Board affirmed the administrative law judge's conclusion that claimant was a "member of a crew" of a vessel under Section 2(3)(G), and excluded from coverage under the Act. *Hansen v. Caldwell Diving Co.*, 33 BRBS 129 (1999), *aff'd,* 243 F.3d 537 (4th Cir. 2001)(table).

Claimant was employed as a boilermaker/welder aboard a ship which was in transit for a portion of claimant's work on board. However, as the administrative law judge credited claimant's hearing testimony that he performed 80 percent of his duties for employer on ships at dock or in powerplants, rather than on ships at sea, the Board affirmed the administrative law judge's finding that claimant's overall employment establishes that he is a land-based worker who owes his allegiance to his land-based employer, and not the ship he was aboard. In addition, the Board affirmed the administrative law judge's finding that claimant lacked a substantial connection to a fleet of vessels, and rejected employer's contention that the ships were "connected" as they were under contract with employer for repair services, as insufficient under *Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997). Thus, the Board affirmed the administrative law judge's finding that claimant was not a "member of a crew," and thus was not excluded from coverage under the Act. *McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000).

The Fifth Circuit affirmed the lower court's grant of summary judgment and held as a matter of law that claimant is not a seaman entitled to Jones Act coverage. Initially, the court stated that it was undisputed that claimant was not permanently assigned to any one vessel in navigation. The court rejected his allegation that he was a member of the crews of the several liftboats used in the jobs performed by employer, and that these boats constitute an identifiable fleet of vessels. The court concluded that the vessels were not acting together under common ownership or control, as they were owned by several different entities and chartered by several other entities. The court declined to adopt claimant's view that "operational control" of the vessels is sufficient to satisfy the "common control" test, as this would require the court to delve into the "day-to-day minutiae" of the vessel's operation. The court also states that whether claimant is exposed to the "perils of the sea" is not determinative of seaman status. *St. Romain v. Industr. Fabrication & Repair Services, Inc.,* 203 F.3d 376 (5th Cir. 2000), *cert. denied*, 531 U.S. 816 (2000).

The Fifth Circuit reversed the grant of summary judgment to employer on the issue of whether claimant is a seaman under the Jones Act. It was conceded that claimant worked aboard a vessel in navigation, that his connection to this vessel was "substantial in duration," and that his duties contributed to the function and mission of the vessel. With regard to whether his connection was "substantial in nature," the district court had determined that such was lacking because claimant's duties did not literally take him out to sea, citing *Papai*, 520 U.S. 548, 31 BRBS 34(CRT)(1997), and thus claimant was not exposed to the "perils of the sea." The Fifth Circuit held that *Papai* and *Chandris,* 515 U.S. 347 (1995), do not require that the claimant's employment be on an ocean, as opposed to a river, but only that his duties regularly expose him to the type of perils associated with employment on water. The court held that as claimant spent 18 months working on the vessel on the Mississippi River in furtherance of the vessel's mission, claimant is a Jones Act seaman as a matter of law. *In Re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000).

In a Jones Act case, the Fifth Circuit affirmed the lower court's grant of summary judgment and held as a matter of law that claimant is not a seaman entitled to Jones Act coverage as he did not establish the requisite temporal connection to a vessel (27.7 percent of time on employer's vessels is not enough). In so holding, the Fifth Circuit reaffirmed its commitment to the 30 percent test in determining whether an injured worker's connection to a vessel or vessels is substantial in terms of duration, *i.e.*, a worker who fails to show that at least 30 percent of his time is spent on vessels under the common ownership or control of his employer is precluded from recovering as a seaman under the Jones Act. *Roberts v. Cardinal Services, Inc.*, 266 F.3d 368 (5th Cir. 2001), *cert. denied,* 535 U.S. 954 (2002).

In a Jones Act case, the Second Circuit affirmed the administrative law judge's finding that claimant was not a "seaman" as his connection to the vessel in question was insufficiently substantial in terms of both its duration and its nature, and thus affirmed the grant of summary judgment. The claimant spent more than half his working hours during a five-month period aboard the barges, but spent all his time performing tasks related to the repair of a pier while the barges were secured to the pier. He belonged to the dockworkers' union, had no seaman's papers, and never spent the night aboard the barges. Thus, claimant produced no evidence that he derives his livelihood from sea-based activities. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002).

The administrative law judge determined that decedent's employment satisfied the first condition of "an employment related connection" to the vessel since, as claimant conceded, decedent was engaged in the "mission" of the dredge. With regard to the second condition, *i.e*., a connection to the vessel that is substantial in both its duration and its nature, the administrative law judge found that decedent had a substantial connection to the dredge as he worked exclusively on it as an oiler for three to four consecutive weeks. The Board affirmed the finding that decedent was a member of a crew, as the administrative law judge examined the total circumstances of decedent's work with employer, and his findings are rational, supported by substantial evidence, and in accordance with law. *Uzdavines v. Weeks Marine, Inc.*, 37 BRBS 45 (2003), *aff'd*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005).

The Second Circuit affirmed the Board's holding that decedent was a "member of a crew of [a] vessel" within the meaning of Section 2(3)(G), and thereby excluded from coverage under the Act because (a) at the time of his alleged injury, he "contributed to the function" of a bucket dredge, which qualifies as a vessel in navigation, and (b) his connection to the dredge was "substantial in terms of both its duration and its nature." The decedent's prior work history is not relevant to this inquiry. Finding "no error in the legal reasoning" of either the administrative law judge or the Board, the court affirmed the denial of benefits under the Act. *Uzdavines v. Weeks Marine, Inc*., 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 45 (2003).

The Board affirmed the administrative law judge's determination that claimant, a deckhand, was covered by the Act. Although the administrative law judge erred in segregating claimant's steering/maintenance duties from his loading/unloading duties to determine his duties do not "aid in navigation," his error was harmless. Further, in assessing whether claimant had a substantial connection to employer's fleet of vessels, it was reasonable for the administrative law judge to rely on language found in the Ninth Circuit cases of *Delange,* 183 F.3d 916, 33 BRBS 55(CRT), and *Cabral,* 128 F.3d 1289, 32 BRBS 41(CRT), and to conclude that claimant's duties are not "primarily sea-based" or "inherently vessel-related" and that his connection to the vessels is not "substantial" under *Chandris.* As the determination of whether claimant is a member of a crew is a question for the fact-finder, and as claimant's duties herein involved stereotypical tasks of both longshoremen and seamen, the Board held that substantial evidence supported the administrative law judge's decision that claimant is a longshoreman and is covered by the Act. *Lacy v. Southern California Ship Services*, 38 BRBS 12 (2004).

The Fifth Circuit held as a matter of law that claimant, an engineering student employed as an intern for an oilfield company, who was injured during an assignment as a crew member on a vessel in navigation, was not a seaman entitled to Jones Act coverage. The court held that claimant lacked the requisite "substantial connection" to a vessel, stating that the Supreme Court in *Chandris,* 515 U.S. 347 (1995), and *Papai,* 520 U.S. 548 (1997), rejected a "voyage test" of seaman status. Thus, claimant's status as a land-based worker was not altered merely by serving a temporary assignment as a crew member on a vessel in navigation; seaman status does not attach to a worker simply because he is necessary to the vessel's mission at the time of his injury. The claimant's essential land-based duties had not been altered by his assignment to a vessel. *Becker v. Tidewater, Inc.,* 335 F.3d 376, 37 BRBS 49(CRT) (5th Cir. 2003).

Where claimant was hired as a crane operator on a barge which was subject to sea swells, wakes, waves and tides, and the barge was moved three times while claimant was aboard and he performed ship-related duties such as handling lines, weighing and dropping anchor, standing lookout, etc., in addition to his crane operator duties, the Ninth Circuit reversed the district court's grant of summary judgment. It held that genuine issues of material fact existed as to whether the nature of claimant's duties had a substantial connection to the vessel. To determine whether claimant has a substantial connection to a vessel in terms of duration and nature, the court stated it must examine the vessel's movement in light of claimant's duties. Although the movement of the vessel was minor and the sea-based duties were ancillary to his normal duties, the court held there are genuine issues of material fact regarding claimant's seaman status that warrant jury consideration. *Scheuring v. Traylor Brothers, Inc.*, 476 F.3d 781, 41 BRBS 9(CRT) (9th Cir. 2007).

18 Tons Net

18 tons net exclusion to Longshore Act jurisdiction applies only when employee is "engaged by the master" to repair a vessel under 18 tons net. The master of a vessel is the captain. Exclusion does not apply in this case as claimant was engaged by a maintenance supervisor to repair small vessel. Clophus v. Amoco Production Co., 21 BRBS 261 (1988).

SECTION 2(4) - EMPLOYER

Digests

The Court held that partnerships and joint ventures can qualify as "employers" under Section 2(4) because the Act does not limit the type of legal entity that can qualify as such, given the intent of Congress to provide coverage under the Act to all persons within the statutory definition of an "employee." Thus, any entity capable of employing a worker covered under the Act can qualify as an employer. Davidson v. Enstar Corp., 848 F.2d 574 (5th Cir.), vacated on other grounds on rehearing en banc, 860 F.2d 167 (5th Cir. 1988).

Because the Board held that claimant is covered under the Act, employer is a statutory employer under Section 2(4), as one of its employees is engaged in maritime employment. Willis v. Titan Contractors, Inc., 20 BRBS 11 (1987); Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991).

As the Board held that claimant is engaged in maritime employment and is therefore covered under the Act, the employer is a statutory employer under Section 2(4). *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

SECTION 3(a) - SITUS

Digests

Updated citation: Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc., 788 F.2d 264, 19 BRBS 10 (CRT) (5th Cir. 1986), cert. denied, 479 U.S. 885 (1986).

Where claimant was employed as a rigger, a traditional maritime job, and was injured on a vessel which was en route from Newark, N.J. to Baltimore, Md., with no planned deviation into the territorial waters of any foreign nation, claimant's injury 14 miles from shore occurred on "navigable waters of the U.S." and therefore is covered under the Act pursuant to Cove Tankers Corp., 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982). Larsen v. Golten Marine Co., 19 BRBS 54 (1986).

Board affirms an administrative law judge's holding that an injury on the high seas was not upon the navigable waters of the U.S. The administrative law judge rationally relied on the factors enunciated in Cove Tankers Corp., 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982). As the trip departed from Texas en route to California via Cape Horn with planned stops at foreign ports and claimant had a state workers' compensation remedy, the Board held that Cove Tankers was distinguishable and claimant's injury 1500 miles off the U.S. coast was not covered by the Act. Kollias v. D & G Marine Maintenance, 22 BRBS 367 (1989), rev'd, 29 F.3d 67, 28 BRBS 70 (CRT) (2d Cir. 1994), cert. denied, U.S. , 115 S.Ct. 1092 (1995).

The Board affirms the administrative law judge's finding that claimant was injured on the navigable waters of the United States, where the injury occurred in the Gulf of Mexico 200 miles offshore, citing Cove Tankers, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982), and Reynolds, 788 F.2d 264, 19 BRBS 10 (CRT) (5th Cir. 1986). The Board rejects employer's contention that waters beyond the three mile territorial limit cannot constitute navigable waters of the U.S. Although the ship upon which claimant was injured was of Bermudian registry, employer is based in New York and claimant is a U.S. resident. Moreover, although the ship made a scheduled deviation into a foreign port, claimant boarded the ship in Texas and was on his way to another Texas port when the injury occurred. Finally, the circumstances of claimant's receipt of state workers' compensation benefits is unclear. Gouvatsos v. B & A Marine Co., 26 BRBS 38 (1992), aff'd sub nom. Kollias v. D & G Marine Maintenance, 29 F.3d 67, 28 BRBS 70 (CRT) (2d Cir. 1994), cert. denied, U.S. , 115 S.Ct. 1092 (1995).

The Second Circuit reverses the Board's decision in *Kollias* and affirms the decision in *Gouvatsos*, holding that the Act covers injuries on the high seas without qualification. The court found that the Act, in Section 39(b), indicates congressional intent to cover the high seas and that this intent overcomes the general presumption against extraterritorial application of U.S. statutes. The court further stated a claimant's eligibility for state benefits is now irrelevant and it eliminated the exceptions to extending coverage to the high seas which it created in *Cove Tankers*. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 28 BRBS 70 (CRT) (2d Cir. 1994), *rev'g* 22 BRBS 367 (1989) and *aff'g Gouvatsos v. B & A Marine Co.*, 26 BRBS 38 (1992), *cert. denied*, U.S. , 115 S.Ct. 1092 (1995).

The Board holds that claimant, who was injured in the port of Kingston, Jamaica, is covered under the Longshore Act. The Board first notes the decision in *Kollias* extending the Act to the high seas without qualification. The Board next finds instructive cases arising under the Jones Act and the Death on the High Seas Act which have extended coverage to injuries and deaths occurring in the territorial waters of a foreign nation. The Board holds that adoption of this policy provides uniform coverage and protection for American workers working in foreign waters when all contacts but the site of the injury are with the U.S. Further, no choice of law issue was raised by the parties. *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (1994).

The Board reaffirmed its prior decision, applying the law of the case doctrine, that claimant, who was injured in the port of Kingston, Jamaica, was injured on a covered situs. The Board examined the exceptions to the doctrine and found none applicable, including that involving intervening case law; therefore, it held, in light of developing case law, that “navigable waters” includes injuries on the high seas and in foreign territorial waters when all contacts except the site of injury are with the United States. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff’d on recon.,* 35 BRBS 190 (2002).

The Board holds that the territorial waters of Guam are included in the "navigable waters of the United States" pursuant to Section 3(a). The fact that Guam was first a "possession" and then an "unincorporated territory" of the U.S., rather than a "Territory" is not dispositive given the ambiguities in the meaning of the terms. Moreover, the Act applies to the Virgin Islands, and Guam is a similar entity; the Board therefore holds that a system of concurrent jurisdiction better comports with the purposes of the Act. The Board notes that Puerto Rico is not covered by the Act, but that it is a different kind of "territory." *Tyndzik v. University of Guam*, 27 BRBS 57 (1993) (Smith, J., dissenting on other grounds), *rev'd on other grounds sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT)(9th Cir. 1995).

After discussing the history of the political status of the Commonwealth of the Northern Mariana Islands and the various implications of the term "territory," the Board held that the territorial waters of the CNMI are included in the "navigable waters of the United States" under Section 3(a). The Board determined that, although the Act does not apply to Puerto Rico, a politically similar entity, the provisions of the Covenant establishing the CNMI and the commission report thereto necessitate finding that the Act applies to the CNMI because it applies to Guam. The Board also rejected employer's argument that its decision in *Tyndzik*, 27 BRBS 57 (1993), *rev'd on other grounds*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995) that the Act is applicable to Guam is *dicta*. Additionally, the Board stated that concurrent jurisdiction over maritime employees by state and federal workers' compensation laws may exist and is not dispositive of the issue, and it noted its rejection of employer's "practical" challenges to the application of the Act over such a great distance. *Uddin v. Saipan Stevedore Co., Inc.*, 30 BRBS 117 (1996).

The Ninth Circuit affirms the Board's holding that the Longshore Act applies to the Commonwealth of the Northern Mariana Islands, based on, *inter alia,* the Act and the history of the Commonwealth. Section 2(9) defines the United States as including "Territories." The Commonwealth is a lower case "territory" as it is unincorporated, but this is not determinative, as the term "territory" when used in the Act is comprehensive and Congress intended the Act to apply to the fullest extent possible with no restrictions on federal coverage short of the limits of maritime jurisdiction. The court further notes that the Act applies to Guam, and the Covenant of the CNMI states that federal laws applicable to Guam apply to the Marianas. *Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.2d 717, 31 BRBS 187(CRT) (9th Cir.1998), *aff'g Uddin v. Saipan Stevedore Co., Inc.*, 30 BRBS 117 (1996).

The Ninth Circuit upheld the Board's determination that where the claimant had been working on a non-navigable lake at the time of his injury, the Act's situs requirement was not satisfied. The Court accordingly did not address the administrative law judge's findings regarding status. *Williams v. Director, OWCP,* 825 F.2d 246, 20 BRBS 25 (CRT)(9th Cir. 1987), *aff'g Williams v. Pan Marine Construction,* 18 BRBS 98 (1986).

The Board holds that the American River in Sacramento at the accident site is not navigable. The Act derives its legitimacy from the Constitution's grant of admiralty jurisdiction. The Supreme Court has held that the admiralty definition of navigability depends on the water's capability of commercial use and not on the mode or extent of that use; the Ninth Circuit requires a showing of present commercial use or susceptibility to future commercial use. Past commercial use alone is not relevant. In this case, there is no evidence that the river is navigated; the water is shallow due to an upstream dam. The barges used on the project in question were trucked to the site and assembled there. The fact that the barge could float in the river is insufficient, standing alone, to confer jurisdiction. *George v. Lucas Marine Construction*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 94-70660 (9th Cir. May 30, 1996).

The Board affirms the administrative law judge's finding that the Croton Reservoir is not navigable, as it is a landlocked body of water. The fact that the Croton River may have been navigable prior to 1841 is insufficient to establish jurisdiction under admiralty jurisdiction which looks to present or future commercial interstate use of the water. *Elia v. Mergentime Corp.*, 28 BRBS 314 (1994).

The Board reversed the administrative law judge's finding that decedent, a bridge construction worker who was killed when he fell to the base of the bridge structure, was injured upon navigable waters. The Board relied on the precedent that bridges are extensions of land despite the flow of navigable waters beneath them, *Nacirema*, 396 U.S. 347 (1969). After thoroughly discussing and distinguishing those cases where bridge builders were covered because they worked on vessels upon actual navigable waters, and after distinguishing *LeMelle,* 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), which did not address the situs issue, the Board held that the evidence did not satisfy the pre-1972 Amendment requirement for situs. As the Eleventh Circuit previously held that the evidence in this case did not establish post-1972 Amendment coverage, the Board held that decedent's death is not compensable under the Act. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000).

The Board held that claimant's injury, which occurred under the seabed of the Atlantic Ocean while claimant was digging a sewage tunnel, did not occur on navigable waters, regardless of whether the rock in which he was tunneling was under the ocean or if it sloped upward above the surface of the water. The bedrock was at all times dry land. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Board discusses the varying concepts of "navigability," and, citing *George*, 28 BRBS 230 (1994), reiterates that the appropriate test for navigability under the Longshore Act is the "navigability in fact" test established in admiralty law. *Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on navigable waters. Claimant was injured in a "floating marsh" in shallow water, and the administrative law judge's finding that only air boats could navigate these waters and that their ability to do so was impeded by the vegetation is supported by substantial evidence. Thus, there is insufficient evidence that the waterway is "navigable in fact" for purposes of admiralty jurisdiction, and therefore claimant's injury did not occur on a covered situs. *Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002).

The Board affirmed the administrative law judge's determination that Thompson Brook is not a navigable body of water as it does not support commerce and is not adaptable for future commercial use. Thus, EBMF could not be considered an "adjoining area" with respect to that body of water. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring in relevant part and dissenting on other grounds), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

The First Circuit affirms the administrative law judge's determination that Thompson Brook is not a navigable body of water. The administrative law judge correctly applied the definition of "navigable" derived from admiralty law. Pursuant to this definition, the administrative law judge's finding that Thompson Brook is not navigable is supported by substantial evidence. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004), *aff'g Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

After discussing at length the concept of "navigability" under the Act, the Board rejects the economic viability test espoused by employer and affirms the administrative law judge's finding that Cayuga Lake, New York, is navigable water for purposes of establishing coverage under the Act since that lake is connected to the Erie Canal, can accommodate most of the vessels that travel through inland waterways, and in fact was recently used in interstate commerce. *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006).

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The Second Circuit holds that the appropriate test for navigability depends on the physical rather than the economic characteristics of the waterway in question. In this case, because Cayuga Lake is physically capable of supporting shipping, it is possible at any time for an interstate commercial vessel to enter the lake. The court therefore affirms the Board's conclusion that Cayuga Lake is navigable for purposes of establishing jurisdiction under the Act. *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003), *cert. denied*, 126 S.Ct. 2319 (2006).

Claimant was injured on a construction trestle attached to a bridge spanning San Francisco Bay. The Board affirms the administrative law judge's finding that claimant was not injured on navigable waters, as the trestle was attached to a permanent, non-covered structure. The trestle, although not "everlasting," was not a removable structure that temporarily displaced navigable waters due to its attachment to both spans of the bridge and support on pilings. *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005).

The Board rejected employer's assertion that the fixed oil platform in this case was not a covered situs because it is entirely in state waters. The Board explained that this is an irrelevant distinction, as the Act covers coastal shipyards and ports in state waters. Moreover, the Board rejected employer's implied argument that claimant's injury is not covered because the platform was not on the Outer Continental Shelf, as the Outer Continental Shelf Lands Act is not applicable to state waters. *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006).

The Board affirms the administrative law judge's finding that claimant, who was injured on a pontoon in a flume containing water which circulated into and out of the heating and cooling system of the World Trade Center, was not injured on actual navigable waters. The water in the flume is not capable of supporting commerce and had been permanently withdrawn from the Hudson River. The Board also affirmed the finding that the flume could not be made navigable again with reasonable improvements. LePore v. Petro Concrete Structures, Inc., 23 BRBS 403 (1990).

The Board reverses the administrative law judge's finding that claimant, who was injured while diving into a reservoir tank in the basement of a paper factory was injured on actual navigable waters. The reservoir was surrounded by walls, was not designed to support commerce by water, and could not be navigated. The administrative law judge erred in focusing on the navigability of the river that flows into the tank. Moreover, as this area is not an enumerated site and is not an adjoining area, situs is not otherwise established. *Rizzi v. Underwater Construction Corp.*, 27 BRBS 273 (1994), *aff'd on recon.*, 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44 (CRT)(6th Cir. 1996), *cert. denied*, ___U.S. ___, 117 S.Ct. 302 (1996).

The Sixth Circuit held that claimant, employed as a diver, did not meet the situs requirement as the reservoir located under the paper plant, where he was injured while working, was not a navigable waterway, and thus affirmed the Board's reversal of the administrative law judge's finding to the contrary. The court agreed with the reasoning of the Board that a navigable waterway ends where underground pipes and vents remove water from a river to a reservoir or tank for manufacturing or storage purposes. In addition, the court affirmed the Board's holding that claimant did not meet the situs requirement under Section 3(a) as the site is also not an enumerated site or an adjoining area. *Rizzi v. Underwater Construction Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *aff'g* 27 BRBS 273, *aff'd on recon.*, 28 BRBS 360 (1994), *cert. denied*, U.S. , 117 S.Ct. 302 (1996).

The Board holds that the breakwater upon which claimant was injured formed a harbor and was, therefore, the equivalent of a pier. Accordingly, since claimant was injured while standing on an area specifically enumerated in Section 3(a), claimant was injured on a covered situs. Olson v. Healy Tibbits Construction Co., 22 BRBS 221 (1989)(Brown, J., dissenting).

Since there is nothing inherently maritime about a fixed oil well and since the particular well where claimant was injured had no maritime connection or maritime function, the Board held that claimant's injury did not occur on a situs covered under the Act. *Munguia v. Chevron U.S.A., Inc.*, 23 BRBS 180 (1990), *aff'd on recon. en banc*, 25 BRBS 336 (1992), *aff'd on other grounds*, 999 F.2d 808, 27 BRBS 103 (CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1994), *cert. denied*, U.S. , 114 S.Ct. 1839 (1994).

On reconsideration en banc, the Board affirms its holding that the fixed wellhead platform upon which claimant was injured is not an "adjoining area" under Section 3(a). Since there is nothing inherently maritime about building and maintaining oil pipelines and platforms, and the only items claimant transported to and unloaded at the wellhead were tools and supplies used for the wellhead's maintenance, the situs element is not met due to a lack of a maritime nexus. *Munguia v. Chevron U.S.A., Inc.*, 25 BRBS 336 (1992), *aff'g on recon. en banc*, 23 BRBS 180 (1990), *aff'd on other grounds*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994).

The Board held that a structure used solely for oil production ;and with no connection to navigation and commerce over navigable water is not a "pier" within the meaning of Section 3(a) and thus is not a situs covered under the Act. In reversing the administrative law judge's decision, the Board held that to be a "pier" under Section 2(3), a structure must have a relationship to maritime activity. *Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990), *rev'd sub nom. Hurston v. Director, OWCP,* 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993).

The Ninth Circuit reversed the Board's decision and held that a structure built on pilings extending from land to navigable waters is a covered situs, a pier, even if it is not used for a traditional maritime activity. The court held that an oil production pier is a covered situs, as it is the type of structure rather than the function it serves that defines whether the situs is covered. *Hurston v. Director, OWCP,* 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993), *rev'g Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990).

The Board affirms the administrative law judge's finding that claimant was not injured on a "pier" pursuant to *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993). The construction trestle on which claimant was injured was attached to the two spans of a bridge. Although the trestle rested on pilings, at the time of claimant's injury the trestle was not attached to land, and therefore did not meet the definition of a pier set out in *Hurston.* The Board also affirms the administrative law judge's finding that the trestle was not an enumerated site under construction. The trestle was never going to become a pier or other facility used for loading, unloading, building, or dismantling vessels but was used only for the seismic retrofitting project on the bridge. *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005).

The Fifth Circuit affirmed the Board's holding that claimant, a pumper/gauger who worked on a fixed oil and gas production platform, was not injured on a covered situs. Specifically, the court held that the platform, which was built on pilings over marsh and water and was inaccessible from land, does not constitute a "pier" within the meaning of the Act. In arriving at this conclusion, the court rejected the Ninth Circuit's broad definition of "pier," as set forth in *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), and it adhered to the functional approach it announced in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976) (subsequent history omitted). The Fifth Circuit reaffirmed that it is not enough for structures to have the appearance of the terms enumerated in Section 3(a); rather, to be covered, the structures must also serve some maritime purpose. The Supreme Court's decision in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT) (5th Cir. 1985) and the Fifth Circuit's decision in *Munguia,* 999 F.2d 808, 27 BRBS 103(CRT) (5th Cir. 1993), support the holding that fixed oil platforms are not maritime concerns. The court also affirms the holding that the site is not an "other adjoining area" under Section 3(a) as it is not used for maritime activity. *Thibodeaux v. Grasso Production Management, Inc.,* 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004).

The Board rejected employer's argument that *Thibodeaux,* 370 F.3d 486, 38 BRBS 13(CRT), applies to this case to preclude coverage because claimant was injured on a fixed platform. The Board held that, because the fixed platform had a docking facility used to load crude oil onto barges unlike in *Thibodeaux*, it was used for a maritime purpose and thus is an "adjoining area." Further, because the platform facility is a configuration of connecting pipelines with no distinct separation between the processing and the loading areas, the entire facility is covered, as in *Gavranovic*, 33 BRBS 1. Thus, the Board affirmed the administrative law judge's finding that claimant was injured on a covered situs even though he was not injured in the docking area. *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006).

The Eleventh Circuit held that although the structure adjoins navigable waters and rests on vertical pilings anchored in a river bed, a seawall constructed to protect a generating plant from an encroaching river is not a pier or an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" and, accordingly, does not meet the situs test for coverage under the Act. *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 31 BRBS 212(CRT) (11th Cir. 1998), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998).

In this case, claimant was injured while repairing a bulkhead which had collapsed into the water after the land behind it washed into the water during several storms. A private residence abutted the area, and the water contained a floating dock to which a boat was tied. Once completed, the bulkhead would prevent erosion of the land into the water. The new bulkhead was built by driving piles deep into the canal. The Second Circuit adopted the Ninth Circuit's reasoning in *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), and concluded that the bulkhead, which was built on pilings and extended into the water, was a pier within the meaning of the Act. Therefore, the court held that claimant satisfied the situs requirement. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998).

In this case where claimant spent one day working on a bulkhead but was injured the next day while working 85 to 90 feet away from the bulkhead, the Board rejected claimant's argument that the entire area around the bulkhead is a covered area. No loading, unloading, building, repairing, or dismantling of vessels occurred in this area along the Hudson River, and absent customary maritime activity, a site cannot be a covered "adjoining area." The Board also rejected claimant's assertion that the bulkhead he worked on is similar to the covered pier-like bulkhead in *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT). The bulkhead here was made of concrete and granite blocks and did not extend over navigable water but, rather, rested along the land's edge. Thus, it was more akin to the seawall in *Silva*, 23 BRBS 123, which was not a covered situs. Accordingly, the Board affirmed the administrative law judge's order granting employer's motion for summary decision, as claimant failed to establish that his injury occurred on a covered situs. *R.V. v. J. D'Annunzio & Sons*, __ BRBS __ (2008).

Claimant satisfied the situs requirement as he was exposed to jet fuel which caused a lung injury on a ship and on a pier adjacent to navigable waters. Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, reh'g denied, 910 F.2d 1179 (3d Cir. 1990), cert. denied, 498 U.S. 1067 (1991).

Board affirms a finding that claimant, who was injured when he fell from a tree overhanging a pier while in the process of moving a sailboat along the pier and struck either the side of the pier or the sailboat before hitting the ground, was injured on a covered situs under Section 3(a). Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86 (1989).

Inasmuch as claimant was injured while working on a pier which was built and maintained for the mooring of boats, the Board reverses the administrative law judge's finding that the situs test was not met. A pier is an enumerated situs under Section 3(a). *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

Since a portion of employer's yard was customarily used for loading and unloading activities and the fabrication and repair of vessels and their component parts, the administrative law judge properly concluded that claimant was injured on a covered situs although he was injured while performing work on a fixed offshore oil-drilling platform which was being constructed in another part of employer's shipyard. Smith v. Universal Fabricators, Inc., 21 BRBS 83 (1988), aff'd, 878 F.2d 843, 22 BRBS 104(CRT)(5th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).

The Fifth Circuit affirmed the Board's holding that claimant was injured on a covered situs, stating that where claimant was engaged in maritime activities in employer's yard, an area adjoining navigable water, the requirements of Section 3(a) was met. Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104(CRT)(5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990).

Applying the jurisdictional law in effect at the time of the manifestation of claimant's injury rather than that in effect at the time of the event that caused the injury, the Ninth Circuit held that claimant's work in the 1940's on a building way was on a covered situs, as a building way is specifically enumerated in Section 3(a) as amended in 1972. SAIF Corp./Oregon Ship v. Johnson, 908 F.2d 1434, 23 BRBS 113 (CRT) (9th Cir. 1990).

Pursuant to the Ninth Circuit's decision in SAIF Corp., and Section 3(a) as amended in 1972, claimant's work in the 1940's at the Swan Island and Vancouver shipyards was on a covered situs, as it is well established that under the 1972 Act, an entire shipyard or terminal facility is considered a covered situs. Martin v. Kaiser Co., Inc., 24 BRBS 112 (1990).

Decedent's employment at the Electric Boat shipyard satisfies the situs test as an entire shipyard facility is considered to be a covered situs pursuant to the 1972 Amendments to the Act. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. Am. v. U. S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

The Board affirms the administrative law judge's finding that decedent's work satisfied the situs requirement, based on the reasonable inference that a naval shipyard is a maritime facility adjoining navigable waters, and is used for shipbuilding and ship repair. Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991).

The Board affirmed the administrative law judge's finding that decedent's work on a dry dock constitutes work on actual navigable waters under *Perini*, as the pre-1972 Act definition of navigable waters includes a dry dock. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The Board affirmed the administrative law judge’s situs finding in this asbestosis death benefits case based on substantial evidence. Claimant’s testimony and the decedent’s *inter vivos* disability claim forms establish that the decedent was exposed to asbestos while working in dry docks for employer and this evidence was not contradicted or refuted by employer. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev’d on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The administrative law judge weighed the conflicting evidence and determined that claimant’s injury occurred on employer’s dock in Harvey, rather than in a field in Baton Rouge. Thus, the Fifth Circuit affirmed the administrative law judge’s finding that claimant was injured on a covered situs pursuant to Section 3(a) as it was supported by substantial evidence. *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Board affirms the administrative law judge's finding that the situs test is not met. Claimant was injured on dry land adjoining navigable waters during the construction of a lock. The area will have a future maritime use, but the situs test is not met merely because the injury occurred adjacent to water. As there is no current maritime use of the site by any employer, the site is not an "adjoining area" under Section 3(a). *Nelson v. Guy F. Atkinson Construction Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996)(table).

The Board affirmed the administrative law judge’s finding that the situs element was met, based on the cumulative nature of decedent’s injury. The administrative law judge found that decedent’s stroke was due, in part, to the stresses he suffered while working at the Avondale shipyard and a dock facility. Thus, inasmuch as decedent was subjected to work stresses in areas that are indisputably maritime sites, claimant’s injury occurred on a covered situs. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev’d,* 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied,* 124 S.Ct. 65 (2003).

Decedent was not injured at an "adjoining area" for purposes of satisfying the situs requirement. At the time of decedent's injury, employer's facility had yet to be used for loading, unloading, or repairing a vessel. "Adjoining area" is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of injury. *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *rev'g* 35 BRBS 121 (2001), *cert. denied,* 124 S.Ct. 65 (2003).

The Board reversed the administrative law judge's finding that claimant was injured on a covered situs. Claimant was injured on dry land adjacent to the intracoastal waterway, where a barge slip was being constructed. The Board stated, based on the Fifth Circuit's decisions in *Trotti & Thompson v. Crawford,* 631 F.2d 1214, 12 BRBS 681, and *Bazor*, 313 F.3d 300, 36 BRBS 79(CRT), and the Board's decision in *Nelson*, 29 BRBS 39, that because the site had no current maritime use, was not a previously covered situs such as navigable waters, and the surrounding areas are not used for a maritime purpose, the case law constrained the Board to hold that the site is not covered. The fact that the project involved construction of an inherently maritime structure is not sufficient to confer coverage absent a present maritime use of the site. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd,* 384 F.3d 180, 38 BRBS 71(CRT)(5th Cir. 2004), *cert. denied,* 125 S.Ct. 1696 (2005).

The Fifth Circuit affirmed the Board's holding that claimant was not injured on a covered situs. At the time of the injury, the construction site had been cleared and the barge slips had been excavated, but the land between the holes and the waterway had not yet been removed. The Fifth Circuit held that because the construction site was not serving a maritime purpose at the time of claimant's injury and had not previously facilitated navigation, the site is not covered. *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *aff'g* 37 BRBS 120 (2003), *cert. denied,* 125 S.Ct. 1696 (2005).

The Board rejects claimant's contention that he was injured on a "marine railway," as this terms refers specifically to a structure located at the water's edge used to raise a ship out of the water for inspection or repairs. The railway used in the sewage treatment tunnel project was not used for this purpose. Moreover, claimant's injury did not occur at any other enumerated site or on an "adjoining area." *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Board affirms the administrative law judge's finding that claimant, who was injured while working on a "float bridge" at a railroad facility which abuts the Chesapeake Bay, was injured on a covered situs. The Board held that the "float bridge" satisfies the situs criteria using either the administrative law judge's analogy with a pier or by identifying it as an "other adjoining area," as the float bridge is used only to load and unload railcars from barges. Regarding the analogy with a pier, the Board, in a footnote, rejected employer's assertion that enumerated areas must also be "customarily used" in the loading process. *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000).

Claimant injured while repairing an amphibious military vehicle at a military storage facility about a mile from the nearest water met the situs test as the facility was located in an area of, and was adjacent to, commercial maritime sites and the facility was used for the repair of vessels which were launched at the site for trials. Stevens v. Metal Trades, Inc., 22 BRBS 319 (1989).

The Board affirmed the administrative law judge's finding that the mountainside where decedent's plane crashed was not proximate to navigable waters and had no specific relationship to the maritime industry; thus, it was not a covered situs pursuant to Section 3(a). The administrative law judge concluded that the site's only connection with the maritime industry was that the aircraft carrying a longshore employee apparently was attempting to overfly it en route to the airport closest to his place of longshore employment, which airport was situated approximately four miles from the maritime situs at which he was to be employed. Moreover, the Board reaffirmed the principle that both the situs and status requirements must be met in order to invoke the jurisdiction of the Act. Shippey v. Crowley Maritime Corp., 20 BRBS 55 (1987).

Claimant contended his deep-vein thrombosis was caused by prolonged sitting during flights between Virginia and Hawaii where he was sent by employer to install sheet metal on a vessel. The Board held that claimant did not meet the situs requirement. Specifically, the Board held that the commercial plane in which claimant flew over the continental U.S. and the Pacific Ocean was not a covered situs prior to the 1972 Amendments, was not an enumerated area, and was not an “other adjoining area” within the meaning of Section 3(a). In holding that it was not an area covered prior to 1972, the Board distinguished this case from *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), which involved an injury to a fish-spotter who flew at low altitudes in a plane to direct fishing boats to large schools of fish. The Board held that the fish-spotting job was a traditional maritime job that required the employee to work over navigable waters. However, the purpose of claimant’s flight over navigable waters was merely to commute to a specific job – it was not a regular part of claimant’s work. Additionally, in holding that the commercial plane was not an “other adjoining area,” the Board relied on *Shippy v. Crowley Maritime Corp.*, 20 BRBS 55 (1987), to affirm the administrative law judge’s determination that the only connection the commercial plane had to the maritime industry was the fact that it was transporting maritime employees. As the commercial plane was not a pre-1972 covered situs, an enumerated area or an “other adjoining area,” the Board affirmed the administrative law judge’s denial of benefits under the Act. *C.C. v. Tecnico Corp.*, 41 BRBS 129 (2007).

The location and function of the grain elevator where claimant was injured satisfied the criteria of the "functional relationship" test, and the elevator was therefore a covered situs. Also, a waterfront facility containing a grain elevator used for loading and unloading vessels is an "adjoining area" within Section 3(a), and an "adjoining area" need not to contiguous to navigable waters nor a prescribed distance from the water's edge. The situs test of Section 3(a) is therefore satisfied. Jackson v. Straus Systems, Inc., 21 BRBS 266 (1988).

The Second Circuit holds that claimant's injury occurred on a covered situs, when the injury occurred 1 1/4 miles from the water, as claimant's job required that he move containers between the water's edge and the rail facility over a mile away, and as this travel was necessitated by geography. The court recited the Herron factors for "adjoining area." Triguero v. Consolidated Rail Corp., 932 F.2d 95 (2d Cir. 1991).

Board affirms administrative law judge's determination that employer's facility did not constitute an "adjoining area" under Section 3(a) under the functional-relationship test set forth in Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), and employed by the Board in Bennett, 14 BRBS 526 (1981), where its location 2-3 miles from the water was not particularly suitable for use in maritime commerce, adjoining properties had not been used primarily in maritime commerce, employer had chosen the site largely for economic reasons, and employer had not attempted to locate as close to the water as possible. The Board noted that the facts presented were virtually indistinguishable from those present in Palma, 18 BRBS 119 (1986). Lasofsky v. Arthur J. Tickle Engineering Works, Inc., 20 BRBS 58 (1987), aff'd mem., 853 F.2d 919 (3d Cir. 1988).

Board holds that employer's Hardings facility is not a covered situs. This facility, used for steel fabrication for employer's shipyard, is located 4 miles from the nearest navigable waters and is in a mixed residential/commercial area. As there is no evidence that the site is as close as feasible to navigable waters or is particularly suitable for maritime uses, it is not an "adjoining area" within the meaning of Section 3(a). Brown v. Bath Iron Works Corp., 22 BRBS 384 (1989).

The First Circuit has held that the site of an injury must “adjoin navigable waters,” but has not addressed the situs inquiry with regard to a site that is not immediately adjacent to navigable waters. Thus, the Board held that administrative law judge rationally looked to the tests espoused in *Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), and *Herron,* 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Although EBMF is only 1,400 feet from the New Meadows River, a navigable body of water, and its function is to produce pre-fabricated piping for installation on ships constructed at employer’s main shipyard in Bath, Maine, on the Kennebec River, the Board affirmed the administrative law judge’s determination that EBMF is not an “adjoining area” with regard to the New Meadows River, as it has no functional relationship with that body of water. Further, EBMF is not an “adjoining area” with regard to the Kennebec River. The Board held that, although the functional relationship is clearly established, the geographical nexus is absent. Specifically, because EBMF is 4-5 miles inland from the Kennebec River and is separated from it by non-maritime commercial businesses and residences, EBMF is not within the perimeter of a general maritime area around the Kennebec River. Thus, EBMF is not an “adjoining area” within the meaning of the Act and is not a covered situs. Therefore, the Board affirmed the administrative law judge’s denial of benefits. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., dissenting). *aff’d sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

The First Circuit assumed without deciding that the administrative law judge and the Board correctly applied the functional relationship test espoused in *Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978) to determine if a site is an "adjoining area" pursuant to Section 3(a). The court reasoned this test provides greater flexibility for determining situs than the test enumerated by the Fourth Circuit in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995). *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004), *aff'g Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

In addressing whether a site is considered an "adjoining area," the Board held that the functional and geographical criteria must be satisfied in relation to one body of water, though that water need not be the closest body of water to the facility. Consequently, the Board rejected claimant's assertion that EBMF is a covered situs because it is 1,400 feet from the navigable New Meadows River and has a functional relationship with the Kennebec River, 4-5 miles away. As EBMF did not satisfy both criteria in relation to the same body of water, the Board held that EBMF is not a covered situs, and it affirmed the administrative law judge's denial of benefits. The Board rejected claimant's assertion that its holding effectively revived the *Jensen* line and narrowed coverage to its pre-1972 state. Further, the Board rejected the contention that its holding will result in disparate treatment of similar employees. Rather, in determining coverage, employees are properly distinguished by where the injuries occur. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting), *aff'd sub nom. Cunningham v. Director, OWCP,* 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

The First Circuit holds that EBMF is not an "adjoining area" with regard to the New Meadows River, as the site in question must have both a geographic and functional nexus with the same body of water. In this case, the New Meadows River has no functional connection with employer's maritime activities. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004), *aff'g Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

Applying the functional relationship test espoused in *Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), the First Circuit holds that EBMF is not an adjoining area in relation to the Bath shipyard and the Kennebec River. The Board correctly concluded that the nature of the area between EBMF and the Kennebec waterfront, in addition to the lack of proximity, compelled the conclusion that the EBMF is outside the perimeter of an "adjoining area" within the meaning of Section 3(a), notwithstanding the functional relationship between the two facilities. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004), *aff'g Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

The Board affirmed the administrative law judge's finding that claimant's injury, at employer's warehouse, did not occur on an "adjoining area." Employer's warehouse was located near the Mississippi River, but there are no docks located on the River and employer does not utilize the River in its business. Rather, employer trucks goods to the Gulf Coast, 65-70 miles away. The Board held that the administrative law judge rationally found that the proximity of employer's facility to the Mississippi River was not dictated by maritime concerns and that there is no functional relationship between employer's warehouse and the Mississippi River in that the area is not used for loading, unloading, building or repairing vessels. *Charles v. Universal Ogden Services*, 37 BRBS 37 (2003).

The administrative law judge properly found that the evidence failed to satisfy the situs requirement of the Act because the area which surrounded employer's facility was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters. Board additionally rejects claimant's contention that the situs requirement has been met solely because employer's facility was customarily used and particularly suited for its ship-repair work since any test which focused only upon whether claimant is a maritime employee would effectively eliminate the situs requirement of Section 3(a). Davis v. Doran Co. of California, 20 BRBS 121 (1987), aff'd mem., 865 F.2d 1257 (4th Cir. 1989).

Where claimant was injured in the course of his maintenance duties at employer's administrative facility located in an industrial complex, the Board affirms the administrative law judge's finding, based on the application of Herron, that the facility failed to qualify as an "adjoining area" and that the situs requirement was not satisfied. The Board rejects the argument that the situs requirement is automatically met where the site is used for a maritime purpose. Anastasio v. A.G. Ship Maintenance, 24 BRBS 6 (1990).

Board holds that in order to be an "adjoining area," a site must have a maritime nexus. In this case, where claimant was injured at a seawall which protected a public highway, at which no cargo was loaded or unloaded, and which had no navigational aids or boat hookups, the requisite nexus was lacking and the wall was not a covered situs. Silva v. Hydro-Dredge Corp., 23 BRBS 123 (1989).

The Board affirmed the administrative law judge’s granting employer’s motion for summary decision. Claimant worked as a laborer on a beautification project to develop park lands along the Hudson River. One day he repaired a concrete bulkhead and the next he was assisting in the removal of landscape lumber away from the bulkhead area. He was injured when his knee was pinned between lumber and another contractor’s construction trailer. As the injury did not occur on navigable waters, on an enumerated site, or on an “other adjoining area customarily used” for maritime activity, having occurred 85 to 90 feet away from the water in an area where no maritime activity occurred, claimant was not injured on a covered situs. The Board rejected claimant’s “walking in and out of coverage” argument, as it does not relate to the situs issue. The Board also rejected claimant’s assertion that the bulkhead he worked on is similar to the covered pier-like bulkhead in *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT). The bulkhead here was made of concrete and granite blocks and did not extend over navigable water but, rather, rested along the land’s edge. Thus, it was more akin to the seawall in *Silva*, 23 BRBS 123, which was not a covered situs. *R.V. v. J. D’Annunzio & Sons*, __ BRBS __ (2008).

The Board affirms the administrative law judge's finding that claimant's injury did not occur on a covered situs using the *Herron* factors as a guide. Although employer's warehouse was close to the waterway, the location was not chosen out of maritime concerns but simply because the owner inherited the property. Moreover, the surrounding properties were not devoted primarily to uses in maritime commerce. *Felt v. San Pedro Tomco,* 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT)(9th Cir. 1993).

The Board affirms the administrative law judge's conclusion that under the "functional relationship" test of *Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), employer's ship repair and fabrication shop was not an "adjoining area" under Section 3(a). Even though it was located one mile from the waterfront it was in an area not primarily devoted to maritime commerce, was not as close to the water as feasible, and the surrounding properties were not devoted primarily to maritime commerce. Employer's requirement of a 15 to 20 minute drive to the waterfront did not convert the facility into a site with the requisite relationship to navigable waters. *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992).

The Board, applying *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), affirms the administrative law judge's finding that the steel mill where claimant was injured did not qualify as a situs covered under Section 3(a) of the Act. Although the mill was located only one-quarter of a mile from its own dock facility on the Mississippi River at which loading and unloading activities occurred, this dock area was separate and distinct from the mill; thus, unlike *Prolerized New England Co. v. BRB*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), the line between the mill's manufacturing and loading operations is clearly drawn. Therefore, as the mill is not used for traditional maritime activity but rather involves manufacturing products which are not used for maritime purposes, the mill is not a covered situs. *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992).

Applying *Winchester*, 632 F.2d 504, 12 BRBS 719, and *Melerine*, 26 BRBS 97, the Board held that claimant’s injury in a warehouse shipping bay at employer’s steel production facility, while loading steel onto a truck bound for a barge, did not occur on a covered situs. The Board stated that both geography and function are necessary considerations in determining whether a site constitutes a covered adjoining area under Section 3(a). Although the facility where claimant was injured is only ¼ to ½ mile from navigable water, the administrative law judge properly concluded it was geographically separate from the barge loading docks. Further, the Board held that the administrative law judge correctly determined that the area in which claimant was injured does not serve a maritime function. The shipping bay in this case is used only to load trucks, and there is nothing inherently maritime about loading steel onto trucks. Therefore, the Board rejected claimant’s argument that *Melerine* is distinguishable and held that it is controlling law, and, consequently, that claimant is not entitled to benefits under the Act. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998).

The Board affirmed the administrative law judge's finding that employer's fabrication yards, where claimant performed load-out operations, were "adjoining areas" under Section 3(a) because they meet the functional and geographic nexus test of the Fifth Circuit in *Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), as the yards are adjacent to navigable waters and used for loading vessels. That these yards were held insufficient in *Mills,* 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989), to meet the situs requirement of the OCSLA is irrelevant as this claim is brought under the Longshore Act. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

The Board affirmed the administrative law judge's determination that employer's entire facility, a fertilizer manufacturing plant, is a covered situs. Employer's facility, which adjoins the navigable waters of the Houston Ship Channel, satisfies the controlling law of the Fifth Circuit, *Winchester*, 632 F.2d 504, 12 BRBS 719, which requires an assessment of both the function and the geography of the facility. Although claimants were not injured in a building specifically used for loading and unloading vessels, part of employer's business involves sending and receiving goods by water, and the entire facility, including the building in which claimants were injured, is adjacent to a navigable body of water and to the loading and unloading docks. *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999).

The Board held that claimant, who was injured in a warehouse while unloading angle irons from a rail car, was injured on a covered situs, as the warehouse and employer's facility are located within the Port of Houston and five percent of the cargo en route through the warehouse is transported by ship, notwithstanding that it may first be stored in a lot ("point of rest" rejected). The Board held that employer's warehouse, therefore, satisfied the Fifth Circuit's geographic and functional requirements for situs under the Act pursuant to *Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980). *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J., dissenting), *aff'd on recon.,* 34 BRBS 127 (2000) (Brown, J., dissenting).

The Board denied employer's motion for reconsideration and reaffirmed its holding that claimant's injury occurred on a maritime situs. The warehouse where claimant was injured is customarily used for maritime purposes because five percent of the materials passing through the warehouse traveled within maritime commerce. The Board distinguished its decision in *Stroup*, 32 BRBS 151 (1998), because the facility therein was physically separate from a maritime facility, and the finished product from the steel manufacturing plant in that case had yet to begin its maritime travel at the point where the claimant was injured in the shipping bay. Here, however, and also in *Gavranovic,* 33 BRBS 1 (1999), the materials which passed through the warehouse were already in maritime commerce, and the overall area in which the injury occurred was a maritime facility. *Uresti v. Port Container Industries, Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon.* 33 BRBS 215 (2000) (Brown, J., dissenting).

The Board discussed its decisions in *Gavranovic,* 33 BRBS 1, *Stroup*, 32 BRBS 151, and *Uresti*, 33 BRBS 215, *on recon.,* 34 BRBS 127 (2000), differentiating between sites with manufacturing and maritime purposes. It held that those portions of employer's facility (a manufacturing plant) where loading and unloading occurs are covered; however, the portions devoted to the manufacturing process, despite being adjacent to the navigable waters of the Mobile River, are not covered, as they do not meet the function criterion for determining situs. As the manufacturing plant itself lacks the functional nexus, it cannot be brought into coverage merely because goods are shipped from another area of the facility. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

Citing *Jones*, 35 BRBS 37 (2001), and *Stroup,* 32 BRBS 151 (1998), the Board initially rejected claimant's contention that the administrative law judge erred by "dividing" employer's manufacturing facility into maritime and non-maritime sites. The Board stated that the issue of coverage concerns whether claimant was injured while working at the maritime or manufacturing portion of employer's facility. The Board held that, as was the case in *Jones*, employer's manufacturing plant, consisting of the wallboard and gypcrete departments, is not a covered situs, since, as the administrative law judge found, it is not an area used for maritime activity but rather involves the manufacturing of products which are not used for maritime purposes. In so holding, the Board relied on the administrative law judge's rational factual determinations that: the areas where claimant's injuries occurred are within a separate facility and not a part of the port area; that the maritime activity of unloading the gypsum from the ships continued along employer's conveyor belt until it was received in the rock shed for storage but did not continue beyond that into employer's manufacturing facilities; and that the specific buildings where the injuries occurred, *i.e.*, the wallboard and gypcrete departments, were used solely in the manufacturing process rather than as a step in the chain of unloading raw materials. *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001), *aff'd,* 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002).

The Eleventh Circuit affirmed the Board's affirmance of the administrative law judge's denial of benefits as claimant did not establish that her work injury occurred on a covered situs pursuant to Section 3(a). The court held that the sheet rock production department where claimant was injured is not an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" because it is not an area customarily used for maritime purposes although it may adjoin navigable waters. The court rejects claimant's contention that it must hold that the entire facility is a covered situs since a portion of its work is maritime, asserting that if it did, it would be writing out of the Act the requirement that the adjoining area where the injury occurred must be customarily used for maritime purposes. *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), *aff'g* 35 BRBS 99 (2001).

The Board, applying *Winchester*, 632 F.3d 504, 12 BRBS 719 (5th Cir. 1980)(*en banc)*, affirms the administrative law judge's finding that claimant's place of injury, a phosphoric acid plant in a fertilizer manufacturing facility, does not satisfy the situs requirement under the Act. Although the plant was geographically close to navigable water where ships are unloaded, the plant itself was not used for loading and unloading. The Board rejected the contention that the entire facility must be a covered situs, citing *Bianco,* 35 BRBS 99 (2001), *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Cir. 2002), *Jones,* 35 BRBS 37 (2001), *Stroup,* 32 BRBS 151 (1998), and *Melerine,* 26 BRBS 97 (1992). The Board distinguished *Gavranovic,* 33 BRBS 1 (1999), as in that case the claimant was injured in a building where fertilizer products were loaded onto vessels via conveyor belts. *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs. The Board held that the site of claimant's injury, a slurry pond at employer's coal preparation plant is not an "adjoining area" under Section 3(a), since it is functionally and geographically separate from employer's unloading/loading operations and it is not used for any maritime purpose. In its decision, the Board explicitly rejected claimant's contention that employer's entire coal preparation facility must be a covered situs under *Winchester*, 632 F.2d 504, 12 BRBS 719, since much like the circumstances in *Bianco*, 35 BRBS 99 (2001), *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Cir. 2002), *Jones*, 35 BRBS 37, and *Dickerson,* 37 BRBS 58, the facility herein contains distinct areas used for loading and unloading, and for non-maritime manufacturing purposes. *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003).

The Board rejected employer's argument that *Thibodeaux,* 370 F.3d 486, 38 BRBS 13(CRT), applies to this case to preclude coverage because claimant was injured on a fixed platform. The Board held that, because the fixed platform had a docking facility used to load crude oil onto barges unlike in *Thibodeaux*, it was used for a maritime purpose and thus is an "adjoining area." Further, because the platform facility is a configuration of connecting pipelines with no distinct separation between the processing and the loading areas, the entire facility is covered, as in *Gavranovic*, 33 BRBS 1. Thus, the Board affirmed the administrative law judge's finding that claimant was injured on a covered situs even though he was not injured in the docking area. *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006).

While the injury need not occur on a situs specifically enumerated in Section 3(a), the Act requires that a non-enumerated situs be used in the loading, unloading, building or repairing of a vessel. In this case, claimant was employed to paint an existing in-use bridge. The administrative law judge rationally found that claimant was not injured on actual navigable waters, and there is no evidence that the bridge was used for any of the above purposes. Thus, the situs test was not satisfied. Johnsen v. Orfanos Contractors, Inc., 25 BRBS 329 (1992).

The Board affirms the administrative law judge's finding that claimant was not injured in an "adjoining area" as the bridge bulkhead area contained no facilities for mooring or loading boats, and no evidence was presented that the canal was used for commercial maritime activities. *Pulkoski v. Hendrickson Bros., Inc.,* 28 BRBS 298 (1994).

The Board rejected claimant's argument that the incomplete bridge on which he worked was really a "pier" and, consequently, an enumerated situs which need not possess a maritime nexus to be covered by the Act. As a bridge is not an enumerated situs, and as there is no evidence demonstrating that the bridge was used for maritime activities, the Board concluded that claimant failed the situs test as a matter of law. *Crapanzano v. Rice Mohawk, U. S. Construction Co., Ltd.*, 30 BRBS 81, 83-84 (1996).

Board reverses administrative law judge's holding that claimant was injured on a covered situs pursuant to Section 3(a). At the time of his injury, claimant was in front of a public restaurant on a public street in an area where general maritime activities co-exist with non-maritime activities. As the location of the restaurant was fortuitous and not based on maritime concerns, and because the surrounding area was not primarily used for or suited to maritime commerce, the Board reversed the finding that the area in front of the restaurant is an adjoining area for purposes of the Act. Further, Board noted that at the time of the injury, claimant was not exposed to the hazards uniquely inherent in maritime employment. Humphries v. Cargill, Inc., 19 BRBS 187 (1986), aff'd sub nom. Humphries v. Director, OWCP, 834 F.2d 372, 20 BRBS 17(CRT) (4th Cir. 1987), cert. denied, 485 U.S. 1028 (1988).

The Fourth Circuit holds that a claimant, who was engaged in maritime employment, but was injured when he was struck by an automobile while returning from a restaurant located one and one-half miles from employer's terminal, was not injured on a maritime situs. Humphries v. Director, OWCP, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), aff'g Humphries v. Cargill, Inc., 19 BRBS 187 (1986), cert. denied, 485 U.S. 1028 (1988).

Claimant injured on a public road outside employer's terminal but within the port complex was injured on a covered situs. In reversing the administrative law judge's decision, the Board stated that the facts relied on by the administrative law judge, i.e., that the accident occurred on a public road, that claimant was on his way home at the time of the accident, and that his accident occurred on only one of several access routes to a terminal, are not dispositive. Hagenzeiker v. Norton Lilly & Co., 22 BRBS 313 (1989).

The Board affirms the administrative law judge's finding that a linesman injured in a car accident occurring on a public road between claimant's home and the harbor was not injured on a covered situs. The administrative law judge properly concluded that, in the absence of record evidence which could establish a nexus between the accident site and maritime commerce, the site of injury did not qualify as an "adjoining area." The Board holds that the specific employment requirements concerning the location of claimant's residence and its use as his duty station, and the use of public roads between his home and the harbor do not automatically bring the location of his injury within the coverage of Section 3(a). Beachler v. National Lines Bureau, Inc., 23 BRBS 438 (1990).

In the instant case, claimant was injured on a road on the property of employer's Steel Plant which was not used for any maritime activity, and which was two miles from the closest building of employer's shipyard. The Board held that the accident site lacks proximity to navigable waters and claimant was not exposed to maritime hazards, and thus affirmed the administrative law judge's finding that claimant was not injured on a covered situs. McConnell v. Bethlehem Steel Corp., 25 BRBS 1 (1991).

The Board held that the administrative law judge erroneously relied on the Third Circuit's' decisions in *Dravo* and *Sea-Land* to find that the situs test was met. These decisions, although not specifically overruled, are significantly undercut by the Supreme Court's decisions in *Caputo* and *Ford*. Thus, it is insufficient that claimant was injured in the course of his maritime employment, as the injury occurred at an auto repair shop which is not an enumerated situs or an adjoining area. *Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993).

The Board affirmed the administrative law judge's denial of benefits inasmuch as claimant was injured in a car accident on a public road that is not a covered situs. The Board affirmed the administrative law judge's finding that employer was not somehow estopped from contesting Longshore coverage based on the state's denial of his state claim on the ground that his remedy was under the Longshore Act. The Board held that the action of the state cannot be imputed to employer as there is no identity of interest. Moreover, the employer could not have stipulated to coverage under the Act had it so desired, and jurisdiction cannot be conferred by consent, collusion, laches, waiver or estoppel. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem.,* No. 00-2463 (4th Cir. Aug. 14, 2001).

The Fourth Circuit declined to follow the opinions of other circuits in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) *(en banc), cert. denied*, 452 U.S. 905 (1981), and *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), and held that an "adjoining area" under Section 3(a) must actually "adjoin" navigable waters, not merely be in general geographic proximity of the waterfront in order to meet the situs test. An area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included under the Act as an "other area" under the Act, the area must be a discrete shoreside structure or facility and it must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." The court affirmed the finding that the situs test was not met, as claimant was injured eight-tenths of a mile from the ship terminal, and the facility does not adjoin navigable waters. *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), *cert. denied,* 518 U.S. 1028 (1996).

The Fourth Circuit affirmed the finding that the situs test was not met, as claimants were injured at a container repair facility located approximately five miles away from a marine terminal. Applying the principles of its decision in *Sidwell*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), the court held that the repair facility does not "adjoin" navigable waters within the meaning of Section 3(a), and is therefore not a maritime situs. The court noted that the facility neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of a marine terminal that is contiguous with such waters. The court rejected petitioners' arguments that the repair facility must be construed as an "other adjoining area" within the meaning of Section 3(a) because it was located at the closest feasible site for employer and because employees regularly traveled between the repair facility and employer's ship terminal facility. *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996), *cert. denied,* 519 U.S. 812 (1996).

The Board held that two employees of a power plant, which was located on Naval property adjacent to the Norfolk Naval Shipyard, were not injured on a covered situs under Section 3(a) of the Act. The Board observed that a railroad spur separates the shipyard from the power plant, and that a chain link fence surrounds the perimeters of each property, further separating the properties from one another. In addition, employer's personnel do not have immediate access to the shipyard, but must obtain a special pass from the shipyard. Based on these factors, the Board concluded that the power plant must be considered to be located on land separate and distinct from the shipyard. Following the Fourth Circuit's holding in *Sidwell,* 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), the Board held that since the power plant is not contiguous with navigable waters, it is not an "adjoining area" under Section 3(a). *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.,* 135 F.3d 770 (4th Cir. 1998), *cert. denied*, 525 U.S. 816 (1998).

The Fourth Circuit, following *Sidwell*, reiterated its holding that an "adjoining area" under Section 3(a) must not only "adjoin" navigable waters, but the property must also be a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters. In the instant case, employer's steel fabrication facility, one-third of which was dedicated to maritime related projects, was located 1000 feet from the water's edge, and employer's property itself extended to the water's edge. Nevertheless, the court reversed the Board's holding that the situs test was met, as it was not customary for employer's workers to move between land and the water in any regular way; rather, they remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland site. The court acknowledged that employer's facility was contiguous with navigable water, and that components were, on rare occasions, shipped by barge from the facility, but found these facts to be fortuitous and not meaningful. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 85(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 547 (1998).

The Board affirms the administrative law judge's finding that claimant's injury did not occur on a covered situs, pursuant to the Fourth Circuit's decision in *Jonathon Corp. v. Brickhouse,* 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998). Employer's facility in this case adjoined navigable waters, but the ship repair work did not take place on the water or at the water's edge. The components had to be shipped elsewhere to be installed on vessels, and thus the *"raison d'etre"* of the repair facility is not its use in connection with navigable waters. The mere fact of a geographical nexus is not sufficient; there must also be a functional nexus with navigable waters. The fact that a "small portion" of the components is shipped by barge is insufficient to confer coverage pursuant to *Brickhouse. Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting), *aff'd on recon. en banc*, 35 BRBS 181 (2002) (Hall, J., dissenting).

The Board held that claimant's injury, which occurred in employer's parking located outside employer's fenced off facility, did not occur on a covered situs under Section 3(a) of the Act. The Board concluded that the parking lot was a separate and distinct property, since it was physically separated from employer's shipyard by a public road and a security fence. As the parking lot was not contiguous with navigable waters, pursuant to the Fourth Circuit's holding in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), the Board held that it was not an "adjoining area" under Section 3(a) of the Act. *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998).

Following its recent decision in *Griffin*, 32 BRBS 87 (1998), the Board affirmed the administrative law judge's determination that employer's Building 511, the location of claimant's injury, is not a situs under Section 3(a) under the holding in *Sidwell,* as the building is separated from the shipyard by public roads and does not adjoin navigable water. *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998).

The Board held that it is undisputed that claimant's injury occurred on a beach --a site that is "adjoining" and "contiguous" to navigable water-- but nevertheless, the site of claimant's injury was not a covered situs pursuant to Section 3(a). The Board held that the record in this case is devoid of evidence demonstrating that the unimproved beach fronting the ocean was "customarily used for loading, unloading, repairing, dismantling, or building a vessel." Because the administrative law judge reasonably found that the customary use of the beach is recreational, the Board rejected claimant's contentions that his duties unloading sand from a dredge constitute the "discharge" of sand onto the beach, making it an area "customarily" used for unloading a vessel. *Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *rev'd in pert. part,* 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

The Third Circuit held that the Board too narrowly defined the word "customarily" in Section 3(a) in this case, by construing it to mean that the *customary* use of the *beach* had to be for some maritime purpose. Rather, the word "customarily" in Section 3(a) modifies the phrase "adjoining area . . . used by an employer," not simply the phrase "adjoining area," and thus, the dispositive question is whether "an *employer customarily*" *uses the beach* for "loading, unloading . . ." The Third Circuit held that under the facts and circumstances of this case the beach at Fenwick Island constituted an adjoining area where employer customarily unloaded sand from its vessels and as such it constituted a covered maritime situs under the Act. The Third Circuit therefore reversed the Board's holding that claimant had failed to meet the situs test. *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115 (CRT) (3d Cir. 1998), *rev'g in pert. part* 30 BRBS 205 (1996).

The Board affirmed the administrative law judge's finding that decedent's work was performed at a covered situs, as employer's entire work site, as was the case in *Nelson,* 143 F.3d 789, 32 BRBS 115(CRT) (3^{d} Cir. 1998), was customarily used for its dredging operation, and thus was used in the loading and unloading of the dredged material. *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001).

The Fifth Circuit holds that a parking lot constructed at a heliport used by employer to transport crewmen to fixed oil platforms is not a covered situs under Section 3(a) as it is not customarily used in loading, unloading, repairing or building a vessel. In *dicta*, the court notes that absolute contiguity with navigable waters is not required for an "adjoining area" under Section 3(a). *Sisson v. Davis & Sons*, *Inc.,* 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998).

The Board affirmed the administrative law judge's finding that the proximity of employer's facility to the port provided an economic benefit for employer, but vacated the administrative law judge's finding that employer's facility is a covered situs under the Act, as the administrative law judge did not address the weight of the other *Herron* factors, and erred in stating that the rail lines at employer's facility go to the port. *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997).

The Board affirms the administrative law judge's finding that claimant was not injured on a covered situs based on an application of the *Herron* factors. Employer's property does not have a sufficient functional nexus to maritime activity to warrant a finding of coverage under the Act. Citing *Gonzalez*, 26 BRBS at 12, the Board noted that while the proximity of the site to the port and the economic benefit it allows employer in lowering its customers' costs of transporting containers between the port and the yard supports a finding of coverage, this factor alone is insufficient to support a finding of a covered situs. The site was chosen for its low cost, the surrounding businesses are not maritime in nature, and the site is not particularly suited for maritime purposes. *Arjona v. Interport Maintenance Co.*, *Inc.*, 34 BRBS 15 (2000).

Applying the *Herron* factors, the Board held that employer's scrap field where claimant suffered his injury, which was 500 feet from the water's edge, was customarily used by employer in the overall process of unloading vessels and part of employer's waterfront facility. Accordingly, the Board held that the scrap field was part of a general "maritime area" sufficient to constitute an "adjoining area" under Section 3(a) of the Act, and affirmed the administrative law judge's determination that claimant satisfied the situs requirement under the Act. *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs pursuant to Section 3(a), where employer's facility was on an island surrounded by navigable water, the site of the injury was four or five blocks from the water's edge, and the facility served a maritime function in that oil rig platforms were loaded and unloaded from barges and electrical hookups and repairs were performed on the barges. *Cooper v. Offshore Pipelines International, Inc.*, 33 BRBS 46 (1999).

After discussing *Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), the Board affirmed the administrative law judge's determination that claimant's injury at employer's "clean shed" occurred on a covered situs. The site is used to repair devices used on vessels, and thus has a functional nexus with maritime activity. Moreover, the geographic criterion of *Winchester* is satisfied, as the site is approximately 300-400 feet from the navigable St. John's River and is adjacent to a canal which leads to the river. Thus, the injury occurred "within the vicinity" of a navigable body of water, notwithstanding that there are non-maritime businesses and residences in the surrounding area. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*).

The Board held that in order for the injury to decedent to be compensable, his exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, *some* exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge of where decedent's injury occurred and, thus, whether the injury is compensable. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

In this case arising within the Eleventh Circuit, the Board reversed the administrative law judge's application of the more stringent standard for situs enunciated by the Fourth Circuit. Rather, the Board held that under the controlling standard set out in *Winchester* and followed in *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), claimant's injury occurred on a covered situs as the undisputed facts establish both the geographical and functional nexus required by that standard. Specifically, the record establishes that employer's business is "within the vicinity" of the Brunswick River, *i.e.*, it relocated to the Brunswick River to facilitate its maritime business, and did, in fact, use the river on a number of occasions in furtherance of its business, and that its facility is used to fabricate and construct marine parts. *Pearson v. Jered Brown Brothers*, 39 BRBS 59 (2005), *aff'd on recon. en banc,* 40 BRBS 2 (2006).