

SECTION 2(3), (4)—MARITIME EMPLOYMENT

Section 2(3)—Status

Introduction

Sections 2(3) and 3(a), 33 U.S.C. §§902(3), 903(a), set forth the requirements for an employee's coverage under the Act. Section 2(3) contains the "status" requirement, which refers to the nature of the work performed, and Section 3(a) defines the covered "situs," which refers to the place where claimant is injured. Both requirements must be met for a claimant to be covered under the Act.

Prior to the enactment of the 1972 Amendments, the Act contained only a situs test; recovery was limited to those injured on the navigable waters of the United States, including any dry dock. *See Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). As a result of the Act's coverage extending only to the water's edge, employees during the course of their days walked in and out of the Act's coverage, depending on whether they were working on a ship or on land. The 1972 Amendments recognized that modern cargo-handling techniques had moved much of the longshoreman's duties off the vessel and onto land and sought to address the problem of workers walking in and out of coverage. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Accordingly, the covered situs of Section 3(a) was expanded landward to specified areas, and the status test was added to define the maritime employees entitled to coverage when injured in the covered areas.

Section 3(a) as amended, provides coverage for injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used in loading, unloading, repairing, dismantling or building a vessel)." 33 U.S.C. §903(a). The situs requirement of Section 3(a) is addressed in Section 3 of this desk book.

Section 2(3), as enacted in 1972, provided

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew or any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. §902(3).

Section 2(4) contains a complementary definition of the term “employer” as “an employer any of whose employees are employed in maritime employment, in whole or in part,” on a site covered by Section 3(a).

The 1984 Amendments added specific categories of employees excluded from the Act’s coverage if subject to coverage under a state worker’s compensation law. 33 U.S.C. §903(A)-(F), as well as denominating the traditional exclusions of members of a crew of a vessel and persons engaged by the master to work on vessels under 18 tons net as subsections (G) and (H). These provisions are discussed in Exclusions from Coverage, *infra*.

The applicable regulation, 20 C.F.R. §701.301(a)(12), addresses the exclusions, *see infra*, but also provides, regarding the definition of an “employee” that it

means any person engaged in maritime employment, including:

- (A) Any longshore worker or other person engaged in longshoring operations;
- (B) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker;
- (C) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions.

20 C.F.R. §701.301(a)(12)(i).

Since the enactment of the 1972 Amendments, the Supreme Court has considered the coverage of the Act’s situs and status requirements on several occasions. Initially, in *Caputo*, 432 U.S. 249, 6 BRBS 150, the Court established the principle that both the status and situs requirements must be met in order for claimant to be covered by the Act. The Court also rejected the “point of rest” theory, which sought to limit coverage of longshoreman to the first shoreside point of rest of cargo, and discussed congressional intent that employees not walk in and out of coverage in the course of a day’s work. The Court thus stated that status involves an occupational test which does not require that a claimant must be engaged in maritime employment at the time of injury; rather, an employee is covered where he spends “at least some of his time” in covered work. The Court also stated that an employee’s union membership is not determinative of coverage.

The Court’s decision in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), held claimants covered where they were engaged in intermediate steps of moving cargo between ship and land transportation and were not merely picking up cargo for further transshipment. Thus, longshoremen are covered up until the point that the cargo moves into or out of landward transportation. The Court again emphasized the occupational

nature of Section 2(3) and stated that it does not enumerate all possible categories of maritime employment.

In *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980), the Court held, consistent with the principles in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), that the 1972 Amendments did not alter the accepted understanding that federal jurisdiction co-exists “with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine.” Thus, concurrent jurisdiction may exist under the Longshore Act and a state compensation law.

The decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), ended the dispute over whether employees injured on actual navigable waters must also meet an occupational test. The Court rejected this conclusion, holding that employees injured on actual navigable waters in the course of their employment who would have been covered prior to the 1972 Amendments based on the site of injury remain covered after the 1972 Amendments. Such employees meet both the status and situs tests and are therefore covered unless excluded by another provision of the Act.

The Court held that oil production workers on fixed drilling platforms are not covered by the Longshore Act in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). The Court held that such work is not maritime in nature.

In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), the 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 involved repairing and maintaining the machinery used to load coal onto vessels were held covered because such work is essential to the loading and unloading process.

These opinions are discussed in more detail in the appropriate sections, *infra*.

Section 20(a) Presumption

Section 20 provides a presumption, “in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of the Act.” 33 U.S.C. §920(a).

While application of the presumption in establishing that the coverage requirements of Sections 2(3) and 3(a) of the Act have been met has been raised in many cases, in actuality Section 20(a) has not been determinative as the issues raised generally are legal and not factual. In *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff’d sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), and *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the courts rejected the Director’s argument that the presumption applied to the coverage issues raised, holding that it does not apply to the legal interpretation of these provisions. In *Dellaventura*, 544 F.2d at 49, 4 BRBS at 174, the Second Circuit reviewed previous coverage decisions of the Supreme Court, finding that they would “be searched in vain for any mention of the presumption.” The court also discussed its prior decisions, *e.g.*, *Overseas African Constr. Corp. v. McMullen*, 500 F.2d 1291, 1296 (2d Cir. 1974), which involved the coverage provisions of the Defense Base Act extension, stating that the presumption was treated merely as an embodiment of the “rule...that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found.” *Id.* The court concluded that the issue before it was not one of whether claimant could fit within a line that had been drawn but defining where the line was to be placed and only in the former case might the presumption apply. *See also O’Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965) (Section 20(a) cannot bring an injury within the pre-1972 coverage of the Act on the facts presented, involving an employee injured on land in the performance of a non-maritime contract and on a building way used in new ship construction).

Following *Dellaventura* and *Stockman*, the Board held that Section 20(a) does not apply to the status and situs inquiries. *See, e.g., Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff’d mem.*, 865 F.2d 1257 (4th Cir. 1989); *Palma v. California Cartage Co.*, 18 BRBS 119 (1986); *Sheridon v. Petro Drive, Inc.*, 18 BRBS 57 (1986); *Wynn v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 31 (1983); *Boughman v. Boise Cascade Corp.*, 14 BRBS 173 (1981) (Miller, dissenting); *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978) (Miller, dissenting), *aff’d sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981).

The Director continued to raise applicability of the presumption in coverage cases, and the Board continued to reject the argument, as the issues raised involved the legal interpretation of the statute, to which Section 20(a) does not apply. *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372

(1994); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director*, OWCP, 86 F.3d 1162 (9th Cir. 1996) (table).

While court decisions have similarly found the presumption not dispositive, opinions addressing it after *Stockman* and *Dellaventura* have acknowledged that Section 20(a) may apply to questions of fact. 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), the Fifth Circuit stated that in determining whether an area falls within Section 3(a), the administrative law judge is guided in this factual determination by Section 20(a). In *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998), the Second Circuit stated its agreement with claimant that the administrative law judge erred in not applying the Section 20(a) presumption to questions of fact involving the coverage issues raised and in placing the burden of producing evidence on claimant. The court held that this error was harmless, as its ruling that claimant, who was injured while working on a bulkhead, was a covered employee was based on undisputed facts of record, with the court addressing only legal issues, and thus the same conclusion would be reached even if the presumption did not apply. Similarly, citing *Stockman*, 539 F.2d 264, 4 BRBS 304, the First Circuit rejected the argument that Section 20(a) provides a bias in favor of coverage, holding that the presumption does not apply to the situs inquiry where legal judgments are being made about undisputed facts. *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 *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002), the Board reversed an administrative law judge's denial of coverage based on a lack of specific evidence regarding the point at which a maintenance worker's failure to remove debris would impede shipbuilding. Despite the administrative law judge's reliance on a lack of evidence, the Board found it unnecessary to address the scope of Section 20(a), as there was no dispute regarding claimant's job duties. The disputed issue involves the legal import of those duties, and only one conclusion was possible based on the evidence and law.

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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), 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 rejected claimant's assertion that Section 20(a) applied to presume that a yacht facility under construction on which he was injured was a maritime facility, citing the court decisions holding 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 regarding this facility, and whether claimant's work on it is "maritime employment" is a legal issue to which the presumption does not attach. *Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003).

The Board affirmed the administrative law judge's finding that claimant contracted histoplasmosis during his employment on a bridge and not during his three days of employment on a barge. Although the Section 20(a) presumption does not apply to legal questions of concerning the Act's coverage provisions, the Board addressed claimant's contention that the administrative law judge failed to give him the benefit of the Section 20(a) presumption. To the extent that the presumption applies to factual issues related to coverage, the Board held that employer presented substantial evidence to rebut the Section 20(a) presumption with evidence that claimant's injury occurred on the bridge. In weighing the evidence as a whole, the administrative law judge rationally credited evidence that claimant's disease was not contracted on the barge. *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

In this case involving an employee of a fish processing company, the Board reiterated that the Section 20(a) presumption does not apply to the legal issues of coverage when the facts are undisputed. *Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012), *aff'd on recon.*, 47 BRBS 5 (2013).

Assuming, arguendo, the Section 20(a) presumption applies to the issue of "navigability," any error in the administrative law judge's failure to apply the presumption is harmless because employer presented substantial evidence that the Passaic River at the point of injury is not navigable in fact. *Wilson v. Creamer-Sanzari Joint Venture*, 53 BRBS 19 (2019).

While the Section 20(a) presumption may apply to facts underlying coverage issues, it does not apply to the legal interpretation of those facts. In this case the presumption is not applicable because the facts concerning the situs issue are undisputed. *Long v. Tappan Zee Constructors, LLC*, 53 BRBS 27 (2019).

Subject Matter Jurisdiction

In *Ramos v. Universal Dredging Corp.*, 10 BRBS 368 (1979) (Miller, dissenting), *rev'd*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981), a majority of the Board overruled a prior decision in *Sablowski v. General Dynamics Corp.*, 5 BRBS 383 (1977), and held that questions of status and situs involve the Board's subject matter jurisdiction and, therefore, are issues which may be raised by the Board *sua sponte*. In *Ramos*, claimant was injured aboard a dredge. The parties agreed he was a maritime employee and employer contested coverage based only on the argument that he was a member of the crew. The administrative law judge rejected this contention. The Board found it unnecessary to reach the member of a crew issue, as it concluded that the situs and status issues involve more than a "coverage" finding but provide the very basis for the administrative law judge's authority to hear a case. As such subject matter jurisdiction cannot be waived, it can be raised at any time. The Board thus raised claimant's status as a maritime employee, and concluded that he did not meet the occupational definition under the law at that time. *See also Mire v. The Mayronne Co.*, 13 BRBS 990 (1981) (raising the issue *sua sponte*, the Board remanded a case involving a death on an oil rig for findings regarding coverage under OCSLA or the Longshore Act); *Perkins v. Marine Terminals Corp.*, 12 BRBS 219 (1980) (raising situs on its own motion, Board held claimant injured on a public highway was not injured on a covered site and thus jurisdiction was lacking). Subsequently, in *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981) (Miller, dissenting), the Board relied on its decision in *Ramos* in holding that the administrative law judge erred in accepting the parties' stipulations concerning coverage. As subject matter jurisdiction cannot be waived, the Board remanded the case for the administrative law judge to accept evidence and address the issue.

The United States Court of Appeals for the Ninth Circuit, however, reversed the Board's decisions in *Ramos* and *Perkins*. In *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981), the court held that the question presented involving status and situs involved coverage under the Act, not subject matter jurisdiction, and the Board had jurisdiction because the injury occurred on navigable waters. In summing up, the court explained

It is clear that the Benefits Review Board in overruling its *Sablowski* decision was troubled by the manner in which it previously construed 903(a), as implemented by 902(3), to deal with *coverage*, rather than jurisdiction: This, it reasoned, permitted the parties to agree upon a "coverage" which might extend beyond the constitutional limits of the admiralty power. In its present approach, the Board would make 903(a) and 902(3) jurisdictional in all respects. In utilizing this approach, it has gone far beyond the Congressional intent. For example, an injury may have a sufficient connection with traditional maritime activity (an offshore oil

spill) to be well within the reach of admiralty jurisdiction, but not an injury covered by 903(a) and 902(3). In that posture, the issue is purely one of coverage. The same can be said of the factual background before us. In other words, because the present injury occurred well to the seaward side of the line initially drawn in [*Jensen*, 244 U.S. 205 (1917)], the only issue is one of coverage.

By so holding, we do not mean to say that an employer and an employee should be able to stipulate that the tort occurred at a situs embodied in 903(a) and that the employee is engaged in “maritime employment” within the meaning of 902(3), when in fact the injury was suffered some fifteen or twenty miles inland and the employee was a bookkeeper for his stevedore employer.

Ramos, 653 F.2d at 1359 , 13 BRBS at 693-694 .

In *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982), *rev’g* 12 BRBS 219 (1980), the Ninth Circuit reiterated its ruling in *Ramos*, holding that the situs issue raised by the Board goes only to coverage, not subject matter jurisdiction, and the Board was therefore without authority to raise it *sua sponte*. As employer did not raise the issue, it was waived. The court also stated that, as claimant was indisputably engaged in maritime employment under Section 2(3), this factor alone would provide a sufficient nexus to traditional maritime activity to create admiralty jurisdiction in this case.

Since the Ninth Circuit’s decisions, this issue has not been addressed by the courts, and the Board has not raised and decided a coverage issue *sua sponte*. The Board, however, in *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986), a case involving a welder on an offshore oil rig, instructed the administrative law judge to consider the issue of coverage on remand, although it had not been raised by the parties, in light of the then-recent Supreme Court ruling in *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985). *See* Offshore Drilling, *infra*. Moreover, the Board continued to hold that coverage could not be stipulated by the parties. *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985).

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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 Board rejected claimant's argument that employer waived the right to contest coverage by making voluntary payments. The parties may not stipulate to coverage under the Act, and employer's voluntary payments are not a waiver of its right to contest issues in the future. *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 estopped from contesting Longshore coverage based on the state's denial of claimant's 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 administrative law judge's finding that employer did not agree to Longshore coverage is supported by substantial evidence; employer did not take any action tantamount to stipulating coverage, even if it could properly do so. As federal courts are courts of limited jurisdiction, jurisdiction that is lacking cannot be conferred by consent, collusion, laches, waiver or estoppel. The Board thus affirmed the administrative law judge's conclusion that even if there had been negligence or misrepresentation on employer's part, such could not bestow coverage where the facts do not establish the situs requirement was met. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd mem.*, 15 Fed Appx. 169 (4th Cir. 2001).

Coverage prior to the 1972 Amendments

Prior to the 1972 Amendments, the sole coverage requirement was contained in Section 3(a), which provided:

Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

33 U.S.C. §903(a) (1970) (amended 1972).

The Act was initially adopted to apply coverage to employees who the Supreme Court had held could not be afforded coverage under state worker's compensation laws constitutionally because they were injured seaward of the water's edge and thus within the admiralty jurisdiction of the U.S. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). In the years following passage of the Act, litigation under Section 3(a) addressed the "Jensen line" and attempted to define the reach of the Act's coverage. In general, the site of injury controlled; thus, injuries occurring on water were covered by the Act, subject to the "maritime but local" exception permitting state coverage, and those on land by the states. The result was a "twilight zone" of concurrent jurisdiction. *See Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *Davis v. Department of Labor*, 317 U.S. 249 (1942); *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941).

In *Calbeck*, 370 U.S. 114, the Supreme Court addressed coverage of employees injured in new ship construction. Prior to the Act's passage, the Court had recognized that traditionally injuries on navigable waters during new ship construction could be covered by state worker's compensation laws, while such statutes could not, constitutionally, be applied to injuries to employees engaged in repairing completed vessels on navigable waters, and the court below had adopted this distinction. The Court rejected this interpretation of Section 3(a), finding that such work, previously found to be of "local concern" to the states, was not precluded from coverage under the Act. Thus, the Court held that the Act provides compensation for all injuries sustained by employees on navigable waters whether or not a particular injury may have been within the coverage of a state compensation law. In *Nacirema*, 396 U.S. 212, the Court affirmed the Act's focus on injuries upon navigable waters, holding that longshoremen injured on piers permanently affixed to land were not covered by the Act. Thus, at the time the Act was amended in 1972, coverage turned on whether the site of the injury was on water or land.

In *Bowman v. Riceland Foods*, 13 BRBS 747 (1981), the Board affirmed the administrative law judge's finding that the employee's death in 1969 was covered under pre-amendment law where decedent fell into the river and death was caused either by drowning or by his striking the deck during his fall. There was no evidence that the injury occurred before he fell from the loading dock, which would not have been a covered situs.

Relevant to coverage in occupational disease or latent injury cases, the Fifth Circuit has stated that, "it is well established that an injury occurring on land may be compensable under the Longshoremen's Act - if its cause originated on the water." *Andras v. Donovan*, 414 F.2d 241, 243 (5th Cir. 1969), citing *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 467 (1968). See *Mississippi Shipping Co., Inc. v. Henderson*, 231 F.2d 457 (5th Cir. 1956) (heart attacks on shore following accidents afloat); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954) (aggravation by fall at home following accident afloat). Thus, in *Andras*, the court held that a back injury which occurred on land as the result of an accident on navigable waters approximately six months earlier was compensable.

The phrase "any dry dock" traditionally has included floating dry docks, marine railways and graving docks. *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965). In *O'Leary*, the Ninth Circuit held the phrase "any dry dock" did not include building ways used for new ship construction. In *Paul v. General Dynamics Corp.*, 16 BRBS 290 (1984), the Board held that in light of the holding in *Calbeck*, 370 U.S. 114, the distinction between new ship construction and ship repair is no longer valid. The Board concluded that building ways are similar to dry docks, graving docks and marine railways, and that an injury on such a site during new ship construction was thus covered under the pre-1972 Act. *Accord Murphy v. Bethlehem Steel Corp.*, 17 BRBS 148 (1985). The Board cited the decision in *Simpson v. Director, OWCP*, 681 F.2d 81, 14 BRBS 900 (1st Cir. 1982), *vacating and remanding* 13 BRBS 970 (1981) (Miller, dissenting), *cert. denied*, 459 U.S. 1127 (1983), wherein the First Circuit held in a case involving new vessel construction on a marine railway that the holding in *Calbeck* applies retroactively to cases decided under the 1927 Act. Thus, in *Simpson*, a claimant injured while engaged in such work in 1941 was held covered.

The holding in *Paul*, 16 BRBS 290, was premised on the determination that coverage under the Act is determined with reference to the law in effect at the time of the event which caused the injury, e.g., exposure to injurious stimuli in an occupational disease case, regardless of when the full effect of the injury becomes manifest. See *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981) (Smith, concurring) (Miller, concurring and dissenting), *modified*, BRB No. 76-244 (Oct. 16, 1984), *aff'd on other grounds*, 775 F.2d 775, 17 BRBS 154(CRT) (11th Cir. 1985) (pre-1972 Act applies to exposure up to 1972; 1972 Amendments apply to work thereafter). In *Paul*, claimant sustained work-related vertebra and neck injuries in 1972, before the effective date of the

1972 Amendments. He later filed a claim for compensation for a 1979 stroke, which was directly attributable to the 1972 injury. The Board affirmed the administrative law judge's choice of pre-amendment law for determining whether claimant was covered because the event which caused the stroke occurred prior to the 1972 Amendments. Similarly, in *Murphy*, 17 BRBS 148, the decedent was exposed to asbestos from 1941 to 1945 at employer's shipbuilding site. The asbestos exposure eventually caused mesothelioma from which the employee died in 1980. The Board rejected claimant's contention that the 1972 Amendments applied, as the decedent's exposure to injurious stimuli occurred pre-amendment.

Thus, the Board held that the coverage provisions of the 1972 Amendments do not apply retroactively, nor do the provisions of the 1927 Act apply retroactively. *Wynn v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 31 (1983). In *Wynn*, claimant filed a hearing loss claim in 1979, and it was denied for lack of coverage. The Board held that claimant's exposure from 1918 to the early 1920's was not covered by the Act. Moreover, although claimant continued to work for employer and sustained exposure from 1924-1965, as claimant's work in this period was not on navigable waters, it was not covered.

The Ninth Circuit subsequently rejected the Board's holdings in *Paul* that building ways are covered pre-Amendment as dry docks and that the law at the time of exposure applies in determining coverage. In *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990), the Ninth Circuit held that the Supreme Court's ruling in *Calbeck*, 370 U.S. 114, 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 its decision in *O'Leary*, 349 F.2d 571, 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 nonetheless affirmed the finding that claimant was covered under the Act, holding that coverage under the Act is determined with reference to the law in effect at the time the injury becomes manifest. Thus, where claimant was last exposed to asbestos while engaged in covered employment in 1942, he is covered under the 1972 Act because his occupational disease did not become manifest until 1980 and Section 3(a) as amended in 1972 includes a "building way" as a covered site. The court noted that this result is consistent with the trend in occupational disease cases holding that the time of manifestation is the time of injury.

Thereafter, in a case arising in the Ninth Circuit, the Board followed the decision in *SAIF Corp.*, 908 F.2d 1434, 23 BRBS 113(CRT), and held that the coverage provisions in effect on the date the employee's occupational disease becomes manifest govern. Thus, where decedent was last exposed to asbestos while engaged in covered employment in the 1940's, coverage must be determined 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 ultimately determined that it would follow the decision in *SAIF Corp.*, 908 F.2d 1434, 23 BRBS 113(CRT), 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*, 16 BRBS 290, and its progeny. As manifestation of decedent's injury did not occur until he was diagnosed with lung cancer in 1984, the Board held that the Act as amended in 1972 and 1984 applied. The Board further held that the requirements of Sections 2(3) and 3(a) were satisfied, as decedent was engaged in shipbuilding at the Electric Boat shipyard. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom Ins. Co. of North America v. U. S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Affirming this decision, the Second Circuit held that 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 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 North America v. U. S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

In light of the Board's decision in *Peterson*, 25 BRBS 71, the Board agreed in *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993), that the administrative law judge erred in deciding the coverage issues under the pre-1972 Act. The Board affirmed the administrative law judge's finding that decedent's work on a dry dock constitutes work on actual navigable waters, entitling him to coverage under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983).

The claimant filed for benefits under the FELA alleging his mesothelioma was caused by asbestos exposure with the employer's predecessor from 1960-1969. The Maryland Court of Special Appeals affirmed the Maryland circuit court's granting of employer's motion to dismiss on the basis the Act is the claimant's exclusive remedy. The court held, inasmuch as the claimant's mesothelioma was not manifest until 2016, his injury arose at that time when the Act, as amended in 1972, applied to extend coverage to his land-based duties supervising the loading of cargo onto railroad cars at a maritime facility. *Crowe v. CSX Transp., Inc.*, 215 A.3d 376 (Md. Ct. Spec. App. 2019).

For a further discussion of coverage where claimant is injured on navigable waters post-1972 and would have been covered under the pre-1972 Act, *see* discussion, *infra*.

Injury on Actual Navigable Waters

After the addition of the status requirement in 1972, a question arose as to whether employees injured on actual navigable waters who would have been covered prior to 1972 by virtue of the location of their injury retained that coverage post-amendment regardless of whether their job duties involved maritime employment.

In an early decision, the Board held a “pondman” covered under the Act because he was injured on the navigable waters of Coos Bay and would have been covered prior to the 1972 Amendments. *Gilmore v. Weyerhaeuser Co.*, 1 BRBS 180 (1974), *rev'd*, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). The Ninth Circuit reversed the Board’s decision, holding that the 1972 Amendments radically altered the requirements for coverage under the Act and, relegating pre-1972 decisions to limbo, held that injury on navigable waters alone is insufficient to confer coverage. The court adopted the test that an employee’s work must have a “realistically significant relationship to ‘traditional maritime activity involving navigation and commerce on navigable waters,’” and he must be injured on a covered site, in order to be covered by the Act. The court concluded that the work of an employee at a saw mill’s log pond lacks such a connection to traditional maritime activity and is thus not covered by the Act. *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961, 3 BRBS 140, 144 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976).

Following this decision, the Board continued to hold that claimants were covered when injured on navigable waters, but it also applied the *Weyerhaeuser* test. In *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821 (1978), *aff'd sub nom. Duncanson-Harrelson Co. v. Director. OWCP*, 644 F.2d 827, 13 BRBS 308 (9th Cir. 1981), the Board held that a claimant working from a floating raft in the construction of a dock was covered as a harbor-worker. The Board also stated that claimant would be covered under the *Weyerhaeuser* test and that he satisfied the status requirement because he was injured over pre-amendment navigable waters. *See also Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980) (holding claimant engaged in construction of a dry dock covered as a harbor-worker, the Board relied on pre-Amendment cases addressing such structures).

However, in *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978) (Miller, dissenting), *aff'd sub nom. Fusco v. Perini North River Assoc.*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981), the Board changed its view that injury on navigable waters alone entitled a claimant to coverage under the Act. *Sedmak* addressed the coverage under Section 2(3) of four employees, some of whom worked from floating platforms, engaged in construction of a sewage treatment plant on the Hudson River. The Board initially held that the employees did not fall within the enumerated categories of Section 2(3). After review of *Caputo* and other relevant cases,

the Board concluded that “it is clear that injury over navigable waters in and of itself is an insufficient benchmark by which to ascertain maritime employment.” *Id.* at 385. Addressing the *Weyerhaeuser* test, the Board found it was overly restrictive in requiring that maritime employment be of a “*traditional*” nature and have a “realistic relationship to the *traditional* work and duties of a ship’s service employment.” *Weyerhaeuser*, 528 F.2d at 96 (emphasis added). The Board thus modified the test to delete the “traditional” maritime activity requirement, holding that in order to fall within the general category of “maritime employment,” an employee’s duties must have a “realistically significant relationship to maritime activities involving navigation and commerce on navigable waters.” *Sedmak*, 9 BRBS at 386. As the employees here lacked a such a relationship to maritime activities, the Board held they were not covered by the Act.

On appeal, the Second Circuit initially reversed the Board’s decision in *Sedmak*. *Fusco v. Perini North River Associates*, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979). After finding that the two employees at issue on appeal were injured on navigable waters, the court decided that the critical phrase “person engaged in maritime employment” in Section 2(3) should be interpreted “geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972.” *Id.*, 601 F.2d at 669, 10 BRBS at 640. The court focused on a portion of the legislative history indicating that Congress did not intend for Section 2(3) to exclude “other employees traditionally covered.” *Id.*, 601 F.2d at 667, 10 BRBS at 636. The court thus rejected the Board’s “occupational” interpretation and held that as their principal duties were over navigable waters, claimants were engaged in maritime employment pursuant to Section 2(3). However, the Supreme Court vacated the Second Circuit’s decision and remanded the case for reconsideration in light of *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). *Perini North River Associates v. Fusco*, 444 U.S. 1028 (1980). In light of the Court’s emphasis on the occupational nature of Section 2(3) in *Ford*, the Second Circuit thereafter affirmed the Board’s decision in *Sedmak*. *Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 332 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981).

In a series of cases following *Sedmak*, the Board denied coverage to employees working on sewage pipelines and plants. *See, e.g., Hutcherson v. Perini North River Associates*, 13 BRBS 737 (1981) (Miller, concurring) (construction workers on barges); *Brown v. Hydro-Dredge Corp.*, 13 BRBS 788 (1981) (Miller, dissenting) (pile driver, diver); *Norman v. Healy Tibbitts Constr. Co.*, 14 BRBS 245 (1981), *rev’d sub nom. Norman v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983) (table) (crane operator).

The Second Circuit again affirmed the Board’s approach in *Churchill v. Perini North River Associates*, 652 F.2d 255, 13 BRBS 399 (2d Cir. 1981), *aff’g* 12 BRBS 929 (1980). The Fifth Circuit, however, adopted the approach which the Supreme Court was to take. In *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 14 BRBS 1013 (5th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1170 (1983), the court held that claimant performing

work related to petroleum extraction aboard a drilling vessel was engaged in maritime employment because he was injured on navigable waters in the course of his employment. The court rejected the Ninth Circuit's test enunciated in *Weyerhaeuser*, 528 F.2d 957, 3 BRBS 140, for employees injured on navigable waters, although it indicated that the test might be applicable in differentiating covered shoreside employees from those who would not be covered. The court noted in this regard that *Caputo* and *Ford* addressed the occupational nature of the maritime employment requirement in addressing the coverage of land-based workers newly covered following the 1972 Amendments. The court also found that offshore oil drilling is maritime commerce, and claimants would therefore also be covered under the *Weyerhaeuser* test, a conclusion that is no longer good law in view of *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985).

Following its decision in *Boudreaux*, the Fifth Circuit held covered a fish spotter/airplane pilot whose plane crashed in navigable waters, stating that an employee who dies when an aircraft strikes the water and who has regularly flown over the water in the course of his employment, using an airplane to do what vessels once did and could still do, is covered. *Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *rev'g* 14 BRBS 74 (1981), *cert. denied*, 459 U.S. 1170 (1983). While such an employee injured in the regular course of his employment on the navigable waters of the United States automatically meets both the status and situs tests, the court added that claimant would also meet the occupational test because fish spotting traditionally was done by ships' crews and thus has a significant relationship to traditional maritime activity. The court also stated that the enumerated occupations are not exclusive.

The issue of coverage for employees injured on navigable waters in the course of their employment ultimately reached the Supreme Court, which reversed the Second Circuit's opinion in *Churchill*, 652 F.2d 255, 13 BRBS 399, and held that a worker who is injured on actual navigable waters in the course of his employment and who would have been covered by the Act before 1972 is engaged in maritime employment and is covered by the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The Court stated that it could not discern any legislative intent to withdraw coverage from those who would have been covered before 1972, quoting the Senate report stating that the maritime employment requirement was not meant "to exclude other employees traditionally covered." The Court expressly stated that it was not holding that only the situs requirement need be met; rather, where a worker is injured on actual navigable waters in the course of his employment on those waters, he satisfies the status requirement and is covered, providing that he is the employee of a statutory employer and is not excluded by any other provision of the Act. Such employees are "engaged in maritime employment" not only because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters. In a footnote, the Court stated that its holding "extends only to those persons 'traditionally covered' before the 1972 amendments. We express no opinion

whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters, or to a land-based worker injured on land who then falls into actual navigable waters.” *Id.*, 459 U.S. at 324 n.34, 15 BRBS at 80 n.34(CRT).

Prior to *Perini*, the Second Circuit held a claimant employed aboard a museum ship as a painter and historical ironworker and ship rigger was not covered under the Act as he was not a “maritime employee” under the occupational test. *McCarthy v. The Bark Peking*, 676 F.2d 42, 14 BRBS 745 (2d Cir. 1982). However, the Supreme Court vacated this decision and remanded the case for further consideration in light of *Perini*. *McCarthy v. The Bark Peking* 459 U.S. 1166 (1983). Following remand, the Second Circuit held that claimant was covered as he was injured on navigable waters in the course of his employment notwithstanding that the ship was welded into place. *McCarthy v. The Bark Peking* 716 F.2d 130, 15 BRBS 182(CRT) (2d Cir. 1983), *cert. denied* 465 U.S. 1078 (1984). *Cf.* 33 U.S.C. §902(3)(B) (provision added in 1984 specifically excluding employees of a museum, *see* Exclusions from Coverage, *infra*)

Since its issuance, the Board has issued numerous decisions applying *Perini*. In *Kelly v. Weyerhaeuser Co.*, 15 BRBS 319 (1983), *aff’d sub nom. Kelly v. Director, OWCP*, 758 F.2d 655 (9th Cir. 1985) (table), a pondman injured on a navigable mill pond on Coos Bay was held covered. A member of a ship’s crab processing and maintenance crew was found covered as he was injured on navigable waters. *Johnson v. Sea Alaska Products, Inc.*, 16 BRBS 1 (1983). In *Ransom v. Coast Marine Constr., Inc.*, 16 BRBS 69 (1984), Section 2(3) was met when claimant was injured in a cofferdam, which is a watertight enclosure from which water is pumped to expose the bottom of a body of water to permit construction. The Board stated that although the injury occurred on temporarily dry ground, claimant was injured on in an area which had been and would return to navigable water. It would take a permanent withdrawal of water to defeat coverage. A claimant who collected coal samples from a barge was covered when injured on that barge in navigable waters. *Bowen v. Allied Chemical Corp.*, 16 BRBS 212 (1984). In *Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95 (1985), *aff’d sub nom. Mike Fink, Inc v. Benefits Review Board*, 785 F.2d 309 (6th Cir. 1986) (table), the Board found coverage for a restaurant worker working aboard a decommissioned steamship located on the Ohio River which had been converted into a restaurant. Claimant fell from the ship’s gangplank into the water at the edge of the river. The Board concluded that, however, illogical it may seem to cover a restaurant worker, the decision in *Perini* was controlling and required a finding of coverage. Noting that the 1984 Amendments expressly excluded restaurant employees injured after September 28, 1984, the Board concluded that claimant fell at the right place and the right time. *See* Exclusions from coverage, *infra*.

Digests

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

The Board affirmed a finding of status in a claim arising in the Fifth Circuit. Claimant was injured performing an electrical repair estimate on board a ship. The Board held that claimant is a covered employee under the rationale of both *Perini*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), as he was injured on navigable waters, and under Fifth Circuit precedent as he was engaged in covered work on the ship at the moment of injury. *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 followed *Ward*, 684 F.2d 1114, 15 BRBS 7(CRT), in holding that claimant, an aircraft pilot injured performing work-related fish spotting duties “over” navigable water, was injured upon actual navigable waters. The Board rejected 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). Affirming the Board’s decision, the Fourth Circuit concluded that as claimant 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).

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), *aff'd mem.*, 294 Fed. Appx. 58 (4th Cir. 2008).

The Board affirmed 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 reversed 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 Constr. 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 affirmed the conclusion that claimant did not meet the situs requirement as the reservoir under the paper plant where he was injured was not a navigable waterway. The court agreed with 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 Constr. Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *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 reversed the administrative law judge's finding that the status test was not met, following *Perini*. The Board noted 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 held 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).

In addressing coverage of a worker on a bridge, the Board discussed the black-letter law on coverage of such workers 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 v. B.F. Diamond Constr. Co.*, 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 affirmed 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) (claimant who sometimes worked from float raft during bridge construction was injured on land); *Eckhoff v. Dog River Marina & Boat Works Corp.*, 28 BRBS 51 (1994) (claimant injured on land during work on a pier; no coverage under *Perini* but situs and status met based on pier work).

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 Constr. 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 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*, 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. Constr. 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 *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), 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. *Caserna v. Consolidated Edison Co.*, 32 BRBS 25 (1998). *See also Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2^d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006), *infra*.

The Board rejected claimant's contention that he is "automatically" covered under the Act by virtue of his injury on navigable waters regardless of statutory exclusions. The holding in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), does not apply if claimant is excluded under another provision of the Act. In this case, employer asserted that claimant was excluded as a security guard under Section 2(3)(A) and that issue must be addressed. *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. 212. 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, 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 affirmed 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).

In a case which did not cite *Perini*, the Eleventh Circuit held that a land-based electrician injured while traveling by boat to a job site on an island was not covered by the Act. The court stated that claimant's only connection with the water was the fact that he happened to be traveling over it incidental to land-based employment; thus, the court held claimant was not covered, although injured on navigable waters, because he was not engaged in loading, unloading, repairing or building a vessel, and his "de minimis connection to maritime activity is simply insufficient." *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991)

The Fifth Circuit held that claimant, an oil production worker, who was injured while unloading equipment from a crew boat docked on navigable waters, 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).

Addressing the issue left open in *Perini* and *Herb's Welding* regarding an employee who is injured while transiently or fortuitously on actual navigable waters, the Fifth Circuit held such a person covered under the Act. The court held that such a 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).

However, the Fifth Circuit later 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 nor 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 overruled *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*, 164 F.3d 901, 32 BRBS 217(CRT). 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).

Following remand, the Board held that it is consistent with *Bienvenu*, 164 F.3d 901, 32 BRBS 217(CRT), in light of Supreme Court decisions in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), and *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941), to conclude 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. 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, on 53 percent of his workdays, 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 "transient" nor "fortuitous." The Board added that specific "duties" on a vessel are not required in order for a claimant to be covered under *Perini*. The Board distinguished *Brockington*, 903 F.2d 152, upon which the administrative law judge relied to deny coverage, since claimant here was not merely commuting to land-based work. Claimant thus was covered under the Act for his injury sustained on navigable waters. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

After discussing at length the concept of "navigability" under the Act, the Board rejected the economic viability test espoused by employer and affirmed 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. Thus, as a barge anchored in the lake was afloat upon the navigable waters of the 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 the administrative law judge's finding that the barge was a fixed platform akin to an island. Moreover, the barge need not meet the test for vessel status in order for an injury upon it to be covered under *Perini*, 459 U.S. 297, 15 BRBS 62(CRT). The Board thus reversed 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*, 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) (2^d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

On appeal, the Second Circuit agreed 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 affirmed the Board's conclusion that Cayuga Lake is navigable for purposes of establishing jurisdiction under the Act. The Second Circuit further held that the barge on which the decedent was employed was not a fixed platform, but an object, albeit moored, floating on actual navigable waters. The court agreed that the barge need not be a "vessel" in order for an injury upon it to be covered under *Perini*. 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) (2^d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

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).

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 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 rejected 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. [Meyers] v. Great Southern Oil & Gas*, 42 BRBS 21 (2008), *aff’d mem. sub nom. Great Southern Oil & Gas Co. v. Director, OWCP*, 401 F. App’x 964 (5th Cir. 2010).

The Board affirmed the administrative law judge’s finding that claimant is not excluded from the Act’s coverage pursuant to Section 2(3)(A) because he was not exclusively performing “office” security work. In this case, claimant was not confined, physically or by function, to an office or other administrative area on land, which is necessary for the exclusion to apply. Rather, his security duties, in furtherance of regulations issued by the Dept. of Homeland Security, were performed on vessels on navigable waters. As claimant was injured on actual navigable waters in the course and scope of his employment on those waters, he is covered under the Act pursuant to *Perini*, 459 U.S. 297. *K.L. [Labit] v. Blue Marine Security, LLC*, 43 BRBS 45 (2009).

The Board affirmed the administrative law judge’s finding that claimant’s injury did not occur on navigable waters. Claimant was injured on a bridge over the Potomac River permanently affixed to land. Thus, his injury would not have been covered prior to the 1972 Amendments, pursuant to *Nacirema*, 396 U.S. 212, and is not covered post-1972 pursuant to *Perini*. The administrative law judge’s reliance on *Kehl*, 34 BRBS 121, for this proposition was proper. The Board also held that *LeMelle*, 674 F.2d 296, 14 BRBS 609, was distinguishable in this Fourth Circuit case. *LeMelle* addressed the status element as situs was agreed to, and the claimant was injured on a bridge piling in the middle of a river. As claimant was not injured on a covered situs, the Board affirmed the denial of the claim. *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009).

Claimant, a bridge vacuumer, spent three days working on a barge because his vacuum was being repaired. The Board affirmed the administrative law judge’s finding that claimant did not contract histoplasmosis while on the barge and thus did not sustain an injury on navigable waters. Substantial evidence supported the administrative law judge’s finding that claimant was exposed to contaminated pigeon droppings in the containment area on the bridge and not in the open air on the barge. Accordingly, the Board affirmed the administrative law judge’s conclusion that claimant was not covered by the Act pursuant to *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT)

(1983); thus, there was no need to address whether claimant was transiently or fortuitously on navigable waters. *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

The plaintiff filed a FELA negligence action in district court for an injury sustained a railroad bridge over the Elizabeth River in Norfolk. The district court granted the employer's motion to dismiss on the ground that the Longshore Act was the plaintiff's exclusive remedy. On appeal, the Fourth Circuit reversed, holding that the injury did not occur on navigable waters as a bridge was not a covered situs prior to 1972; an employee working on a bridge over navigable waters is not working "upon navigable waters." Moreover, the employee did not work from a vessel. The decisions in *LeMelle* and *Zapata* are distinguished. *Muhammad v. Norfolk Southern Ry. Co.*, 925 F.3d 192, 53 BRBS 5(CRT) (4th Cir. 2019).

Amount of Time in Maritime Employment

In *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U. S. 249, 6 BRBS 150 (1977), the Supreme Court addressed the coverage of two employees, Caputo and Blundo. The Court initially held that claimant Blundo was clearly engaged in covered employment when he was injured, as he was checking items being removed from a container and such work is clearly an integral part of the unloading process as altered by the advent of containerization. Claimant Caputo, however, was injured while putting goods already unloaded from a ship or container onto a delivery truck. While the Director asserted that this work was covered as the last step in the loading process, the Court determined that it need not decide whether claimant Caputo's duties at the time of injury were maritime because he was a longshoreman by occupation and could have been assigned to covered or uncovered duties during his work day without losing coverage.

In so holding, the Court rejected the "moment of injury" test, which looks to claimant's duties at the time of injury, for purposes of excluding claimants from coverage, under Section 2(3). *Accord Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), *aff'g* 1 BRBS 273 (1975). The Court discussed the Congressional intent that a claimant not walk in and out of coverage in a day's work, and concluded that, in its desire for uniformity of coverage, the Act focuses on occupation, rather than on claimant's duties at the time of injury. Thus, under *Caputo*, claimant need not be engaged in maritime employment at the time of injury to be covered by the Act. The Court stated that Congress intended to cover "persons whose employment was such that they spent at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. As a member of a regular stevedoring gang, claimant Caputo clearly met the Act's occupational test.

The Fifth Circuit subsequently described *Caputo* as providing alternate bases for coverage: claimant Blundo was covered because his activity at the time of injury involved covered work, while claimant Caputo was covered based on his occupation as a longshoreman. The court thus held claimant could be covered if he met the coverage requirements based either on his occupation or on his activity at the moment of injury. *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979) (applying both the activity and occupation tests, the court affirmed the district court's finding that claimant, an oilfield maintenance and construction worker, who drowned as he was being transported by boat to the job site was not covered as he was not engaged in one of the enumerated occupations. In *Boudreaux*, 680 F.2d 1034, 14 BRBS 1013, the court noted that this conclusion rested on a basis rendered invalid by *Ford* and subsequent decisions).

In discussing the *Thibodaux* formulation in *Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *rev'g* 14 BRBS 74 (1981), *cert. denied*, 459 U.S. 1170

(1983), the court stated that it held “that an employee could satisfy the status test in two ways: he might, at the time of injury, be engaged in an *activity* properly classified as maritime employment, or he might be engaged in an *occupation* considered maritime employment.” *Id.*, 684 F.2d at 1117, 15 BRBS at 9(CRT). In holding a fish spotter pilot covered because injured on navigable waters, the court stated he met both prongs of the test as he was engaged in a maritime occupation and was performing that occupation at the moment of injury.

In *Odom Constr. Co., Inc. v. U. S. Dept. of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), the court held that claimant, a construction worker who was injured while moving concrete blocks used to moor barges, met the status requirement of Section 2(3). The court held first that claimant’s work at the moment of injury constituted maritime employment. However, while the court stated that its conclusion that claimant was covered at the moment of injury arguably could be the sole basis for its decision, the court did not rest its decision on this ground alone. Viewing all the circumstances of claimant’s employment, the court found that where claimant was performing maritime work and where a significant part of employer’s business, 20 percent, was maritime in nature, the policies of the Act favored coverage. The court noted that employer had a separate maritime gang which was assigned to work on maritime projects and that claimant was not assigned to work on this gang. The court determined, however, that coverage could not be permitted to turn on the fact that employer did not choose to assign claimant to a certain group, as it would impermissibly allow an employer to avoid liability to workers injured while engaged in maritime employment simply by allowing each employee only to do a limited amount of maritime work. *See also Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983) (claimant covered because he was assisting in the transfer of pilings from a barge at the time of injury).

The Eleventh Circuit also has applied the moment of injury test, consistent with its rule that decisions of the Fifth Circuit issued prior to September 30, 1981, are binding precedent in that circuit unless specifically overruled. *Browning v. B.F. Diamond Constr. Co.*, 676 F.2d 547, 14 BR8S 803 (11th Cir. 1982), *rev’g* 14 BRBS 313 (1981), *cert. denied*, 459 U.S. 1170 (1983). The court found coverage because the decedent was unloading metal forms from a barge at the time of death, and was thus engaged in longshoring activities.

The Board initially interpreted *Caputo* as rejecting a moment of injury test for granting coverage as well as denying it. *See Howard v. Rebel Well Service*, 11 BRBS 568 (1979) (Miller, dissenting), *rev’d*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980) (holding the fact that claimant may have been performing ship repair when he was injured while cleaning a boiler is insufficient to confer coverage). The Board reluctantly applied the moment of injury test in a case arising in the Fifth Circuit in which claimant was injured while installing a toilet seat aboard a floating oil rig. *Henry v. Gentry Plumbing & Heating Co.*,

18 BRBS 95 (1986). Because claimant was involved in the maintenance and repair of a vessel at the moment of injury, the Board held the status test was satisfied. The Board noted its disagreement with the Fifth Circuit rule, as it permits claimants to walk in and out of coverage. The Board's approach has been to determine whether claimant's overall employment was maritime in nature, regardless of whether his duties at the moment of injury are covered.

Since *Caputo*, it is well settled that an employee who regularly performs duties relating to maritime employment should not be denied coverage if injured while temporarily performing some non-maritime activity. What has been at issue is how much of claimant's overall employment must be spent in maritime activity. The Board relied on the *Caputo* language that persons are covered if they spend "at least some of their time" in covered work in determining that an employee satisfies the status requirement if he spends "a substantial part of his employment in indisputably maritime activity." *Howard*, 11 BRBS at 572. In determining whether a substantial portion of claimant's overall duties were maritime in nature, the Board employed either a "primary function" test where an employee clearly had certain principal activities, but spent an insignificant amount of time performing other activities, *Maples v. Marine Disposal Co.*, 14 BRBS 619 (1982) (Miller, dissenting) (claimant spent the majority of his time picking up trash, which was his primary duty. Dumping the accumulated garbage onto a barge, the activity he was performing at the time of death, was merely incidental); *Cappelluti v. Sea-Land Service, Inc.*, 10 BRBS 1024 (1979) (Miller, dissenting); see *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977) (primary duties are controlling, and as claimant's primary duties were clerical in nature, claimant was not covered by the Act), or the "substantial portion" test where an employee worked on a variety of projects, some of which were maritime and others of which were not. *Ries v. Harry Kane, Inc.*, 13 BRBS 617 (1981) (Smith, dissenting) (claimant was covered under the substantial portion test where 33 percent of his time was maritime employment driving pilings to enlarge slips for recreational boats).

The U.S. Courts of Appeals for the First, Fifth and Ninth Circuits rejected the "substantial portion" and, by inference, the "primary function" tests, reversing the Board's decisions on this point. The Fifth Circuit in *Boudloche v. Howard Trucking Co. Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *rev'g* 11 BRBS 687 (1979), *cert. denied*, 452 U.S. 915 (1981), relied on the Supreme Court's language in *Caputo* that a worker who spends "at least some" of his time in longshoring operations is afforded coverage. The court stated that "some" is not "substantial," and that in "substituting its 'substantial portion' language for the Court's 'some' in the coverage definition, the Board has departed from the letter and spirit of the High Court's rule. This, of course, it cannot do." *Id.*, 632 F.2d at 1348, 12 BRBS at 734. The court thus reversed the Board's decision that a truck driver who spent a small amount of time (2.5 to 5 percent of time at docks lacking its own equipment or personnel plus time assisting at well-equipped docks) loading and unloading oilfield equipment onto docks and ships was not engaged in

longshoring operations. *Accord Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980), *rev'g* 11 BRBS 568 (1979) (claimant covered consistent with “some” of the time standard of *Caputo* and *Ford* where 10 percent of his time was regularly spent in ship repair; no need to address coverage based on moment of injury).

In *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), *rev'g* 13 BRBS 16 (1980), the First Circuit rejected the “substantial portion” test and reversed the Board’s denial of coverage. The court found first that claimant’s overall masonry work on shipyard facilities was sufficient for coverage because maintenance and repair of shipyard facilities is essential to building and repairing ships. In addition to finding claimant’s overall masonry work covered, the court determined that the Board erred in holding that claimant’s work cleaning out acid tanks and steel mill boilers was insufficient to confer coverage because of the small amount of time claimant spent performing these maritime duties. The court held that these duties were sufficient because they constituted a “regular portion” of claimant’s overall employment.

The court followed that decision with *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 25(CRT) (1st Cir. 1984), *rev'g* 15 BRBS 281 (1983) (Kalaris, concurring) (Miller, dissenting), stating that coverage under Section 2(3) is determined by looking to the employee’s “regularly assigned duties as a whole.” The court held that the Board erred in two respects, first by simply terming claimant’s work “clerical” without looking beyond his title of Book Clerk to address his actual duties, which included checking to ensure the correct containers were loaded and unloaded, and second by essentially applying a “primary function” test rather than properly reviewing claimant’s regularly assigned duties. Specifically, the court held that in determining whether a regular portion of claimant’s duties included maritime employment, the Board erred in focusing exclusively on claimant’s “primary” work “as a clerk documenting goods received and delivered” and disregarding his activity at the container yard and his function as a surrogate runner for ships weighing less than 300 tons. The court concluded that the Board was not entitled to recast claimant’s duties outside the office as “non-routine and irregular” and to discount them on that basis.

The Ninth Circuit rejected the “substantial portion” test in *Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78(CRT) (9th Cir. 1982), *rev'g* 13 BRBS 22 (1980), *cert. denied*, 459 U.S. 1170 (1983), which involved a claimant employed as a sales manager for a recreational boat builder. The court held that claimant’s “regular performance” of maritime operations including visual inspections of boats under construction, the testing of new models to evaluate their design, and occasional maintenance in connection with the testing activities was sufficient to confer status.

Thereafter, the Board abandoned the “substantial portion” test and reviewed a claimant’s employment duties to determine whether he spent “at least some part of his time” in maritime activities. In *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984), a

claimant who spent two days per week servicing and maintaining equipment used in construction and repair of offshore drilling rigs and who was injured while tying up a barge was found covered under the Fifth Circuit's moment of injury test and because he spent some portion (two days a week) of his overall employment in maritime activities. In *Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984), the Board found coverage where part of claimant's duties involved checking the ship's oil and monitoring the discharge process. The Board held that "at least some" of claimant's work constituted maritime employment and that the work was a regular portion of his assigned job duties. *See also Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983) (maintenance man who inventoried containers and maintained terminal buildings among other duties held covered). In *Wuellet v. Scappoose Sand & Gravel Co.*, 18 BRBS 108 (1986), the Board affirmed the administrative law judge's finding that claimant, a welder/mechanic at a barge loading facility which was part of a mining operation, was covered, stating that "a sufficient portion of claimant's regularly assigned duties qualifies as maritime employment." While claimant repaired equipment used in the mining operation, which would not be covered work, he spent some of his time repairing loading equipment.

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).

Rejecting employer's argument that claimant, a container and chassis mechanic, was not covered because the majority of his time (90%) involved repair of containers and chassis used in overland transportation, the Board stated that an employee is covered if some portion of his activities constitutes covered employment, provided that such activities are not too episodic, momentary or incidental to non-maritime work. Claimant's overall employment facilitates the movement of cargo between ship and land transportation and is maritime in nature, and his specific work on containers coming into the port to be put on ships and on equipment used solely to move cargo within the port area is also covered employment. Since claimant spends at least some of his time on indisputably maritime activities, the Board held he was covered, stating it could not find that claimant's activities were so momentary or episodic as to place him outside the coverage of the Act. *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). On appeal, the Eleventh Circuit affirmed the Board's holding that claimant's overall employment activities were essential to loading and unloading. The court stated that the fact claimant worked primarily on making loaded chassis/container rigs road worthy does not diminish his involvement in the loading and unloading process, as without such work, the unloading process would stop indefinitely at

the Port. Making the chassis road worthy is the last step necessary to complete the unloading process, and a contrary conclusion would reinvigorate the point of rest doctrine rejected by the Supreme Court. Because the court held that all of claimant's activities were essential to loading and unloading, the court found it unnecessary to address the "substantiality" issue raised by *Boudloche*, 632 F.2d 1346, 12 BRBS 732, or the "moment of injury" test. *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

The Board affirmed the finding of status in claim arising in Fifth Circuit where claimant was injured performing an electrical repair estimate on board a ship. The Board held that claimant is a covered employee under the rationale of both *Perini*, due to his injury on navigable waters, and the Fifth 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 Fifth Circuit affirmed the Board's holding that claimant satisfied the status requirement where, although he was engaged in non maritime 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), *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 constitutes 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 did not apply the Fifth Circuit's moment of injury test and affirmed the U.S. District Court's grant of 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 intercoastal waterway while traveling in a co-worker's boat, was 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) (the case does not address *Perini*).

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 so momentary or episodic that it placed claimant outside the coverage of the Act. *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990).

Although the administrative law judge found that claimant's work hand-loading some items and driving his truck onto ships to deliver supplies was covered activity, the Board affirmed the conclusion 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 duties during the remaining 10 percent of his time, comprised of visual damage surveys, marking cars for destination, and shuttling tractors from port to yard, cannot be considered the regular

performance of maritime work, 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 affirmed 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 following a decision on situs, *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT), the Board addressed the status issue reserved in its initial decision, 24 BRBS 94. The Board initially held claimant covered because he was engaged in the construction of a pier based on the Ninth Circuit's prior ruling. The Board also affirmed the administrative law judge's finding of coverage based on his overall employment. Claimant worked out of a hiring hall for various employers, and ninety percent of his time was spent as a diver, which is inherently maritime employment. The remaining time claimant worked as a pile butt, and this work also involved maritime projects. Rejecting employer's argument that work on other projects was irrelevant, the Board held that this employment history satisfies the requirement of *Caputo* that claimant "spend at least some of [his] time in indisputably" maritime work. *Hurston v. McGray Constr. Co.*, 29 BRBS 127 (1995) (decision on remand), *rev'd*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999).

Reversing this decision, the Ninth Circuit held that claimant's pier construction work was not covered as the pier did not serve a maritime purpose and only work for the employer on the project in which he was injured could be considered. Citing *Papai*, 520 U.S. 548, 31 BRBS 34(CRT), a member of a crew case holding such status cannot be conferred by looking at work for a group of employers, the court held that the fact that an employee has been engaged in maritime employment with other employers and that he is hired out of a union hall for maritime work does not confer coverage if his current employment is non-maritime. The court distinguished its decision in *Schwabenland*, 683 F.2d 309, 16 BRBS 78(CRT), as the claimant herein was not engaged to perform both maritime and non-maritime work for the same employer 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).

In a case in which claimant spent 3 to 5 percent of his time on a 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's regular work entailed some portion of 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 of the administrative law judge establish that claimant, a crane operator, spent some of his time performing indisputably 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 they 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. *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 affirmed 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 that of a truck driver who merely carries the cargo for further transshipment over land, as the cargo at issue was still in the unloading process. As decedent's work on the conveyor belts constituted a regular, non-discretionary, albeit infrequent, portion of his job, it met the *Caputo* requirement of "some" time and conferred 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. *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997).

In its decision after remand, the Board rejected employer's assertion that the Supreme Court's standard of spending "at least some time" in maritime employment must be reconciled with the 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 Fifth Circuit in *Boudloche*, 632 F.2d 1346, 12 BRBS 732, 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. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

The Fourth Circuit held 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. In so holding, the court rejected claimant's contention that because only 15% of his duties involved loading and unloading 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, and not on whether the particular duties performed at the time of injury are maritime. 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*, 525 U.S. 1019 (1998).

The Board affirmed the administrative law judge's finding that claimant, a bulldozer operator, met the status test as he was required as 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).

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 and the relevant precedent, the Board rejected the argument that claimant must be subject to reassignment

on the day of injury. The Board held there is no precedent for such a test, the creation of such would involve an incorrect interpretation of the Supreme Court's comments in *Caputo*, 432 U.S. 249, 6 BRBS 150, and the Third Circuit's statements 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 arguments that the Supreme Court's decision in *Papai*, 520 U.S. 548, 31 BRBS 34(CRT), eliminated the occupational test of *Caputo* and that *McGray Constr.*, 181 F.3d 1008, 33 BRBS 81(CRT), supports a 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*, 540 U.S. 1088 (2003).

Affirming the Board's decision, the Third Circuit 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 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), on the ground that claimant in this case, while having different job assignments, worked only for one employer. *Maheer Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3^d Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003).

The Board affirmed 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 noted that under Fifth Circuit precedent, which applies in this case, 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 Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Fifth Circuit affirmed the finding of coverage for claimant, who spent 9.7 percent of his work time engaged in maritime activities involving loading oil onto transport barges and servicing equipment necessary to load the oil. Citing its decision in *Boudloche*, 632 F.2d 1346, 12 BRBS 732, in which status was upheld for an employee who spent only 2.5 to 5 percent of his employment engaged in maritime activities which were part of his regularly assigned duties, the court held that claimant in this case clearly engaged in maritime activities for more than any minimum amount of time required to confer status. That the majority of claimant's time was spent in activities relating solely to uncovered oil and gas production does not detract from claimant's routine, non-episodic maritime activities. *Coastal Prod. Services Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), *aff'g* 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, a truck driver, was not engaged in covered employment even though the majority of his time was spent in overland work, as his regular job assignments included transporting goods within the port. 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. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff'd*, 378 F. App'x 691 (9th Cir. 2010).

The Board affirmed the administrative law judge's finding that claimant was engaged in maritime employment pursuant to Section 2(3). The administrative law judge permissibly gave significant weight to evidence that claimant regularly participated in the loading and unloading process by directing and monitoring the flow of liquid bulk

product to and from vessels and the tank yard. Thus, claimant’s job duties were integral to the loading and unloading process. Moreover, the administrative law judge properly focused on claimant’s employment as a whole. His conclusion that at least some of claimant’s regular job duties were integral to the loading and unloading of vessels is supported by substantial evidence. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff’d sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that claimant’s job duties were integral to the loading and unloading of liquid bulk product between employer’s terminal facility and vessels at its dock. Claimant was tasked with monitoring and effecting the flow of oil products, opening and closing manifolds to direct flow, and communicating with other team members to ensure proper loading and unloading. A claimant need not spend a “substantial amount of time loading and unloading, but only “some” time. *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Covered Occupations in General

Section 2(3) of the Act defines a covered employee as “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker. 33 U.S.C. §902(3). The provision excludes specified employment from coverage if the employees are covered under a state compensation law, 33 U.S.C. §902(3)(A)-(F), as well as a master or member of a crew of a vessel and anyone engaged by the master to load, unload or repair any small vessel under eighteen tons net. 33 U.S.C. §902(3)(G), (H).

The Supreme Court has emphasized that Section 2(3) contains occupational, not geographical, requirements. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Coverage is not determined by union membership. *Id.*; see *W.B. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff’d mem.*, 378 F.App’x 691 (9th Cir. 2010). Moreover, Section 2(3) does not enumerate all possible categories of maritime employment. A claimant may be covered under Section 2(3) either because his work constitutes an occupation specifically enumerated in Section 2(3) or because it falls within the general category of “maritime employment.” See *Pfeiffer*, 444 U.S. at 77 n. 7, 11 BRBS at 324 n. 7.

A claimant is covered where he actually performs work loading, unloading, repairing or building a vessel, but he may also be covered where his duties have a sufficient nexus to an enumerated occupation, even though he is not engaged in such occupation itself. In a case decided prior to *Caputo*, the Fifth Circuit addressed coverage for five employees and held that coverage may be granted where an employee is actually performing work loading, unloading, repairing or building a vessel or is “directly involved” in such work. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F. 2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP v. Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977) (*Perdue*) and *P.C. Pfeiffer Co. v. Ford*, 433 U.S. 904 (1977) (*Ford* and *Bryant*), *cert. denied*, 433 U.S. 908 (1977), *remanded parts adhered to on remand*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978), *cert. denied*, 440 U.S. 967 (1979) (*Perdue*), *aff’d sub nom. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979) (*Ford* and *Bryant*). As the lengthy case history indicates, two of the consolidated cases, involving longshoremen *Ford* and *Bryant*, were ultimately affirmed by the Supreme Court. The initial *Perdue* decision, however, required that the employees be performing covered work at the time of injury; as discussed, *supra*, this holding is no longer valid in light of *Caputo*. Thus, the conclusion that claimant Skipper was not covered because, although he normally worked as a ship repairman, on the day of the injury he was assigned to dismantle a shipyard building no longer used for a maritime purpose, must be viewed in light of *Caputo*. The case is still cited for the proposition that a site must be used for a maritime purpose at the time of injury to be a covered situs under Section 3(a). See

Section 3. Claimant Nulty, a shipyard carpenter, was held covered based on his work in a fabrication shop on a part for a ship, and his case was not appealed. Claimant Perdue was denied coverage because, after a 12-hour day performing repairs on an aircraft carrier, he was injured at an administrative office where he went to punch out; the court concluded he was not injured on a covered situs. This portion of the *Perdue* opinion was subsequently overruled 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).

The “directly involved” test announced in *Perdue* continues to be applied. In addition, early cases support coverage where claimant’s work bears a “functional relationship” to maritime activities, *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), or is an “integral part” of the shipbuilding or loading process. *Dravo Corp. v. Maxin*, 545 F.2d 374, 5 BRBS 268 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978). Additional cases applying these tests are discussed in addressing specific occupations, *infra*.

The courts also addressed definitions for the general category of maritime employment. The Ninth Circuit adopted a test based on whether claimant’s work has a “realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters.” *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), *rev’g* 1 BRBS 180 (1974), *cert. denied*, 429 U.S. 868 (1976); *see also Schwabenland v. Sanger Boats*, 683 F.2d 309, 6 BRBS 78 (9th Cir. 1982). The Fifth Circuit has also relied on this test, *see Odom Constr. Co., Inc. v. U. S. Dept. of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), and *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), in which the Fifth Circuit held that claimant was covered regardless of whether his overall employment had a realistically significant relationship to traditional maritime activities involving navigation and commerce on navigable waters. The court held that it was enough that claimant’s job at the time of injury had such a relationship.

The Board found the *Weyerhaeuser* test overly restrictive and adopted an altered version in *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978), *aff’d sub nom. Fusco v. Perini North River Associates*, 662 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). The Board refused to accept the *Weyerhaeuser* proposition that the maritime employment must be of a “traditional” nature and have a realistic relationship to the “traditional work and duties of a ship’s service employment.” The Board thus eliminated the word “traditional” and held that a claimant’s duties must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. *See Silva v. Massman Constr. Co.*, 9 BRBS 932 (1979). Many Board cases applying this test were superseded by decisions conferring coverage on claimants injured on navigable waters, but it remains useful for land-based

workers who do not fall within one of the enumerated occupations. *See Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 14 BRBS 1013 (5th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1170 (1983) (court rejected the *Weyerhaeuser* test for employees injured on navigable waters, but it indicated that the test might be applicable in differentiating covered shoreside employees from those who would not be covered).

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 involved repairing and maintaining the machinery used to load coal onto vessels were held covered because their work was essential to the loading and unloading process. The Court stated that coverage is not limited to employees who are called “longshoremen” or who physically handle cargo, and maintenance workers are not excluded just because they have other duties not integrally connected with loading or unloading. A worker “who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee’s contribution to the loading process is not continuous or that repair or maintenance is not always needed.” In a concurring opinion, Justices Blackmun, Marshall and O’Connor expressed 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 Eleventh Circuit 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. The Act applies to any person “engaged in maritime employment” and does not distinguish between management and non-management personnel; additionally, Section 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, 618 n.5, 23 BRBS 101, 107 n.5(CRT) (11th Cir. 1990) (suggesting that the *Sanders* test, which looks to whether an employee’s responsibilities have a “significant relationship” to the maritime concerns of his employer, is questionable in light of the *Schwalb* test requiring that an employee’s work be “an integral or essential part” of maritime activities).

The Board held 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), 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), 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). Affirming the conclusion that a union shop steward was covered, the Second Circuit concluded that 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). 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) (2^d Cir. 2001).

The Fourth Circuit held that claimant was not engaged in maritime employment while working as president of a union local because his job was not integral to the loading or unloading of cargo vessels. The court distinguished *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT), as the claimant in that case worked at the waterfront terminal and boarded vessels on a regular basis whereas the claimant in this 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. As claimant's union job was not maritime employment, the union could not be the responsible employer for claimant's hearing loss, and VIT was responsible as the last maritime employer. *Sidwell v. Virginia Int'l Terminals, Inc.*, 372 F.2d 238, 38 BRBS 19(CRT) (4th Cir. 2004).

The Board affirmed 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), 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), and *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT), as the claimants did not interact with other employees and supervisors to the same extent. Rather, their work was more like that in *Coloma v. Director, OWCP*, 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. The Board also cited *Neely v. Pittston Stevedoring Corp.*, 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 exclusion from coverage as a clerical worker. *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989).

The Board held 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 held 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. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff'd mem.*, 378 F.App'x 691 (9th Cir. 2010).

The Fourth Circuit reversed 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 noted 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), 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 as his construction work was not 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), 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 affirmed 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 affirmed 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 held 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 distinguished *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 Board affirmed the administrative law judge's finding that claimant was not engaged in maritime employment while working at the Norfolk Naval Shipyard. Claimant was assigned to install cables in a building at the shipyard, and the cables would later be used to link the Navy and the Marine Corps to the same computer system. When claimant's job was finished, she would go to another facility under the contract. In accordance with *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT), the Board stated that as claimant's presence at the shipyard was temporary, even if the cable system would later be integral to a maritime purpose, future use is insufficient to confer coverage, and the administrative law judge rationally found that claimant's work was not essential or integral to the building, repairing, loading, or unloading of ships. Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Balonek v. Texcom, Inc.*, 43 BRBS 153 (2009).

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 improving the ports' roadways in the future and was not an essential aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project designed to improve the movement of traffic 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 they 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 part*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998). The Third Circuit, however, 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).

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 as 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) (3^d 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 Int'l, Inc.*, 33 BRBS 46 (1999).

Citing *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), 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 held that claimant was engaged in maritime employment pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). 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 held 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 reversed 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), 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 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 affirmed 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).

Claimant was injured during his employment as a bridge vacuumer. The vacuum was connected by hose to a recycler machine on a spudded barge beneath the bridge. The Board rejected claimant's assertion that his work constituted "loading" the barge, citing *Mungia*, 999 F.3d .808, 27 BRBS 103(CRT). Well-established law establishes that work on a bridge is not inherently maritime, and the vacuumed debris did not "enable" the barge to "engage in maritime commerce." As claimant was not engaged in "maritime employment," the administrative law judge properly denied benefits. *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

Claimant worked as a beach-walker in an oil-spill clean-up project. The Board rejected claimant's arguments that his picking up oil debris from the beach and water's edge, loading and unloading his supplies and tools to and from the transport vessel, driving the "Gator" to shuttle workers around the island, and occasional loading of waste on to the debris vessel conferred coverage. The Board affirmed the administrative law judge's findings that these activities were either not part of claimant's regular duties and/or were not maritime in nature and did not constitute a step in the loading process. Accordingly, the Board concluded that claimant did not establish an essential element of his claim for benefits, and it affirmed the administrative law judge's order granting employer's motion for summary decision and denying the claim. *Smith v. Labor Finders*, 46 BRBS 35 (2012).

Claimant worked for employer as a missile mechanic senior at a naval base. His duties included building, dismantling, and inspecting missiles and subassemblies of missiles that were to go on or that came off Trident submarines. The Board rejected claimant's contention that the administrative law judge erred in finding he did not satisfy the Act's status requirement. The administrative law judge found that claimant's work was not integral to the loading, unloading, building, repairing, maintaining, or dismantling submarines. The Board affirmed the finding and the denial of benefits stating that, contrary to claimant's argument, missiles are more akin to cargo than to components of the submarine, and manufacturers of cargo are not covered workers merely because their products are to be transported by vessels. As claimant's job was to build missiles which, months later, would be put on submarines to be carried for military purposes, his work was not integral to the construction of submarines. *Kinnon v. Lockheed Missiles & Space Co.*, 47 BRBS 13 (2013).

The Board affirmed the administrative law judge's finding that a construction worker who was injured while renovating an existing carpentry building at the Portsmouth Naval Shipyard was engaged in maritime employment. The Board held that *Graziano v. General Dynamics Corp.*, 663 F.2d, 340, 14 BRBS 52 (1st Cir. 1981) applied. The fact that claimant's skills were essentially "non-maritime" is not dispositive because work involved the repair and maintenance of a building that was essential to the shipbuilding process. *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018).

Longshoremen and Longshoring Operations

Point of Rest

The “point of rest” theory sought to limit the coverage of the Act to workers engaged in unloading cargo from a vessel to its first point of rest on land, and loading cargo onto a ship from its last resting place on land. Under this theory, only workers engaged in loading or unloading from this point seaward were covered by the Act. The Supreme Court rejected the “point of rest” theory in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The Court rejected employer’s arguments that longshore operations cover only work from “the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading),” and that maritime employment includes only “the stevedoring activity of the longshore gang...which in the case of unloading, takes cargo out of the hold of the vessel, moves it away from the ship’s side, and carries it to its point of rest on the pier or in a terminal shed.” *Id.*, 432 U.S. at 275, 6 BRBS at 166-167. The Supreme Court held that the “point of rest” theory is too restrictive, as it could bifurcate coverage for employees who performed essentially the same work, thus perpetuating the evils of the pre-1972 Act which the amendments were trying to eliminate and ignoring Congressional desire for uniformity of coverage.

In *Caputo*, 432 U.S. at 277 n. 40, 6 BRBS at 168 n. 40, the Court noted that the First, Second, Third and Fifth Circuits had rejected coverage based on the initial point of rest. *Stockman v. John T. Clark & Son*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2^d Cir. 1976), *aff’d sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3^d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976) (subsequent history omitted). Only the Fourth Circuit adopted the point of rest theory. *I.T.O. Corp. of Baltimore v. BRB*, 529 F.2d 1080, 3 BRBS 88 (4th Cir. 1975), *modified en banc*, 542 F.2d 903, 4 BRBS 343 (4th Cir. 1976), *vacated and remanded sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904 (1977).

Following *Caputo*, the Board continued to reject arguments based on a point of rest theory. See *Molee v. Novelties Distribution Corp.*, 15 BRBS 1 (1982), *aff’d*, 710 F.2d 992, 15 BRBS 168(CRT) (3^d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff’d*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982).

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The Board affirmed 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 requirement of 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).

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 an intermediate step in moving cargo between ship and land transportation under *Ford*, 444 U.S. 69, 11 BRBS 320. 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). *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

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 the ship's 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. Thus, claimant was involved in the land-based stream of commerce and he was not involved in intermediate steps in the loading process under the applicable Supreme Court decisions and 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 Board affirmed the administrative law judge's conclusion that claimant is not covered by the Act. *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (2002).

The Board reversed 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 intermediate steps 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. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff’d*, 378 F. App’x 691 (9th Cir. 2010).

In this case, claimant drove a truck to deliver groceries from an inland supplier to a maritime site. The Board reversed the administrative law judge’s finding that, in manually unloading groceries and fastening crane straps to pallets of food, claimant was involved in the overall process of maritime transportation, as these steps were the last steps in land transportation. As the groceries had not yet been delivered to the maritime facility, they were not at their point of rest within the maritime facility. *Jacobs v. G & J Land & Marine Food Distrib.*, 48 BRBS 9 (2014).

The Board affirmed the administrative law judge’s finding that claimant, a truck driver who made deliveries between maritime facilities and facilities outside the port, was not engaged in maritime employment and thus, was not covered by the Act. The Board held that the administrative law judge rationally found claimant’s work more like that of the trucks driver in *Dorris* and *McKenzie* (transporting cargo between port terminals and facilities located outside the port not covered) than the driver in *Booker* (regular job assignments transporting goods between marine terminals and other sites located within the port is covered), because the facts establish that claimant was not involved in intermediate cargo-moving steps within the Port of Seattle. Claimant’s work involved the first step in land transportation of cargo previously at sea and the last step in land transportation of cargo going to sea. *Ahmed v. W. Ports Transp., Inc.*, 50 BRBS 41 (2016), *aff’d on other grounds*, 731 F. App’x 661 (9th Cir. 2018).

Cargo

As an initial matter, a few cases address whether the material being loaded or unloaded is, or must be, “cargo.” In *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *rev’g* 12 BRBS 556 (1980), *cert. denied*, 459 U.S. 1169 (1983), the Fifth Circuit found coverage because claimant was unloading pilings from a barge at the time of injury, holding that this work constitutes longshoring operations even though the pilings were to be used in bridge construction. The court stated that “it can hardly be disputed that the pilings in the case *sub judice* were cargo. They traveled 110 miles over navigable waters to reach their intended destination.” *Id.*, 659 F.2d at 58, 13 BRBS at 1051. The Eleventh Circuit followed this holding in finding a claimant who was unloading metal forms to be used in bridge construction covered by the Act. *Browning v. B.F. Diamond Constr. Co.*, 676 F.2d 547, 14 BRBS 803 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

However, in finding that an oilfield worker who unloaded tools and supplies needed to maintain the platform facilities from a boat was not covered by the Act, *Munguia v. Chevron U.S.A., Inc.*, 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 Fifth Circuit stated that any contact claimant “may have had with cargo was fleeting, unrelated to maritime commerce, and usually at a time by which these supplies no longer possessed the properties normally associated with ‘cargo.’” *Id.*, 999 F.2d at 813, 27 BRBS at 107 (CRT). In a footnote, the court cited the definition of “cargo,” from Black’s Law Dictionary as “the load (i.e. freight) of a vessel, train, truck, airplane or other carrier,” and stated that the “loading and unloading test for ‘maritime employment’ [encompasses] at least an implicit requirement that what is loaded be ‘cargo.’” *Id.* at n.8. See *Coastal Prod. Services, Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh’g denied*, 567 F.3d 752 (5th Cir. 2009) (oil being loaded onto a vessel from a platform is cargo).

The Fourth Circuit subsequently rejected the *Munguia* “cargo” requirement in finding a claimant who worked on pipelines conveying steam, water and fuel to vessels was covered by the Act, stating

while work covered by the LHWCA must be an essential part of the loading or unloading of a vessel, we have never limited that definition to cargo. As stated above, we have liberally construed the definition of maritime employment to allow for coverage under the LHWCA. The adoption of an implicit “cargo” requirement, without any statutory or judicial support for such a prerequisite, would be contrary to this policy and a disservice to the LHWCA. Moreover, the loading of supplies such as steam, water, and fuel, which are necessary to the functioning of the vessels and their transport of cargo, cannot rationally be distinguished from cargo itself. The Director expressly repudiates the Fifth Circuit’s “cargo”

interpretation and, because his view is reasonable, supported by law, and not contrary to congressional intent, we reject Pittman's contention.

Pittman Mechanical Contractors, Inc. v. Director, OWCP, 35 F.3d 122, 126, 28 BRBS 89, 94(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993). In its decision in *Simonds*, the Board also rejected the argument that claimant was not covered because his work did not involve loading "traditional cargo." See *Allen v. Agrifos, LP*, 40 BRBS 78 (2006)(acid is cargo); *Olson v. Healy Tibbitts Const. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds) (loading and unloading of construction material, equipment and debris related to work on a breakwater is covered).

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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 hold that employees who are vital to the loading and unloading process are covered employees. Additionally, the Board cited decisions of the courts of appeals holding that loading and unloading construction materials is a traditional longshoring activity. *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996).

The Board affirmed the administrative law judge's finding that claimant, who worked at a rail yard 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).

Citing *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), the Board, in affirming the finding that claimant is covered under Section 2(3), stated the administrative law judge properly concluded it was unnecessary for claimant to establish an additional "independent connection" to maritime commerce in order to be covered under the Act, because he was directly involved in the loading or unloading of vessels. Additionally, the Board stated the administrative law judge properly concluded on the facts in this case that it is of "no consequence [to the status inquiry] that the cargo being unloaded would be used for oil production work." *Malta v. Wood Group Prod. Services*, 52 BRBS 31 (2018), *aff'd sub nom. Wood Group Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that claimant was engaged in maritime employment based on his overall job and his job at the time of injury. Claimant spent 25 to 35 percent of his hitches loading and unloading vessels and was injured during the unloading process. The court rejected the contention that coverage was defeated because the loading and unloading process was for the purpose of oil and gas exploration and production. The court held there is no “maritime cargo” requirement in Section 2(3). The cases employer cited, *Smith*, 46 BRBS 35, *Hough*, 45 BRBS 9, and *Bazemore*, 20 BRBS 23, are distinguishable as none of those claimants engaged in loading and unloading vessels. *Wood Group Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019).

Loading and Steps in the Process

Early decisions following the 1972 Amendments established coverage for workers in “traditional” longshoring occupations, *e.g.*, those directly loading and unloading the vessel, container stuffers and strippers, and checkers. *See, e.g., Handcor, Inc. v. Director, OWCP*, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978), *aff’g* 1 BRBS 319 (1975); *Green v. Atlantic Container Lines, Ltd.*, 2 BRBS 385 (1975); *Batista v. Atlantic Container Lines, Ltd.*, 2 BRBS 193 (1975); *Spennato v. Pittston Stevedoring Co.*, 5 BRBS 117 (1976); *Stockman v. John T. Clark & Son of Boston, Inc.*, 2 BRBS 99 (1975), *aff’d*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

The more difficult issues involved workers whose activities were a step or more beyond the actual loading and unloading at the vessel, addressing at what point claimant’s activities become too tangential to longshoring operations. In *Stockman*, 539 F.2d 264, 4 BRBS 304, claimant was stripping a container that had been unloaded from a vessel berthed at another facility and trucked to the terminal where claimant worked for stripping. Affirming a finding of coverage, the court stated that where a container unloaded from a vessel contains goods for a number of consignees, the unloading process is not complete until the container is stripped and the cargo sorted so as to be accessible to the consignees.

In *Blundo v. I.T.O. Co., Inc.*, 2 BRBS 376 (1975), the Board stated that unloaded cargo remains in maritime commerce until delivered to the consignee for further transshipment, and that readying cargo for delivery to the consignee is covered employment. Thus, the Board held that claimant Blundo, a checker of stripped cargo and claimant Caputo, a terminal laborer who was injured while loading cargo onto a consignee’s truck, *Caputo v. Northeast Marine Terminal Co.*, 3 BRBS 13 (1975), were covered under the Act. The Board viewed the loading process similarly, holding that unloading railroad cars and trucks, either manually or with forklift-type equipment, prior to its storage and loading on the ships, is also covered employment. *See, e.g., Scalmato v. Northeast Marine Terminal Co.*, 1 BRBS 461 (1975); *DiMartino v. Universal Terminal & Stevedoring Corp.*, 5 BRBS 55 (1976).

The Second Circuit affirmed the Board's decisions in *Blundo*, 2 BRBS 376, and *Caputo*, 3 BRBS 13, in *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BR6S 156 (2d Cir. 1976), stating that status under Section 2(3) is conferred on 1) those who are engaged in stripping and/or stuffing containers, or 2) those who are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier, or in the case of loading, from the time when the consignee has stopped his vehicle at the pier, provided that the employee has spent a significant part of his time in typical longshoring activities of taking cargo on or off a vessel. *Accord Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976) (key to coverage is the "functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing").

The Supreme Court affirmed *Dellaventura*, stating that work involving cargo as it moves between sea and land transportation after its immediate unloading is maritime in nature. *Northeast Marine Terminal Co., Inc., v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The Court discussed the history of coverage under the Act and the effects of containerization, and it emphasized that the test for coverage under Section 2(3) is occupational in nature. The Court initially held that claimant Blundo was clearly engaged in covered employment, as he was injured while working as a checker which is clearly an integral part of the unloading process. Claimant Caputo was injured while putting goods already unloaded from a ship or container onto a delivery truck. While the Director asserted that this work was covered as the last step in the loading process, the Court determined that it need not decide whether claimant Caputo's duties at the time of injury were maritime because he was a longshoreman by occupation and could have been assigned to covered or uncovered duties during his work day without losing coverage. Thus, holding that work at the moment of injury is not determinative, the Court affirmed the conclusion that Caputo was covered based on the nature of his overall employment.

The Supreme Court specifically addressed the coverage of intermediate steps between ship and land transportation in finding coverage for two claimants in *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). Claimant Ford was injured on a dock while securing military vehicles, which had been unloaded earlier, to railroad cars for further transshipment. Claimant Bryant, a cotton-header, was injured while unloading a bale of cotton from a dray wagon into a pier warehouse for subsequent loading. The Supreme Court held that the requirements of Section 2(3) were met because both claimants were engaged in intermediate steps of moving cargo between ship and land transportation and were not merely picking up cargo for further transshipment. *See also John T. Clark & Son of Maryland, Inc. v. Cooper*, 687 F.2d 39, 15 BRBS 5(CRT) (4th Cir. 1982), *aff'g* 11 BRBS 453 (1979) and 14 BRBS 154 (1981) (stevedore securing container to railroad car). *Cf. Conti v. Norfolk & Western Ry. Co.*, 566 F.2d 890 (4th Cir. 1977) (brakemen responsible for sending coal cars rolling to a point where coal was dumped for loading aboard a vessel were not covered by the Act as their work was neither traditionally maritime nor an integral part of the loading process).

Following *Pfeiffer*, the Supreme Court vacated and remanded for reconsideration two cases in the Second and Ninth Circuits which had denied coverage. *Director, OWCP v. Walter Tantzen, Inc.*, 446 U.S. 905 (1980), *vacating and remanding Walter Tantzen, Inc. v. Shaughnessy*, 601 F.2d 670, 10 BRBS 710 (2d Cir. 1979), and *Powell v. Cargill, Inc.*, 444 U.S. 987 (1979), *vacating and remanding* 573 F.2d 561, 7 BRBS 1 (9th Cir. 1977), *rev'g* 1 BRBS 503 (1975). On reconsideration, the Second Circuit vacated its prior opinion, holding that claimant, a scalesman employed to weigh, sample, test and inspect commodities, was engaged in longshoring operations or their equivalent. *Walter Tantzen, Inc. v. Shaughnessy*, 624 F.2d 5, 12 BRBS 379 (2d Cir. 1980). The Ninth Circuit similarly withdrew its prior opinion and affirmed the Board's holding that a claimant who regularly worked unloading railroad cars, the contents of which were placed in grain elevators prior to loading aboard ship, was covered by the Act. *Cargill, Inc. v. Powell*, 625 F.2d 330 (9th Cir. 1980).

Thus, a checker who moves lumber from its initial placement on a pier to an area for pick up by the consignee is covered. *Molee v. Novelties Distribution Corp.*, 15 BRBS 1 (1982), *aff'd*, 710 F.2d 992, 15 BRBS 168(CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). In *Molee*, the Board held that it did not matter that employer was a separate corporate entity from the terminal operator or that its employees did not go aboard vessels or directly unload them; claimant was covered as he performed an intermediate step in the longshoring operation. Affirming the conclusion that Novelties worked as an integral unit with the terminal operator, the court also rejected the argument that claimant was not covered as he was an agent of the consignee. A truck driver carting gravel from a floating shipside platform to a storage site was also held covered. *Warren Brothers v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980), *aff'g* 7 BRBS 627 (1978). In *Warren Brothers*, the court held that the unloading process was not finished until the gravel was unloaded from the floating platform, where it initially was dumped, and moved to the stockpile. *See also Arbeeney v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *rev'g* 12 BRBS 435 and 12 BRBS 473 (1980), *cert. denied*, 454 U.S. 836 (1981) (security guards whose duties included guarding unloaded cargo on piers and occasionally on board ships had status under the Act because their activities were integral to the loading and unloading of cargo and its safe transit).

The Board also found coverage by analogizing employees' jobs to those of stuffers and checkers. In *Mildenberger v. Cargill, Inc.*, 2 BRBS 51 (1975), the Board held that a grain blender who blended grain in preparation for shipment and controlled the flow of grain to the ship during loading satisfied Section 2(3) because his duties were similar to those of a stuffer. In *Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984), a gauger who boarded tankers to determine whether the vessel contained the correct type and amount of oil was analogized to a checker who assured employer of the integrity of the product being delivered. Also covered is a longshoreman who handled the recovery operation for

spilled bulk cargo, because the recovery operation was a customary and integral part of the unloading process. *Tourville v. Portland Stevedoring, Co.*, 4 BRBS 361 (1976).

In *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), the Board affirmed the administrative law judge's finding of coverage for an employee who operated a front-end loader which moved unloaded cargo to a conveyor belt for further transshipment. The Board held that this work involved an intermediate step in the unloading process, similar to the employees' work in *Caputo* and *Pfeiffer*. However, a claimant who unloaded fish being sold to employer by a dealer who had bought, unloaded and taken exclusive possession of the fish from the vessel was not covered because the unloading of the vessel was complete when the dealer/consignee took possession of the fish. *Taylor v. Zapata Haynie Corp.*, 623 F.2d 332, 12 BRBS 332.2 (4th Cir. 1980), *aff'g* 10 BRBS 1017 (1979).

Similarly, a claimant who trucks cargo between the docks and inland consignees is not covered because his work involves overland transportation. *Dorris v. California Cartage Co.*, 17 BRBS 218 (1985), *aff'd sub nom. Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987); *Martinez v. Distribution Auto Service*, 19 BRBS 12 (1985). In *Dorris*, the Ninth Circuit held that a truck driver who transported cargo from a berth at a dock to a berth in a different harbor was not engaged in longshore work where the goods were unloaded from a ship and loaded aboard another by other workers. The court also relied on the statement in *Caputo* 432 U.S. at 267, 6 BRBS at 162, that "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered."

The reach of the loading process also includes maintenance and repair of loading equipment. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). Thus, railway workers whose work involved repairing and maintaining the machinery used to load coal onto vessels were held covered because their work is essential to the loading and unloading process.

Workers maintaining conveyors and similar equipment are also covered. *See Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982); *Prolerized New England Co. v. Benefits Review Board [McNeil]*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). In *McNeil*, claimant worked on the "Shear," which was used to cut scrap metal into sizes suitable for loading. The court found this work covered as it involved an intermediate step in the loading process. Cases specifically addressing the coverage of mechanics and repairmen are addressed, *infra*. Where a manufacturing plant includes loading operations within the same facility, a line can be drawn between the manufacturing operation aimed at creating a product, and loading operations which includes the materials' transportation to ships for loading via conveyor or other means and the alteration of material for shipment. Cases addressing

status at such mixed use facilities are digested, *infra*, and additional cases are addressed under *situs* in Section 3.

Covered loading activities may also be performed in conjunction with construction or other work. Whether this work is covered may involve such factors as the type of material being unloaded, *e.g.*, personal equipment versus items shipped by water, and whether claimant performed such work a sufficient amount of his time. See Section of Amount of Time in covered work, *supra*. In *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *rev'g* 12 BRBS 556 (1980), *cert. denied*, 459 U.S. 1169 (1983), the Fifth Circuit found coverage because claimant was unloading pilings from a barge at the time of injury, holding that this work constitutes longshoring operations even though the pilings were to be used in bridge construction.

Digests

Intermediate Steps

In a case involving a mechanic who repaired containers and chassis, the Board rejected employer's argument that claimant was not covered as his work primarily involved equipment used in landward transportation, holding claimant covered as his overall work facilitated the transfer of cargo from sea to land transportation and his specific work on containers coming into the port to be put on ships and on equipment used solely to move cargo within the port area is directly integral to the loading and unloading process. *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). Affirming this decision, the Eleventh Circuit found it unnecessary to address whether the 4 to 6 percent of work employer conceded was maritime was sufficient, as it agreed with the Board that claimant's overall work was covered. The court reasoned 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).

The Fifth Circuit affirmed 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 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. As these finding establish that claimant is a land-based employee, the

Board affirmed the conclusion that he was not excluded from coverage as a 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. 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). *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

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).

The Second Circuit held that a driver of a yard hustler used to transport cargo containers between employer's dockside storage facility and the rail facility is a covered employee because his work played an integral role in the loading of cargo. Moreover, his "truck" is not a registered vehicle for use on public roads, although 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 Association. *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991).

The Board affirmed the administrative law judge's finding that claimant was 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'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*, 159 F.3d 1354 (3d Cir. 1998) (table).

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, were 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).

However, where claimant drove a truck not to move cargo as part of the loading or unloading process, but between the Port and landward destinations, he was not covered by the Act. 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 consistent with Supreme Court precedent and 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 was not covered by the Act was affirmed. *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41 (2002).

Where claimant spent some of his time driving within the Port, the Board reversed the administrative law judge's finding that claimant, a truck driver, was not a covered employee. The Board held that, while the majority of his time spent transporting containers from the port to customers was not covered work, claimant's regular work assignments involving transporting containers between the 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. Claimant was thus covered as he spent some of his time in longshoring work. The Board addressed the Ninth Circuit's statement in *Dorris*, 808 F.2d at 1365, 19 BRBS at 84(CRT), reserving the question of "whether moving cargo from berth to berth in the same harbor would be longshore work..." and held that claimant's work transporting containers that had missed the intended shipping from one maritime terminal to another terminal within the same port for further shipment aboard another vessel was covered work. *W.B. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007), *aff'd mem.*, 378 F. App'x 691 (9th Cir. 2010).

The Board affirmed the administrative law judge finding 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, 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).

Following *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), 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 (in which brakemen engaged in moving trains were held not involved in the loading and unloading process), since the employee's job involved directing the crane and fastening the cargo onto 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), the court, relying on *Conti*, 566 F.2d 890 (in which the employees were engaged in moving trains and not the loading and unloading process), stated that there is a meaningful distinction between loading or unloading ships and loading or unloading rail cars. In this case, claimant was a locomotive engineer who was part of the switchyard crew performing railroad rather than maritime work. Rather than engaging in an "essential or integral" part of the shiploading process, claimant merely moved rail cars to the docks for dock employees to load or unload and moved them away when this process ended. These duties were part of the first or last stage of the overland railroad shipment of cargo and were thus not maritime employment. *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 26 BRBS 155(CRT) (6th Cir. 1993), *cert. denied*, 510 U.S. 813 (1993).

The Board affirmed the administrative law judge's finding that claimant, who worked at a rail yard 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 affirmed 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 noted that this case arises in the Fifth Circuit, and under its precedent, claimant also was covered since he was performing maritime employment at the moment of injury. *Schilhab v. Intercontinental Terminals, Inc.*, 35 BRBS 118 (2001).

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 improving the ports' roadways in the future and was not an essential aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project designed to improve the movement of traffic 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 that claimant's work servicing mobile equipment, including equipment used in the transfer of coal from a hopper onto barges, is integral to the loading process, and that claimant, therefore, spent at least some of his time in indisputably maritime work as this repair work was a regular non-discretionary part of claimant's job. The fact that the equipment claimant repaired was not used primarily to load coal and that claimant repaired other equipment as well is not dispositive as claimant's contribution to the loading process need not be constant. *D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008), *aff'd sub nom. Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

The Third Circuit affirmed the Board's holding that claimant's work as a mechanic on the repair and maintenance of equipment used in the process of loading coal onto vessels was integral to the loading process. That this equipment was not repaired "at the river's edge" and was also used for non-loading purposes, and that the loading was not continuous, is insufficient to establish that claimant's work not integral to the loading process. *Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

The Eighth Circuit affirmed the district court's remand order in which it held that claimant's claim was properly filed in state court under the Federal Employers' Liability Act and rejected employer's attempt to remove the case to federal court based on alleged Longshore coverage. Although the parties agreed that the situs element of Section 3(a) was met, the court held that the status element was not met because claimant's duties as a switchman/conductor were completed before the loading process began. The court was guided by the Supreme Court's description in *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), of the process of loading coal from railcars onto vessels. Claimant's crew spotted rail cars loaded with coal onto their proper tracks and set the handbrakes. Claimant's work was complete before the railroad cars subsequently descended to the dumper, which is when the loading process begins. The court rejected employer's argument that claimant's injury was covered under Section 2(3) because his actions were "essential or integral" to the overall loading process, because claimant's work as a railroad switchman was not actually involved in the loading process itself. *In Re Norfolk Southern Ry. Co. [Demay]*, 592 F.3d 907, 43 BRBS 77(CRT) (8th Cir. 2010).

The Board reversed the administrative law judge's finding that claimant's work as a truck driver, delivering groceries from an inland supplier to a maritime site, involved intermediate steps in maritime transportation. The Board observed that the claimant's responsibility on the waterfront was essentially to deliver cargo and that his work manually unloading groceries and fastening crane straps to pallets were the last steps in land transportation. The Board further held that claimant's infrequent communications with ship captains regarding a delivery were incidental to his primary non-maritime responsibility of trucking groceries to the site. Thus, the Board held that claimant's duties were not covered activities under Section 2(3). *Jacobs v. G & J Land & Marine Food Distrib.*, 48 BRBS 9 (2014).

The Board affirmed the administrative law judge's finding that claimant, a truck driver who made deliveries between maritime facilities and facilities outside the port, was not engaged in maritime employment and thus, was not covered by the Act. The Board held that the administrative law judge rationally found claimant's work more like that of the trucks driver in *Dorris* and *McKenzie* (transporting cargo between port terminals and facilities located outside the port not covered) than the driver in *Booker* (regular job assignments transporting goods between marine terminals and other sites located within the port is covered), because the facts establish that claimant was not involved in intermediate cargo-moving steps within the Port of Seattle. Claimant's work involved the first step in land transportation of cargo previously at sea and the last step in land transportation of cargo going to sea. *Ahmed v. W. Ports Transp., Inc.*, 50 BRBS 41 (2016), *aff'd on other grounds*, 731 F. App'x 661 (9th Cir. 2018).

The Maryland Court of Special Appeals held the job duties of supervising the loading of stored cargo from the pier warehouse to railcars and trucks for further inland shipment was maritime employment under the Act. The court held the nature of a worker's activity determines whether the worker is engaged in maritime employment. In this case, the employee's status both as a railroad worker and as a supervisor was immaterial. *Crowe v. CSX Transp., Inc.*, 215 A.3d 376 (Md. Ct. Spec. App. 2019).

Loading and Manufacturing

The Board affirmed the finding that a claimant who was injured while working on a part for an oil drilling platform was covered by the Act, as a part of his regular duties included fabricating parts for drilling barges and loading and unloading component parts from barges. Claimant spent at least some of his time in indisputably longshoring operations. *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). On appeal, the Fifth Circuit affirmed as substantial evidence supported the conclusion that a significant portion of claimant's time was spent in indisputably longshore operations. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). *Accord Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

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).

The Fifth Circuit held that claimant, an oilfield worker, was 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. Tools and supplies are not cargo. *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), *cert. denied*, 511 U.S. 1086 (1994) (Board's decision addressed situs and is digested in Section 3).

The Board affirmed 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 intermediate steps between sea and land transportation. *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (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, remanded the case for the administrative law judge to address claimant's testimony that he also removed debris from the conveyor 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 affirmed the administrative law judge's finding that claimant's hearing loss was covered under the Act where he worked at a paper mill which included a barge facility. As claimant worked at the barge facility in the early years of his employment some of the time and was exposed to noise during this work, his hearing loss was covered under the Act. *Meadry v. Int'l Paper Co.*, 30 BRBS 160, 162 (1996).

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 transshipment 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 met the *Caputo* requirement of "some" time and conferred 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. *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997).

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 Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Fifth Circuit affirmed the finding of coverage for claimant, who spent 9.7 percent of his work time engaged in maritime activities involving loading oil onto transport barges and servicing equipment necessary to load the oil. Citing its decision in *Boudloche*, 632 F.2d 1346, 12 BRBS 732, in which status was upheld for an employee who spent only 2.5 to 5 percent of his employment engaged in maritime activities which were part of his regularly assigned duties, the court held that claimant in this case clearly engaged in maritime activities for more than any minimum amount of time required to confer status. That the majority of claimant's time was spent in activities relating solely to uncovered oil and gas production does not detract from claimant's routine, non-episodic maritime activities. *Coastal Prod. Services Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Board affirmed the administrative law judge's finding that claimant was engaged in maritime employment pursuant to Section 2(3). The administrative law judge permissibly gave significant weight to evidence that claimant regularly participated in the loading and unloading process by directing and monitoring the flow of liquid bulk product to and from vessels and the tank yard. Thus, claimant's job duties were integral to the loading and unloading process. Moreover, the administrative law judge properly focused on claimant's employment as a whole. His conclusion that at least some of claimant's regular job duties were integral to the loading and unloading of vessels is supported by substantial evidence. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that claimant's job duties were integral to the loading and unloading of liquid bulk product between employer's terminal facility and vessels at its dock. Claimant was tasked with monitoring and effecting the flow of oil products, opening and closing manifolds to direct flow, and communicating with other team members to ensure proper loading and unloading. A claimant need not spend a "substantial amount of time loading and unloading, but only "some" time. *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Loading in Construction Work

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 for purposes of constructing the plant structure did not involve longshoring operations under the holding in *Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988).

The Board held that claimant's duties loading and unloading 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 Tibbitts Constr. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting on other grounds).

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 decisions of the courts of appeals holding that the loading and unloading of construction materials is a traditional longshoring activity. *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996).

Mechanics and Repairmen

In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), 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 involved repairing and maintaining the machinery used to load coal onto vessels were held covered because their work is essential to the loading and unloading process. The Court stated that such employees are engaged in activity that is an integral part of and essential to those overall processes.

Coverage is not limited to employees who are denominated ‘longshoremen’ or who physically handle the cargo. Nor are maintenance employees removed from coverage if they also have duties not integrally connected with the loading or unloading functions. Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee’s contribution to the loading process is not continuous or that repair or maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship.

Id., 493 U.S. at 47, 23 BRBS at 100(CRT). The Court found this result consistent with the decisions of every Court of Appeals to have addressed the issue, as well as with the position of the Secretary of Labor and the decisions of the Board. In a concurring opinion, Justices Blackmun, Marshall and O’Connor expressed 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 issue.

As the Court stated, the Board and the Courts of Appeals have consistently held that repair and maintenance of equipment used in longshoring operations is essential to the movement of maritime cargo and to the continued use of equipment, such as containers, in such operations. Thus, mechanics and repairmen engaged in such work are covered by the Act. The Board has stated that, in order to be covered, repair operations must be oriented to sea, and not land, transportation. In *Parker v. Sea-Land Services, Inc.*, 8 BRBS 321 (1978), the Board reversed the conclusion that a container and chassis repairman was not covered by the Act, but, noting that the record was sparse, remanded the case for the administrative law judge to take additional evidence and make new findings as to whether the repair was related to land or maritime commerce. See *Cappelluti v. Sea-Land Service, Inc.*, 10 BRBS 1024 (1979) (Miller, dissenting), *decision following remand in Sea-land Service, Inc. v. Director, OWCP*, 552 F.2d 985, 5 BRBS

632 (3d Cir. 1977) (applying primary duties test, Board affirmed a finding that claimant, a mechanic in the “truck garage” was not covered by the Act as his work primarily involved outbound equipment). *Cf. Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990) (chassis and container mechanic held covered based on overall employment; essential maintenance to make rigs roadworthy is the last step necessary to complete the loading process). The Board distinguished *Cappelluti* in *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980), holding a container mechanic who worked in the chassis department covered as he repaired chassis and containers to facilitate their continued use in longshoring operations and was thus involved with the sea as well as the land phase of employer’s operations, as opposed to *Cappelluti*, whose work was concerned solely with the outbound equipment in the land phase of employer’s operations. In addition, the Board noted that the decision in *Cappelluti* was mandated by a Third Circuit opinion issued prior to *Ford*, 444 U.S. 69, 11 BRBS 320, and thus limited it to its facts.

In *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 6 BRBS 265 (5th Cir. 1977), *modified*, 561 F.2d 1213 (5th Cir. 1977), *aff’d on other grounds*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the Fifth Circuit found that a gear man whose job was to repair and maintain tools used in loading and unloading ships was within the coverage of the Act. The court concluded that, although no ships were being loaded or unloaded on the day of injury, claimant’s job repairing and maintaining the gear used by longshoremen was a continuous, direct involvement with maritime activities

In *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *aff’g McNeil v. Prolerized New England Co.*, 8 BRBS 1 (1978), *cert. denied*, 452 U.S. 938 (1981), the First Circuit held that a maintenance man at a scrap metal operation was covered under the Act. The court reasoned that the shear, which cut scrap metal into pieces, was used to prepare metal for shipping and consequently that the claimant’s duties repairing, maintaining and occasionally operating the shear machine constituted intermediate and necessary steps in the movement of marine cargo. The court distinguished work in the prolo mill as being akin to a manufacturing process. Since the shear involved an intermediate step in the loading process, the court held claimant was covered by the Act. *Cf. Castro v. Hugo Neu-Proler Co.*, 10 BRBS 35 (1979) (Miller, dissenting) (claimant working on an auto shredder at employer’s shoreside scrap metal facility was not engaged in longshoring operations because the shredding was not done to facilitate ship loading).

In *Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23(CRT) (1st Cir. 1982), *aff’g* 14 BRBS 811 (1981), the Board held that claimant’s work on conveyors used to move the scrap metal, or “prolo,” from the mill to the radial stacker was covered, as “once the prolo begins to move on the conveyors to the radial stacker for storage and subsequent loading, it has left the manufacturing stage and has entered the stream of

commerce.” *Id.*, 14 BRBS at 815. Thus, the Board held claimant covered based on his overall employment. In affirming, the court agreed with the Board, stating that the stacker, like the shear in *McNeil*, is an integral part of the loading process, as its only function is to position the prolo for loading onto ships. The court also stated that neither the stacker nor the conveyor leading to it is part of the manufacturing process carried on in the prolo mill. Thus, the line drawn in *McNeil* between the manufacturing and loading process was not crossed by holding claimant covered by the Act.

In *Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981), *aff’g* 11 BRBS 441 (1979), the court affirmed a finding of status where claimant maintained equipment in a grain elevator, including belt conveyors used to move grain around the facility to the scale where it was weighed prior to loading onto ship, and repaired equipment on barges and ships as necessary. Claimant boarded barges to jack up derailed barge covers so that the barge could be opened up for unloading or closed after loading and to repair “marine legs,” bucket conveyors used to load or unload the barges. He also repaired the loading spout through which grain and pellets flowed from the grain facility onto the ship; only a millwright like claimant could perform this repair. The court held claimant’s duties repairing the loading spout and maritime legs, moving barge hatch covers, and performing general maintenance on employer’s grain facility constituted maritime employment. The court stated that such functions are integrally related to the loading and unloading process and connected with and vital to the movement of maritime cargo on navigable waters. The court noted that claimant’s duties included maintenance of equipment both on land and on barges and/or ships.

The Ninth Circuit similarly found a mechanic covered in *Sea-Land Services, Inc. v. Director, OWCP [Ganish]*, 685 F.2d 1121 (9th Cir. 1982), *aff’g* 13 BRBS 419 (1981), affirming the Board’s finding of coverage for a mechanic who repaired trailers used to move containers and forklifts employed in loading and unloading. Claimant also repaired inland bound trailers and containers. *Accord Insinna*, 12 BRBS 772.

The Fourth and Fifth Circuits reached similar results. In *Price v. Norfolk & Western R.R. Co.*, 618 F.2d 1059 (4th Cir. 1980), the court held that work painting a support tower which is part of a conveyor belt system used to move grain between ship and land transportation was essential to the loading and unloading process. The court found no significant distinction between the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading process or in the fact that claimant was merely painting the structure housing the conveyor mechanism rather than the mechanism itself. The support tower here is just as essential to the actual loading and unloading of ships as the machinery in other cases. In *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *aff’g* 7 BRBS 538 (1978), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit held a carpenter engaged in erecting scaffolding as part of an ongoing pier repair project involving the repair of a turntable (affixed to the pier) used by longshoremen in the loading and

unloading of ships was covered by the Act. The court rejected employer's attempted distinction between this work and "maintenance and repair" cases based on claimant's lack of a direct role in the actual repair of the turntable; employer argued Carroll was not engaged in the maintenance or repair of longshoring equipment, but was merely utilizing his essentially non-maritime carpentry skills to build a scaffold to be used by others. The court, however, held the scaffolding work was an integral part of an indisputably maritime pier repair project, an essential and indispensable step in the repairs to be effected. It was not merely "incidental" to that project.

As the above court decisions affirming its conclusions indicate, the Board consistently held mechanics and repairmen covered,. In addition, in *Wuellet v. Scappoose Sand & Gravel Co.*, 18 BRBS 108 (1986), the Board affirmed the administrative law judge's finding of coverage for a welder/mechanic who repaired conveyor belts used to load rock onto barges and who repaired dump trucks and loaders used to load and haul rock to the loading facility. The Board stated that such work is maritime employment because it is integral to the loading process and to the transfer of cargo between land and maritime transportation. Claimant also repaired mining equipment but because a sufficient portion of time was spent in maritime employment, claimant satisfied Section 2(3). The Board also held crane assembly and disassembly was covered employment. *Droogsmma v. Equipment Rental Center, Inc.*, 7 BRBS 491 (1978).

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Claimant, a sheet metal worker installing a dust control system on a grain elevator, was a maritime employee under Section 2(3) because his activities directly related to loading and unloading 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).

In a case involving a mechanic who repaired containers and chassis, the Board rejected employer's argument that claimant was not covered as his work primarily involved equipment used in landward transportation, holding claimant covered as his overall work facilitated the transfer of cargo from sea to land transportation and his specific work on containers coming into the port to be put on ships and on equipment used solely to move cargo within the port area is directly integral to the loading and unloading process. Container repair is essential to the 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). Affirming this decision, the Eleventh Circuit found it unnecessary to address whether the 4 to 6 percent of work employer conceded was maritime was sufficient, as it agreed with the Board that claimant's overall work was covered. The court reasoned 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).

The Board affirmed the administrative law judge's finding that claimant met 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 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 used to supply steam, fuel and water to vessels 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), 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).

Affirming this decision, the Fourth Circuit agreed 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 rejected the notion that claimant is not covered because the pipelines did not convey traditional cargo; the loading of supplies such as steam, water and fuel which are necessary to the function of the vessels and their transport of cargo cannot rationally be distinguished from the cargo itself. *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The Board affirmed the administrative law judge's finding that claimant's work servicing mobile equipment, including equipment used in the transference of coal from a hopper onto barges, is integral to the loading process, and that claimant, therefore, spent at least some of his time in indisputably maritime work as this repair work was a regular non-discretionary part of claimant's job. The fact that the equipment claimant repaired was not used primarily to load coal and that claimant repaired other equipment as well is not dispositive as claimant's contribution to the loading process need not be constant. *D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008), *aff'd sub nom. Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

The Third Circuit affirmed the Board's holding that claimant's work as a mechanic on the repair and maintenance of equipment used in the process of loading coal onto vessels was integral to the loading process. That this equipment was not repaired "at the river's edge" and was also used for non-loading purposes, and that the loading was not continuous, is insufficient to establish that claimant's work not integral to the loading process. *Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

Claimant worked as a carpenter repairing and remodeling buildings and was hurt while using a man-lift to repair the building at a facility adjacent to navigable waters. The Board reversed the administrative law judge's determination that claimant was not a covered employee. Contrary to the administrative law judge's decision, a worker who maintains structures involved in maritime activities is a covered employee. The administrative law judge found that the building was used to carry out maritime activities in that it housed tools used to repair the LeTourneau machine and the log broncs, both of which served maritime purposes. Accordingly, the Board held that claimant's work satisfies the status requirement and remanded the case for further proceedings. *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010), *aff'd mem.*, 660 F. App'x 487 (9th Cir. 2016).

Repair and maintenance of equipment used in the loading and unloading process are integral to that process and such work is therefore, covered employment. Thus, the Board affirmed the administrative law judge's finding that claimant's repair of intermodal containers, some of which were used for maritime purposes, satisfied the Act's status requirement. *Zepeda v. New Orleans Depot Services, Inc.*, 44 BRBS 103 (2010), *aff'd sub nom. New Orleans Depot Services, Inc. v. Director, OWCP*, 689 F.3d 400, 46 BRBS 41(CRT) (5th Cir. 2012), *rev'd on other grounds on reh'g*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (*en banc*).

The Fifth Circuit affirmed the finding that claimant, who worked as a container and chassis repairman, was a maritime worker under Section 2(3), as maintaining or repairing equipment essential to loading and unloading is covered work. The court cited with approval the Eleventh Circuit's decision in *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990), and concluded that substantial evidence supported the finding that claimant sometimes worked on marine containers. *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 689 F.3d 400, 46 BRBS 41(CRT) (5th Cir. 2012), *rev'd on other grounds on reh'g*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (*en banc*).

The Board affirmed the administrative law judge's finding that claimant's work as a chassis and container mechanic is maritime. As it is essential to the loading/unloading process, claimant's work satisfies the status requirement. *Ramos v. Container Maintenance of Florida*, 45 BRBS 61 (2011), *aff'd mem. sub nom. Ramos v. Director, OWCP*, 486 F. App'x 775 (11th Cir. 2012).

Clerical and Miscellaneous Work

In enacting the 1972 Amendments, Congress indicated its intent to exclude employees not engaged in maritime work who may be injured on a covered situs, stating

[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972).

In a pre-*Caputo* decision, the Third Circuit reversed a Board decision finding coverage for a delivery clerk because it found him to be a clerical employee. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), *rev'g* 3 BRBS 42 (1975). The court's decision turned on the fact that claimant's primary duties were performed in an office and did not require him to go down to the pier or to board a vessel.

The First Circuit, however, in a post-*Caputo* case, reversed a Board decision finding no coverage for a book clerk. *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 25(CRT) (1st Cir. 1984), *rev'g* 15 BRBS 281 (1983) (Kalaris, concurring) (Miller, dissenting). The court found that the Board erred in two respects. First, in determining whether an employee is covered, the proper focus is on his actual duties rather than his formal job classification or title. Second, the Board erred in applying a "primary duties" analysis rather than properly determining claimant's "regularly assigned duties as a whole." In this regard, the Board was not entitled to recast claimant's duties performed outside the office as "non-routine and irregular" and to discount them on that basis. Claimant's regularly assigned duties included going to the yard to clear up discrepancies between the number on the manifest and the number on the container and acting as a runner whenever ships under 300 tons were loaded or unloaded. These tasks were not discretionary or extraordinary and are directly related to the movement of cargo. Claimant was thus covered by Section 2(3).

In *Powell v. Int'l Transportation Services*, 18 BRBS 82 (1986), the Board affirmed the administrative law judge's finding that a "vessel planning and stowage coordinator" who worked in an office satisfied Section 2(3), as his duties were integral to the loading and unloading of ships. The Board rejected employer's argument that claimant's duties were purely clerical in nature and that therefore he was not covered. The Board noted, however, statements in the legislative history of the 1984 Amendments indicating that the Amendments may exclude employees not exposed to normal longshoring hazards.

The Board also found employees performing miscellaneous duties covered by analogizing their jobs to those of stuffers and checkers. *See Malone v. Howard Fuel Co.*, 16 BRBS 364 (1984) (gauger who boarded tankers to determine whether the vessel contained the correct type and amount of oil is similar to a checker who assures employer of the integrity of the product being delivered); *Tourville v. Portland Stevedoring Co.*, 4 BRBS 361 (1976) (longshoreman who handled the recovery operation for spilled bulk cargo covered as the recovery operation is a customary and integral part of the unloading process); *Mildenberger v. Cargill, Inc.*, 2 BRBS 51 (1975) (worker who blended grain in preparation for shipment and controlled the flow of grain to the ship during loading covered as his duties are similar to those of a stuffer).

The 1984 Amendments to the Act exclude employees “employed exclusively to perform office clerical, secretarial, security, or data processing work” if they are covered by a state workers’ compensation statute. 33 U.S.C. §902(3)(A). *See Exclusions from Coverage, infra.*

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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. 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 it had no connection with loading and unloading 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 recon.*, 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). Affirming the Board, the Ninth Circuit held 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. The court referred to the Supreme Court’s "essential elements of loading and unloading" test as more restrictive than the *Weyerhaeuser* “significant relationship” test and noted that the Eleventh Circuit’s decision in *Sanders* applied a standard similar to *Weyerhaeuser*. Claimant’s duties herein were not essential because after the restaurant closed employer’s longshoring operation continued. *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 818 (1990).

The Board reversed the administrative law judge and held that claimant’s job as a courtesy-van driver at employer’s loading facility satisfied the status test of Section 2(3), as this employment directly related to furthering the maritime concerns of a covered employer. Claimant transported 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). Reversing this decision, after a comprehensive review of recent Supreme Court and circuit court decisions, the Third Circuit held 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).

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).

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 Fifth Circuit affirmed 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 was excluded from coverage by Section 2(3)(A). Claimant worked 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, that a delivery clerk who worked in an office was not covered was controlling. The Board noted that while the validity of *Farrell* could be questioned in light of intervening Supreme Court law, the Third Circuit reaffirmed its validity in *Rock*, 953 F.2d 56, 25 BRBS 112(CRT).

Claimant, moreover, is now excluded from coverage by Section 2(3)(A), which the *Rock* court found consistent with *Farrell. Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).

The Board rejected 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, Board vacated the denial of coverage and remanded the case because the administrative law judge stated several times that claimant occasionally worked as a checker. If he did so, 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). Following remand 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 on the day of injury. *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). On appeal, the Third Circuit rejected claimant's argument that his work as a delivery clerk was covered employment, citing *Farrell*, 548 F.2d 476, 5 BRBS 393, and *Sette*, 27 BRBS 224. The court nonetheless affirmed the finding of coverage, as claimant's duties at the time of injury do not control, claimant was subject to assignment as a checker, and the parties stipulated he worked some of the time (half) as a checker, which is covered work. *Mahe Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003).

The Second Circuit affirmed the finding that claimant, a union shop steward, was covered under the Act as his duties were integral or essential to employer's longshoring operations. The court rejected employer's contention that claimant is not covered because he was not continuously present on the docks as inconsistent with *Schwab*, 493 U.S. 40, 23 BRBS 96(CRT). 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) (2^d Cir. 2001), *aff'g* 34 BRBS 112 (2000).

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 improving the ports' roadways in the future and was not an essential aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project designed to improve the movement of traffic 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 decision granting employer's motion for summary decision on the basis that claimant, a shipyard occupational health nurse, did not satisfy the status requirement. The Board affirmed the administrative law judge's finding that claimant's work was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), *Ellis*, 42 BRBS 35, *Buck*, 37 BRBS 53, and *Gonzalez*, 33 BRBS 146, as claimant presented no evidence that could support a finding that failure to perform her duties as a nurse would disrupt employer's shipbuilding operations. *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010).

Shipbuilding, Ship Repair, Ship-Breaking

Shipbuilding and Ship Repair

Section 2(3) provides coverage for “any harbor-worker including a ship repairman, shipbuilder, and ship-breaker.” The cases addressed in this section concern those employees involved in the building of ships and their component parts, and the repair of shipbuilding equipment and structures. Coverage of employees building harbor facilities is addressed in the section, *infra*, on harbor-workers.

An employee need not be involved in the actual and final fabrication of a ship as long as he is engaged in or directly involved with an ongoing shipbuilding operation. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976) (citations to subsequent case history provided in Covered Occupations in General, *supra*); *Smart v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 995 (1978) (claimant worked in employer’s submarine shop supervising the preparation of nuclear reactors for installation on nuclear frigates).

Early cases established coverage for the following shipyard employees: ship electrician, *Barton v. Litton Systems, Inc., Ingalls Shipbuilding*, 6 BRBS 92 (1977); shipfitter apprentice, *Winter v. Litton Systems, Inc., Ingalls Shipbuilding*, 5 BRBS 519 (1977); *Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61, 5 BRBS 754 (5th Cir. 1977), *aff’g* 3 BRBS 310 (1976), *cert. denied*, 434 U.S. 966 (1977); tack welder trainee, *Hemminger v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1099 (Miller, concurring) (S. Smith, dissenting); *cf. Taylor v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 22 (2005), (Hall, J., dissenting), *infra*; chippers and welders, *Crowley v. Dravo Corp.*, 5 BRBS 344 (1977); *Foutz v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 7 BRBS 815 (1978); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), *aff’g* 5 BRBS 7 (1976) and 5 BRBS 323 (1977), *cert. denied*, 439 U.S. 979 (1978); and a burner manufacturing barge components, *Dravo Corp. v. Maxin*, 545 F.2d 374, 5 BRBS 268 (3^d Cir. 1976), *aff’g* 2 BRBS 372 (1975), *cert. denied*, 433 U.S. 908 (1977).

In *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3^d Cir. 1977), the Third Circuit held that an unskilled laborer, whose duties included general maintenance at a shipyard, was not a covered employee. Citing the “integral part” test of *Caputo*, the court said such work was merely a necessary “incident” of any operation and was not a necessary “ingredient” of the shipbuilding process. Claimant’s duties had no traditional maritime characteristics but, rather, were typical of support services performed in any production entity, maritime or not. *Id.*, 567 F.2d at 595, 7 BRBS at 200. The court analogized claimant’s duties to those of the clerical worker excluded from coverage in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3^d Cir. 1977).

In *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the Fifth Circuit rejected employer's argument that claimant's work was no different than a carpenter's work on land, stating that the fact that his activities were in many respects similar to a carpenter who builds, for example, houses rather than vessels is irrelevant, as the tests under the Act involve whether claimant had a "realistically significant relationship to traditional maritime activity" or whether his activities "directly furthered the shipbuilding goals of his employer." The court concluded that "it is difficult to conceive of an activity more fundamental to maritime employment than the building and repair of navigable vessels." In *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983), the Fifth Circuit found claimant, a night watchman, was covered under the Act where he guarded sophisticated equipment on a vessel. The court stated that it was not holding every watchman of a vessel in navigable waters is covered, but on the facts presented, claimant was integral to and directly involved in employer's ship repair operation.

The employees in ship repair cases have basically the same occupations as those in shipbuilding cases and the analyses in the cases are equally applicable. Thus, a driver whose usual duties consisted of transporting ship parts between the shipyard and independent repair shops in the New York City area was held covered by Section 2(3) as part of employer's ongoing ship repair operation. *D'Amato v. Ira S. Bushey & Sons*, 4 BRBS 414 (1976). Employees were held covered under Section 2(3) because they were engaged in ship repair in cases involving a painter, *Fuduli v. Maresca Boat Yard, Inc.*, 7 BRBS 982 (1978); a machinist who worked aboard ship and in a machine shop, *Nalej v. H. W. Ramberg, Inc.*, 8 BRBS 640 (1978); and a sandblaster/painter engaged in barge repair, *Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir 1981), *rev'g* 11 BRBS 568 (1979).

In *Alford v. American Bridge Div., U. S. Steel Corp.*, 7 BRBS 484 (1978), the Board held that a welder in a steel shop did not satisfy Section 2(3) because the manufacturer did not maintain, and claimant did not participate in, an ongoing shipbuilding operation. Rather, employer fabricated steel parts for use in bridges, buildings and tanks, as well as ship components. *Accord Buller v. American Bridge Div., U. S. Steel Corp.*, 7 BRBS 481 (1978). The Fifth Circuit consolidated *Alford* and *Buller*, along with an appeal of an unreported Board decision involving claimant Cantu. Reversing the Board, the court held that claimants Alford and Buller were shipbuilders as they were engaged in fabricating custom-built modules for newly constructed vessels. The court found it significant that the modules which claimants were constructing were not interchangeable with any other type of fabricated steel which the company manufactured. The court concluded that the module construction was clearly a fundamental, integral and essential step in the process of building vessels. Regarding claimant Cantu, the court initially held that the navigational signal on which he was working, while required by the Coast Guard, was not an integral part or module of a ship and thus his work bore too tenuous a connection to shipbuilding for coverage. On rehearing, however, the court vacated this decision and

found that in light of more recent decisions, Cantu was also covered by the Act. *Alford v. American Bridge Div., U. S. Steel Corp.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1981), *modified*, 655 F.2d 86, 13 BRBS 837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982).

The Board followed the court's holding in *Alford* in *Dennis v. Boland Marine & Manufacturing, Inc.*, 13 BRBS 528 (1981) (Smith and Kalaris, concurring), holding that an employee who performed aluminum fabrication work, which involved the development and assembly of smokestacks and masts, was covered because the fabrication of component parts to be installed in vessels is an essential step in the shipbuilding process. However, in a subsequent case, the Board distinguished *Alford* on the basis that the ship parts produced by claimant's division were fungible machine parts interchangeable with parts produced by similar land-based manufacturers and with parts in inventory for non-maritime uses. *Skow v. Marco Seattle, Inc.*, 17 BRBS 25 (1985).

As with those involved in the repair of loading equipment, employees who repair shipbuilding and repair equipment are covered employees. *Kininess v. Alabama Dry Dock & Shipbuilding Co.*, 4 BRBS 13 (1976), *aff'd*, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977) (maintenance of shipbuilding crane); *Wade v. Ingalls Shipbuilding Corp.*, 8 BRBS 208 (1978) (crane electrician). Similarly, the maintenance and repair of structures housing shipyard machinery and in which shipbuilding operations are performed is "no less essential to shipbuilding than is the repair of the machinery itself." *Graziano v. General Dynamics Corp.*, 663 F. 2d 340, 14 BRBS 52 (1st Cir. 1981), *rev'g* 13 BRBS 16 (1980); *Sills v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 976 (1978), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 591 F.2d 1340 (4th Cir. 1979) (table).

Claimants engaged in the initial steps in the shipbuilding process are also covered. In *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BR8S 862 (1st Cir. 1982), *aff'g* 14 BRBS 29 (1981), the First Circuit held a claimant whose job required him to unload raw steel from railroad cars as it came into the shipyard via crane and to issue the steel from the storage bays by harnessing it to cranes for transportation to the fabrication shop where the construction process began was covered as a shipbuilder as his work was a necessary ingredient or integral part of shipbuilding. The Fourth Circuit held that a pipe clerk who color coded pipe for ship fabrication was involved in the first step taken to physically alter the pipe for use in ship construction and thus, was directly involved in shipbuilding. *White v. News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), *rev'g* 9 BRBS 493 (1978). *Accord Woodard v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 532 (1981) (Smith and Kalaris, concurring); *Le Batard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979) (Smith, dissenting).

Digests

In General

The Board held that claimant's work maintaining the physical plant, forklifts and cranes at a facility used to test missile launching systems for submarines is not covered as shipbuilding or under the general category of maritime employment. 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 the 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 in denying coverage. *Wilson v. General Engineering & Machine Works, Inc.*, 20 BRBS 173 (1988).

The Board held that 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 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 this decision, the Eleventh Circuit held that claimant's duties satisfy the status test as they were significantly related to and directly furthered employer's ongoing shipbuilding and ship repair operations. The Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel; additionally, Section 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). *Cf. Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 618 n.5, 23 BRBS 101, 107 n.5(CRT) (11th Cir. 1990) (suggesting that the *Sanders* test, which looks to whether an employee's responsibilities have a "significant relationship" to the maritime concerns of his employer, is questionable in light of the *Schwalb* test requiring that an employee's work be "an integral or essential part" of maritime activities).

The Board affirmed the administrative law judge's finding that claimant's work as general manager of employer's shipyard facility is covered under the Act as his work is necessary to employer's shipbuilding business of shipbuilding and repair business, consistent with the holding in *Sanders*. The Board rejected 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 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).

Pursuant to Section 2(3) of the 1972 Act, decedent's employment at a shipyard in the 1940's 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 at this covered site 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).

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).

Applying the law at the time of manifestation of claimant's illness, the Board held decedent covered under the 1972 Amendments as his work in the model and joiner shops consisting of building scale model components and battery wedges used in submarine construction is related to shipbuilding. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (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 for employer, 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). Therefore, he 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).

The Board held that claimant, whose work involved the fabrication of gear box units which control the raising and lowering of legs of floating offshore drilling rigs, was a covered employee, since 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 as shipbuilding, in addition to being covered because claimant worked in a dry dock and is therefore covered under *Perini. Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The Board affirmed the administrative law judge's finding that claimant was 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 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).

The Board held that decedent, the chief engineer of employer's vessel casino, was covered by the Act. As his 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, the Board concluded that while decedent was an employee of a recreational operation, the proper focus under Section 2(3)(B) is on his overall duties and whether they furthered the recreational operation or whether they involved maritime commerce and exposure to maritime hazard. The Board concluded that since decedent worked in shipbuilding at all times during his employment prior to his death, he was covered. 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). Reversing this decision, the Fifth Circuit held that decedent was 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 held 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), *cert. denied*, 540 U.S. 814 (2003).

Citing *Coloma*, 897 F.2d 394 23 BRBS 136(CRT), and *Rock*, 953 F.2d 67, 25 BRBS 121(CRT), the Board affirmed the administrative law judge's finding that decedent is not covered under Section 2(3) as his duties, which involved cleaning and restocking

restrooms and portable toilets throughout the NASSCO shipyard, including performing these services in bathroom facilities located aboard ships approximately two to three times a day, were not integral to the shipbuilding process. *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999).

Citing *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), 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, 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) 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). Following remand, the Board reversed 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 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 erred in failing to draw the only 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), and *Watkins*, 36 BRBS 21, 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 held that claimant, a janitorial worker, was engaged in maritime employment pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). 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 held 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 affirmed 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), *Ruffin*, 36 BRBS 52 and *Watkins*, 36 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 affirmed the administrative law judge's decision granting employer's motion for summary decision on the basis that claimant did not satisfy the status requirement where 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. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008).

The Board affirmed the administrative law judge's finding that claimant was not engaged in maritime employment while working at the Norfolk Naval Shipyard. Claimant was assigned to install cables in a building at the shipyard, and the cables would later be used to link the Navy and the Marine Corps to the same computer system. When claimant's job was finished, she would go to another facility under the contract. In accordance with *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT), the Board stated that as claimant's presence at the shipyard was temporary, even if the cable system would later be integral to a maritime purpose, future use is insufficient to confer coverage, and the administrative law judge rationally found that claimant's work was not essential or integral to the building, repairing, loading, or unloading of ships. Accordingly, the Board affirmed the administrative law judge's denial of benefits. *Balonek v. Texcom, Inc.*, 43 BRBS 153 (2009).

The Board affirmed 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), 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), and *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT), 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), and *Rock*, 953 F.2d 56, 25 BRBS 112(CRT), where the employees' work was helpful, but not indispensable, to the loading process. The Board also cited *Neely*, 12 BRBS 859, as authority on this issue, although noting that the case has been partly overruled. *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (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 stated that its decision to the contrary in *Hemminger*, 13 BRBS 1099, was not persuasive authority in view of intervening cases including *Schwalb*, *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT), and *Rock*, 953 F.2d 56, 25 BRBS 112(CRT). *Taylor v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 22 (2005) (Hall, J., dissenting).

The Board affirmed the administrative law judge's decision granting employer's motion for summary decision on the basis that claimant, a shipyard occupational health nurse, did not satisfy the status requirement. The Board affirmed the administrative law judge's finding that claimant's work was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), *Ellis*, 42 BRBS 35, *Buck*, 37 BRBS 53, and *Gonzalez*, 33 BRBS 146, as claimant presented no evidence that could support a finding that failure to perform her duties as a nurse would disrupt employer's shipbuilding operations. *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010).

Claimant worked for employer as a missile mechanic senior at a naval base. His duties included building, dismantling, and inspecting missiles and subassemblies of missiles that were to go on or that came off Trident submarines. The Board rejected claimant's contention that the administrative law judge erred in finding he did not satisfy the Act's status requirement. The administrative law judge found that claimant's work was not integral to the loading, unloading, building, repairing, maintaining, or dismantling submarines. The Board affirmed the finding and the denial of benefits stating that, contrary to claimant's argument, missiles are more akin to cargo than to components of the submarine, and manufacturers of cargo are not covered workers merely because their products are to be transported by vessels. As claimant's job was to build missiles which, months later, would be put on submarines to be carried for military purposes, his work was not integral the construction of submarines. *Kinnon v. Lockheed Missiles & Space Co.*, 47 BRBS 13 (2013).

The administrative law judge found that no evidence was presented to support a finding that claimant's failure to respond in his capacity as a security guard/EMT to work accidents and injuries would disrupt employer's shipbuilding process; thus, like the claimants in *Gelinas*, 44 BRBS 85, *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the administrative law judge concluded that claimant is not a maritime employee pursuant to Section 2(3). Moreover, claimant did not engage in security work on navigable waters, piers, or vessels, nor did not work as a cargo watchman. The Board affirmed the administrative law judge's decision, as he properly applied the law to claimant's employment duties and rationally determined that those duties were not integral to employer's shipbuilding process. *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013).

Claimant, a marine carpenter hired by employer to fabricate topside living quarters to be incorporated onto the tension leg oil platform *Big Foot*, did not satisfy the Section 2(3) status requirement because his work did not involve “shipbuilding.” Addressing the 1 U.S.C. §3 definition of “vessel,” and the Supreme Court’s decisions in *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005), and *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735, 46 BRBS 93(CRT) (2013), the Board affirmed the administrative law judge’s finding that *Big Foot* is not a “vessel” under the Act. Specifically, in light of *Lozman* and *Stewart*, in this “‘borderline case’ where the ‘capacity to transport is in doubt,’ it [was] necessary to consider whether *Big Foot* is ‘practically capable’ of transporting people or cargo based on the purpose for which it was created and its physical characteristics.” As *Big Foot* can float but lacks the capability of self-propulsion and will be towed to its final destination, and as its end-purpose is to be a tension leg platform for oil extraction on the Outer Continental Shelf, tethered to the bottom of the sea, a reasonable person looking at the purpose and characteristics of *Big Foot* could rationally conclude it is not a vessel. As *Big Foot* is not a “vessel,” the administrative law judge properly found that claimant was not involved in shipbuilding and is not covered under Section 2(3) of the Act. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff’d sub nom. Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Fifth Circuit affirmed the Board’s holding that claimant lacked status as a maritime employee. Claimant was injured while working on modules for *Big Foot*, which is a tension leg offshore oil platform. The circuit court held that *Big Foot* is not a “vessel” as it has no means of self-propulsion, has no steering mechanism or rudder, and has an unraked bow. *Big Foot* can be moved only by being towed, and when towed to its permanent location, *Big Foot* will not carry items being transported from place to place in maritime commerce, and is intended to remain anchored to the floor of the OCS for twenty years. Therefore, claimant is not a shipbuilder or otherwise engaged in maritime employment. *Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Board affirmed the administrative law judge’s finding that a construction worker who was injured while renovating an existing carpentry building at the Portsmouth Naval Shipyard was engaged in maritime employment. The Board held that *Graziano v. General Dynamics Corp.*, 663 F.2d, 340, 14 BRBS 52 (1st Cir. 1981) applied. The fact that claimant’s skills were essentially “non-maritime” is not dispositive because work involved the repair and maintenance of a building that was essential to the shipbuilding process. *Luckern v. Richard Brady & Associates*, 52 BRBS 65 (2018).

Clerical Workers

Since claimant’s injury occurred after September 28, 1984, the Board held that the 1984 Amendments exclusions apply, and a claimant employed as a key machine operator at a shipyard was not covered as her duties involve office clerical work excluded by Section 2(3)(A). Claimant’s work involved processing invoices and inspection information using a computer terminal and generating descriptive stickers and tags which were placed on parts and used in the shipyard inventory and routing process. While claimant herself did not inspect the parts or affix the inspection stickers, claimant’s office was adjacent to the warehouse/inspection office, and she occasionally would have to physically go into the parts warehouse. Distinguishing *White v.*

Newport News Shipbuilding & Dry Dock Co., 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), the Board held that claimant's duties involved handling paper rather than shipbuilding materials. Thus, while claimant's duties may fall within the definition of maritime employment, her job is specifically excluded from coverage. *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989).

The Board held that claimant is excluded from coverage under both the 1972 and 1984 versions of Section 2(3), see *Caputo* and Section 2(3)(A), as her job as a keypunch operator in a shipyard involved only office clerical work. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

The Board reversed the administrative law judge's finding of coverage for an office-bound shipyard 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, 29 BRBS 75(CRT) (4th Cir. 1995). In its unpublished opinion, the Fourth Circuit vacated the Board's decision, finding the Board exceeded its authority in finding that claimant performed exclusively office clerical work, as the administrative law judge relied on a conclusion that claimant's work was integral to the shipbuilding process and thus did not make the necessary findings of fact as to nature of the different skills required, and whether claimant's duties were exclusively clerical and performed exclusively in a business office. The case was remanded for these findings.

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 held that 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, was 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).

Finding this case analogous to *Stone*, 30 BRBS 209, the Board affirmed the administrative law judge's findings that claimant's work as a production clerk was clerical in nature, that it was performed primarily in an office setting, and that claimant's forays outside the office were merely an extension of his office work. The administrative law judge rationally distinguished

this case from *Jannuzzelli*, 25 BRBS 66, because unlike the claimant in that case who worked in longshoring operations and ensured proper manpower on the docks, claimant herein merely handled paperwork. The administrative law judge's finding that claimant falls within the clerical exclusion at Section 2(3)(A) and is not covered by the Act is affirmed. *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998).

The Board affirmed the administrative law judge's finding that claimant, who worked as a clerk in an office and primarily oversaw the computer documentation and recording of pipe hangers and joints installed by employer's employees, is excluded from coverage 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, 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 reviewing 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 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). *Accord 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 affirmed the administrative law judge's finding that claimant, who worked as a drawing clerk, is excluded from coverage pursuant to Section 2(3)(A). Substantial evidence supported the finding that claimant worked exclusively in an office setting, verified administrative data, retrieved requested documents from cabinets and drawers, checked out these documents and checked them back in. The Board rejected claimant's contention that her job duties were similar to those in *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005), because the administrative law judge permissibly concluded that her duties did not require the exercise of judgment and expertise that goes beyond typical clerical work. The Board also rejected claimant's contention that she is entitled to coverage under the Act because her job duties were integral to shipbuilding as the exclusion applies nonetheless. *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018).

Ship Repair

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).

The Board held that claimant, who was injured while repairing an amphibious military vehicle at a storage facility about a mile from the nearest water was covered. Since claimant's usual employment was ship repair, claimant satisfied status test of Section 2(3). *Stevens v. Metal Trades, Inc.*, 22 BRBS 319 (1989).

Small/Recreational Boat Builders

Following the 1972 Amendments, the Board and the courts had several opportunities to address coverage in cases involving recreational vessels. In *Napoles v. Donzi Marine, Inc.*, 5 BRBS 685 (1977) (Hartman, dissenting), *appeal dismissed sub nom. Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978), the Board held that claimant, a sander/polisher for a manufacturer of small boats and pleasure craft, was not covered under the Act because employer did not have any employees engaged in vessel construction over navigable waters or on a dry dock, building way or marine railway. The Board stated, however, that the size of the vessel was irrelevant.

In *Bosarge v. Mississippi Coast Marine, Inc.*, 8 BRBS 224 (1978) (S. Smith, concurring), *aff'd*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), the lead opinion stated that a marine carpenter who repaired recreational boats and small pleasure craft was covered under the Act, because on occasion repair work was performed on boats which were floating in navigable waters. Judge S. Smith concurred in the result because some of claimant's work was performed on commercial vessels but stated that he did not believe that repairing small pleasure craft constituted ship repair. In affirming the Board's decision, the court rejected employer's argument that claimant's work was no different than a carpenter's work on land, stating that the fact that his activities were in many respects similar to a carpenter who builds, for example, houses rather than vessels is irrelevant, as the tests under the Act involve whether claimant had a "realistically significant relationship to traditional maritime activity" or whether his activities "directly furthered the shipbuilding goals of his employer." The court concluded that "it is difficult to conceive of an activity more fundamental to maritime employment than the building and repair of navigable vessels."

In *Schwabenland v. Sanger Boats*, 13 BRBS 22 (1980) (S. Smith, concurring) (Miller, dissenting), the Board denied coverage to an employee who worked as a sales manager with duties including promotion, sales, inspection, testing and occasional maintenance of recreational boats. In the lead opinion, Judge Kalaris stated her opinion that recreational boat builders were covered by the Act, but denied coverage because the testing and inspection aspects of claimant's employment, although arguably maritime in nature, failed to meet the "substantial portion" test. *See* the section on the amount of time spent in maritime employment, *supra*. Judge S. Smith in a separate opinion agreed with the denial on this ground and reiterated his belief that Congress did not intend to cover employees who worked with small non-commercial vessels. The Ninth Circuit reversed the denial, holding that the recreational boat industry is covered by the Act. Rejecting the substantial portion test, the court also held that claimant's regular performance of inspection and maintenance activities was sufficiently related to the construction of vessels to be covered. *Schwabenland v. Sanger Boats*, 683 F. 2d 309, 16 BRBS 78(CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

In *Ziemer v. The Stone Boat Yard*, 13 BRSS 58 (1981) (Miller, concurring) (S. Smith, dissenting), the Board majority held claimant, who spent about two-thirds of his time working on pleasure craft ranging in size from 26 to 63 feet long and from 3 to 85 tons net and his remaining time repairing tugs, fishing vessels, publicly owned vessels and barges weighing 8 to 100 tons and who was injured while repairing a state-owned vessel, was covered by the Act. The Board rejected the argument that claimant's work on recreational vessels excluded him from the Act based on the holdings in *Napoles* and *Schwabenland*.

This issue was addressed by the 1984 Amendments, which added 33 U.S.C. §902(3)(F), which provides for the exclusion from coverage of "individuals employed to build, repair, or dismantle any recreational vessel under 65 feet in length" provided they are covered under a state workers' compensation law. This provision was amended in 2009, and the new provision excludes "individuals employed to build any recreational vessel under 65 feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel." See also 33 U.S.C. §903(d) (providing that, under certain circumstances no compensation is payable to employees employed at a facility whose business involves entirely small vessels as defined in that section).

In 2009, Congress amended Section 2(3)(F) such that the exclusion now applies to individuals employed to build any recreational vessel under 65 feet in length, and to individuals employed to repair *any* recreational vessel or dismantle *any* recreational vessel in connection with its repair. New regulations defining "recreational vessel" and addressing other issues concerning this exclusion have been promulgated. 20 C.F.R. §§701.302, 701.501-505. This amendment applies to injuries occurring after February 17, 2009. 20 C.F.R. §701.504 (describing date of injury for different types of injuries). Applicability of this exclusion remains contingent on the availability of state workers' compensation coverage.

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The Board held, for purposes of determining coverage under Section 2(3)(F), 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).

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).

In a case where claimant was exposed to noise at work for employer as early as 1992 and continuing through at least April 2009, the Board held that the amended version of the recreational vessel exclusion at Section 2(3)(F) does not apply and vacated the administrative law judge's finding to the contrary. Rather, the regulations to the new version specifically provide that noise-induced hearing loss occurs over a period of time, and, if any of that exposure occurred before February 17, 2009, the enactment date, then the amended version does not apply to ascertain a claimant's status. 20 C.F.R. §701.504(a)(3). As the prior version applies here due to pre-February 2009 exposure, and as there is no evidence in the record regarding the length of the vessels on which claimant worked, the Board remanded the case to the administrative law judge for further fact-finding and application of the proper version of Section 2(3)(F). The Board affirmed the finding that claimant is covered by state workers' compensation law; therefore, if the administrative law judge finds, on remand, that claimant satisfies the exclusion at Section 2(3)(F), he is not covered by the Longshore Act. *Czikowsky v. Ocean Performance, Inc.*, 47 BRBS 35 (2013).

In this case involving a case of first impression under the 2009 version of Section 2(3)(F), the Board reversed the administrative law judge's award of benefits to a ship repairman, holding that his work on yachts used on display in boat shows and to take potential customers on sea trials constituted repair of "any recreational" vessel and is not covered by the Act. In reaching this conclusion, the Board addressed the definition of "recreational vessel" in 20 C.F.R. §701.501. Initially, the Board held that both parts of the definition, 20 C.F.R. §701.501(a), (b), must be applied to ascertain whether a vessel is "recreational," rejecting the Director's interpretation that ignored paragraph (b); the Director contended the administrative law judge properly found the vessels were used for the business purpose of generating sales and therefore were not "recreational." In applying the definition, the Board held that the vessels in question were reasonably said to be operated "primarily for pleasure" of the potential customers pursuant to subsection (a). The Board then addressed whether the vessels in question were involved in "commercial service" as defined by the regulation under paragraph (b) such that they were not "recreational vessels," and held that they were not used in "commercial service" because they were not used to transport goods or people from one place to another. *See* 20 C.F.R. §701.501(b)(2)(D). As claimant repaired only recreational vessels, and as he is covered by a state workers' compensation law, he is excluded from coverage pursuant to Section 2(3)(F) of the Act. *DeJesus v. Viking Yacht Co., Inc.*, 47 BRBS 51 (2014).

Ship-Breaking

The Board has held that a burner who dismantles ships or ship parts for scrap is a covered employee. *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135 (1984); *Cendejas v. Nicolai Joffe Corp.*, 8 BRBS 230 (1978). In *Dygert v. Manufacturer's Packaging Co.*, 10 BRBS 1036 (1979), the Board held that a stevedore foreman who unloaded parts from a navy ship for the purpose of dismantling the ship was engaged in the first step of ship-breaking and therefore satisfied Section 2(3).

Harbor-Workers

Aside from employees engaged in shipbuilding, ship repair or ship-breaking, the Board has defined the general category of coverage as a harbor-worker as including employees directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). *Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (1978)

The Fourth Circuit affirmed the Board's finding of coverage in *Stewart* and a consolidated case for a painter/sandblaster and an excavation foreman engaged in building a dry dock. The court did not discuss the Board's harbor-worker definition, as it found with regard to dry dock construction that such work was held to be traditionally maritime under the former Act and it was confident that such work was not stripped of its maritime character by the 1972 Amendments. *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *aff'g* 7 BRBS 356 and 7 BRBS 608 (1978), *cert. denied*, 446 U.S. 981 (1980).

The Board found coverage as harbor-workers for employees including pile drivers working on pier and dock projects, *Maher v. Horn, Sand, Slattery Associates*, 14 BRBS 767 (1981); *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 13 BRBS 308 (9th Cir. 1981), *aff'g in pertinent part Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821 (1978), and *Hatchett v. Duncanson-Harrelson Co.*, 11 BRBS 436 (1979) (court declined to rule on whether claimants were "harbor-workers" because it found that they were engaged in "maritime employment"); a "levee hand" who was directly involved in a dredging operation, *Wood v. Universal Dredging Corp.*, 8 BRBS 95 (1978); a construction worker injured by an acetylene torch he was operating while working on a temporary docking area in a ship loading facility, *Maze v. Odom Constr. Co., Inc.*, 7 BRBS 467 (1978), *aff'd sub nom. Odom Constr. Co., Inc. v. U. S. Dept. of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); a carpenter who built forms and worked with pilings in a wharf construction project, *Crawford v. Trotti & Thompson, Inc.*, 9 BRBS 685 (1979) (Miller, concurring) (S. Smith, dissenting), *aff'd*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980) (court did not reach "harbor-worker" definition); and a dockbuilder working on a multipurpose pier, *Matson v. Perini North River Associates*, 9 BRBS 967 (1979) (Miller, concurring) (S. Smith, dissenting).

In its decision in *Odom*, 622 F.2d 110, 12 BRBS 396, the Fifth Circuit discussed coverage for a claimant who was normally a land-based worker but was injured while attempting to move four large concrete blocks on a navigable canal which were used to tie up vessels. Holding that moving the blocks was maritime work, the court stated that the repair of moorings could be covered as harbor work, but it was not necessary to address that specific category of employment as claimant was covered under the general category of maritime employment. In this regard, the court stated that maritime commerce was furthered by replacing the blocks, which could then be used to tie up

barges for loading and unloading, and the restoration of such a facility was traditionally regarded as a maritime activity rather than as one only “peripherally” related to maritime matters. The court also rejected employer’s argument that claimant was not covered because the majority of his work was non-maritime, stating that claimant was entitled to coverage as he was injured while doing maritime work that required him to go into the water and a significant part of the employer’s overall work, 20 percent, was maritime.

The Fifth Circuit followed *Odom* in *Trotti & Thompson*, 631 F.2d 1214, 12 BRBS 681, holding a claimant who worked as a carpenter for employer on both land-based and maritime projects was covered when injured while working on a pier construction project to which he had been assigned for six months. The court rejected any distinction between building a pier and repairing one and held that claimant’s work on the pier was maritime employment.

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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 cleaning up the storage yard 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 Constr. 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, was not covered by the Act. The seawall had no maritime use and its purpose was to protect the road from the water. *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989).

The Board held that claimant was covered as a harbor-worker when he was working as a form carpenter assisting in the modification of a pier used in the repair of ships at Norfolk Naval Shipyard. *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990).

The Board affirmed the administrative law judge's conclusion that a claimant working as a linesman and boat operator was not a member of a crew as he lacked a permanent connection with a vessel and did not perform a substantial portion of his work aboard a vessel or fleet. Given that claimant's linesman's duties were the same whether performed on land or on the skiffs, that his duties in 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 harbor-worker. *Griffin v. T. Smith & Son Inc.*, 25 BRBS 196 (1991).

The Board affirmed 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 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 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), 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 affirmed this finding, as claimant's work on the pipelines was necessary for transporting steam, water and fuel -- supplies essential to the operation of a vessel -- from the storage facility through the pier to the ship. The court rejected the notion that claimant is not covered because the pipelines did not convey traditional cargo; steam, water and fuel necessary for the vessels' function and movement of cargo 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).

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 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 those of a dock builder and 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).

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 after the court found that claimant was injured on a covered situs, 989 F.2d 1547, 26 BRBS 180(CRT), the Board addressed the status issue reserved in its initial decision, 24 BRBS 94. The Board held that claimant, a pile driver working on an oil production structure that the court had held was 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 Constr. Co.*, 29 BRBS 127 (1995) (decision on remand), *rev'd*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999). Reversing this decision the Ninth Circuit relied on the fact that the pier in this case does not serve a maritime purpose as it in no way accommodated ships; that the court held this structure was a covered situs as a "pier" does not confer status. The platform did not differ materially from the fixed platform in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78, and the claimant working there was not engaged in covered employment. The court also rejected the Board's reliance on the fact that claimant was exposed to a maritime environment. *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999).

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*, 525 U.S. 981 (1998).

The Board affirmed 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), 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 stated 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 affirmed 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 deferred 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).

Maritime Employment

In General

Section 2(3) does not enumerate all possible categories of maritime employment. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (5th Cir. 1980). Thus, employees who do not fit within one of the enumerated occupations may nonetheless be covered under the general category of “maritime employee.”

In an early decision, the Board found a pondman covered under the Act because he was injured on navigable waters (Coos Bay) and would have been covered prior to the 1972 Amendments. *Gilmore v. Weyerhaeuser Co.*, 1 BRBS 180 (1974). The Ninth Circuit reversed, holding that this job was not “maritime employment” because a pondman did not have a “realistically significant relationship to ‘traditional maritime activity involving navigation and commerce on navigable waters.’” The court held that in order to be covered by the Act, claimant must meet this test for status and be injured on a covered site under Section 3(a). *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961, 3 BRBS 140, 144 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976).

The Board adopted a portion of the *Weyerhaeuser* holding as its test for coverage under the general category of maritime employment. Eliminating the “traditional” requirement, the Board held that an employee’s duties must have “a realistically significant relationship to maritime activities involving navigation and commerce on navigable waters.” *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978) (Miller, dissenting), *aff’d sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981).

The Board in *Sedmak* held this definition applicable to workers injured on navigable waters as well as those injured on covered landward areas. However, this determination was overturned insofar as workers injured on actual navigable waters are concerned when the Supreme Court held that a worker who is injured on actual navigable waters in the course of his employment and who would have been covered by the Act before 1972 is engaged in maritime employment and is covered by the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The Court stated that it could not discern any legislative intent to withdraw coverage from those who would have been covered before 1972. Thus, such a worker meets both the status and situs requirements, and is covered unless excluded by another provision. Cases discussing coverage under *Perini* are addressed under Injuries on Navigable Water, *supra*.

To the extent the pre-1983 cases discussed in this section of the deskbook relied on the *Sedmak* test in addressing coverage of employees injured on water, the result has been

superseded by *Perini*. The test remains applicable in addressing coverage of “maritime employees” injured on covered land-based sites.

Within the category of maritime employment, the Board found status for a claimant being trained as a diver for underwater inspections, *Sharp v. Pacific Gas & Electric Co.*, 2 BRBS 381 (1975), and a foreman driving pilings to enlarge slips for recreational boats, *Ries v. Harry Kane, Inc.*, 13 BRBS 617 (1981) (Miller, concurring) (Smith, dissenting).

Some claimants, however, had jobs too remotely related to maritime activities and were denied coverage. In *Neely v. Pittston Stevedoring Corp.*, 12 BRBS 859 (1980) (Miller, dissenting), the Board held that an insurance claims examiner was not a maritime employee because he had no significant effect on navigation or commerce. Rather, he merely performed a support service incidental to the operation of many businesses. See Support Services, *infra*. In *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981), the Board initially held that a claimant who worked, *inter alia*, as the shipyard manager of the medical safety and security department was not covered during this employment as he was providing a support service incidental to any business. However, based on intervening decisions, the Board vacated this holding in an Order, stating that claimant performed an integral role in assuring the safety of workers and the security of employer’s yard and that duties directly involving shipbuilding safety are essential to ongoing shipbuilding operations. *Verderane v. Jacksonville Shipyards, Inc.*, BRB No.76-244 (Oct. 16, 1984) (Order), *aff’d on other grounds*, 772 F. 2d 775, 17 BRBS 154(CRT) (11th Cir. 1985). *Accord Gilley v. Marathon LeTourneau Co.*, 15 BRBS 411 (1983) (safety manager held covered as claimant’s duties played an integral role in employee safety and thus the progress of the drilling barge construction project).

The Fifth Circuit held that a claimant employed as a security guard and, subsequently, as a driver/courier, who guarded detainees aboard ship, took payrolls aboard ship, and transported cargo between vessels and shore was covered under the Act. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982), *rev’g* 12 BHBS 793 (1980). The court rejected the Board’s reliance on the fact that she provided a “support service” similar to that of any business entity, and held that her overall employment was maritime in nature. Similarly, in *Holcomb v. Robert W. Kirk and Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983), the Fifth Circuit found claimant, a night watchman, was covered under the Act where he guarded sophisticated equipment on a vessel. The court stated that it was not holding every watchman of a vessel in navigable waters is covered, but on the facts presented, claimant was integral to and directly involved in employer’s ship repair operation. The Second Circuit, in *Arbeeney v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *rev’g* 12 BRBS 435 and 12 BRBS 473 (1980), *cert. denied*, 454 U.S. 836 (1981), held that security guards whose duties included guarding unloaded cargo on piers and occasionally on board ships had status under the Act because their activities were integral to the loading and unloading of cargo and served the maritime purpose of assuring "the

safe transit of goods shipped by sea." *Id.*, 642 F.2d at 675, 13 BRBS at 181. See cases discussed, *infra*, regarding coverage of security guards in general and under the 1984 Amendments exclusion.

Digests

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), adding specific exclusions of coverage which are not applicable in this case, "instructive," since he did not rely on them to deny coverage. *Wilson v. General Engineering & 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. *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988).

The Board held 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 duties satisfy the status test since they were significantly related to and directly furthered employer's ongoing shipbuilding and repair operations. The Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel; additionally, Section 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, 618 n.5, 23 BRBS 101, 107 n.5(CRT) (11th Cir. 1990) (suggesting the *Sanders* test, which looks to whether an employee's responsibilities have a "significant relationship" to the maritime concerns of his employer, is questionable in light of the *Schwalb* test requiring that an employee's work be "an integral or essential part" of maritime activities).

The Board affirmed the administrative law judge's finding that a general manager of a shipyard is covered under the Act as this job is necessary to employer's shipbuilding and repair business, consistent with the holding in *Sanders*. The Board rejected employer's contention that claimant's coverage should turn 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 reversed the administrative law judge and held that claimant's job as a courtesy-van driver at employer's facility satisfied the status test, as this work directly related to furthering the concerns of a covered employer. Claimant transported 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 reversed the Board's decision. After a comprehensive review of recent Supreme Court and circuit court cases, the court held 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).

The Eleventh Circuit affirmed the district court's determination that claimant, a land-based electrician who had contracted to do work at a marine lab on an island off the Georgia coast and was injured while traveling there 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) (note that the decision did not address *Perini*).

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 loading and unloading 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). Affirming the Board, the Ninth Circuit held 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. The court referred to the Supreme Court's "essential elements of loading and unloading" test as more restrictive than the *Weyerhaeuser* "significant relationship" test and noted that the Eleventh Circuit's decision in *Sanders* applied a standard similar to *Weyerhaeuser*. Claimant's duties herein were not essential because after the restaurant closed employer's longshoring operation continued. *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 818 (1990).

Citing *Coloma*, 897 F.2d 394 23 BRBS 136(CRT), and *Rock*, 953 F.2d 67, 25 BRBS 121(CRT), the Board affirmed the administrative law judge's finding that decedent is not covered under Section 2(3) as his duties, which involved cleaning and restocking restrooms and portable toilets throughout the NASSCO shipyard, including performing these services in bathroom facilities located aboard ships approximately two to three times a day, were not integral to the shipbuilding process. The Board distinguished *Spear*, 25 BRBS 132, and *Holcomb*, 655 F.2d 589, 13 BRBS 839, 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 on the basis that claimant did not satisfy the status requirement where it was undisputed that she 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. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008).

The Second Circuit affirmed the finding that claimant, a union shop steward, 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). 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) (2^d Cir. 2001), *aff'g* 34 BRBS 112 (2000).

The Board affirmed 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), 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), and *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT), 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), and *Rock*, 953 F.2d 56, 25 BRBS 112(CRT), where the employees' work was helpful, but not indispensable, to the loading process. The Board also cited *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 the 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 improving the ports' roadways and was not an indispensable aid to the loading process. Moreover, the claimant did not establish a sufficient nexus between the road project, which was designed to improve the movement of traffic 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 decision granting employer's motion for summary decision on the basis that claimant, a shipyard occupational health nurse, did not satisfy the status requirement. The Board affirmed the administrative law judge's finding that claimant's work was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), *Ellis*, 42 BRBS 35, *Buck*, 37 BRBS 53, and *Gonzalez*, 33 BRBS 146, as claimant presented no evidence that could support a finding that failure to perform her duties as a nurse would disrupt employer's shipbuilding operations. *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010).

Claimant worked as a beach-walker in an oil-spill clean-up project. The Board rejected claimant's arguments that his picking up oil debris from the beach and water's edge, loading and unloading his supplies and tools to and from the transport vessel, driving the "Gator" to shuttle workers around the island, and occasional loading of waste on to the debris vessel conferred coverage. The Board affirmed the administrative law judge's findings that these activities were either not part of claimant's regular duties and/or were not maritime in nature. Accordingly, the Board concluded that claimant did not establish an essential element of his claim for benefits, and it affirmed the administrative law judge's order granting employer's motion for summary decision and denying the claim. *Smith v. Labor Finders*, 46 BRBS 35 (2012).

The administrative law judge found that no evidence was presented to support a finding that claimant's failure to respond in his capacity as a security guard/EMT to work accidents and injuries would disrupt employer's shipbuilding process; thus, like the claimants in *Gelinas*, 44 BRBS 85, *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the administrative law judge concluded that claimant is not a maritime employee pursuant to Section 2(3). Moreover, claimant did not engage in security work on navigable waters, piers, or vessels, nor did not work as a cargo watchman. The Board affirmed the administrative law judge's decision, as he properly applied the law to claimant's employment duties and rationally determined that those duties were not integral to employer's shipbuilding process. *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013).

Bridge Builders

Bridge construction and demolition workers employed on navigable water were covered prior to the 1972 Amendments. *Davis v. Dept. of Labor*, 317 U.S. 249 (1942); *Hardaway Contracting Co. v. O’Keeffe*, 414 F.2d 657 (5th Cir. 1968); *Dixon v. Oosting*, 238 F.Supp 25 (D.C. Va. 1965); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff’d*, 463 F.2d 252 (3d Cir. 1972). In *Davis*, the employee drowned while working from a barge on a bridge dismantling project. The decedent in *Hardaway Contractors* was similarly working from a vessel when he drowned while employed as a laborer in a bridge construction project. *Dixon* involved an employee working on the Chesapeake Bay Bridge Tunnel; the district court held his injury on a cap piling one and a half miles off shore occurred on navigable waters. In *Peter*, decedent was operating a crane from a causeway in a bridge demolition project; he was killed when the crane toppled into the water. The district court initially rejected the argument that decedent’s injury did not occur on navigable water as the causeway was land on the basis that the causeway was a temporary structure. The court further rejected the argument that bridge construction is not “maritime employment,” and thus coverage fell within state laws, citing the above cases holding injuries to such workers compensable and stating that the project was required to protect the navigability of the river. Thus, decedent’s work had a direct relationship to navigation on the river and served a maritime purpose. On appeal, the Third Circuit adopted this opinion.

Prior to *Perini*, the Board reviewed these cases in accordance with its determination that the injury on navigable waters was insufficient alone to confer coverage, holding that employees engaged in bridge construction are not maritime employees because a bridge aids highway, not maritime, commerce. *Gilliam v. Wiley N. Jackson Co.*, 12 BRBS 556 (1980); *Nold v. Guy F. Atkinson, Co.*, 9 BRBS 620 (1979) (Miller, dissenting) (piledriver injured on navigable water), *dismissed*, 784 F.2d 339 (9th Cir. 1986). The Fifth Circuit reversed the Board’s decision in *Gilliam* on the basis that claimant was unloading cargo (pilings) from a barge at the time of injury and was thus covered on that basis. *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983).

In *LeMelle v. B. F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *rev’g* 13 BRBS 542 (1981), *cert. denied*, 459 U.S. 1177 (1983), the Fourth Circuit held that a construction worker injured while working on the James River Bridge project, which included the construction of a new bridge and the demolition of an old one was engaged in maritime employment. Claimant’s injury occurred on a fixed section of the bridge approximately one mile from shore and eight to ten feet above the water as he was pouring concrete inside a form on a piling. During his work, he had been required to wear a life jacket and was continually over the water. The court specifically disagreed with the Board’s statement that

the James River Bridge, like all bridges, is a means of land transportation, not maritime commerce. As claimant points out, the bridge was being constructed in a manner to minimize its actual obstruction of maritime traffic. Nevertheless, the very presence of a bridge obstructs navigation, serves no maritime purpose and in no way benefits navigation and commerce. *LeMelle*, 13 BRBS at 544.

Id., 674 F.2d at 298, 14 BRBS at 612. After discussing evidence that the project was designed in part to aid navigation, the court cited the pre-1972 decisions holding that bridge construction and demolition workers employed over navigable waters were covered and concluded that

claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment, and is therefore an employee within the meaning of the Act. Although bridge demolition and construction is not classically maritime work under the “ancient traditions of the sea,” it has long been merged with such work by the exigencies of modern coastal land and sea traffic. Essential to improving navigation and possessing many of the same hazards and working conditions as more traditional work on navigable waters, such employment carries with it the fundamental elements of what historically has been regarded as maritime employment.

Id., 674 F.2d at 298, 14 BRBS at 613.

In the wake of *Perini*, the Board’s decisions generally turn on whether an injury during bridge work occurred on navigable waters. *See Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000). The Board has adhered to its view that a bridge is an instrument of land transportation and, as such, land-based workers engaged in construction and repair are not “maritime employees.”

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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, 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 *LeMelle*, 674 F.2d 296, 14 BRBS 609, 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;" rather, they hold that employees who are vital to the loading and unloading process are covered employees. Additionally, the Board cited decisions of the courts of appeals holding that loading and unloading construction materials is a traditional longshoring activity. *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996).

The Board affirmed the administrative law judge's finding that claimant, a journeyman ironworker performing bridge construction who was injured when he tripped on the bridge structure and fell to the ground below, was not covered, distinguishing *LeMelle* on the basis that there is no evidence the bridge here would aid navigation. The Board relied on precedent that bridges are extensions of land as they are permanently affixed to land, see *Nacirema*, 396 U.S. 212, and held claimant was thus not covered under *Perini* as he fell from the bridge to the land. Thus, cases where bridge builders were covered because they worked on vessels upon actual navigable waters were inapplicable. Further, the Board rejected claimant's contention that he was engaged in maritime employment, as the case was controlled by the Second Circuit's holding in *Fusco*, 622 F.2d 1111, 12 BRBS 328, 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 that in cases arising in other circuits, workers unloading construction materials from vessels has been held covered. Lastly, the Board rejected claimant's arguments that *Nacirema* had been overruled and that the bridge should be analogized to a pier and covered on that basis. *Crapanzano v. Rice Mohawk, U. S. Constr. Co., Ltd.*, 30 BRBS 81, 83 (1996).

The Board reversed the administrative law judge's finding that decedent, a bridge construction worker who was walking on an unfinished part of the bridge structure when he fell, striking the concrete foundation and landing in the water, was injured upon navigable waters and thus covered under *Perini*. In a prior decision, the Eleventh Circuit had held that decedent was not a maritime employee and was not injured on a landward site under the 1972 Amendments and remanded the case for findings as to whether claimant was injured on navigable waters and thus covered under *Perini*. *Martin Paving Co. v. Kehl*, 152 F.3d 933 (11th Cir. 1998) (table). In finding claimant was not covered,

the Board relied on precedent that bridges are extensions of land as they are permanently affixed to land. See *Nacirema*, 396 U.S. 212. The Board distinguished those cases where bridge builders were covered because they worked on vessels on navigable waters and *LeMelle*, 674 F.2d 296, 14 BRBS 609, which did not address this situs issue, and held that the evidence did not establish an injury on navigable waters. As the only basis for coverage in this case given the Eleventh Circuit's prior ruling was thus not met, the Board held that decedent's death is not compensable under the Act. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000).

The Board affirmed 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), and the Board's holdings in *Pulkoski*, 28 BRBS 298, and *Crapanzano*, 30 BRBS 81, 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 results in the applicability of the Act here. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on navigable waters. Claimant was injured on a bridge over the Potomac River permanently affixed to land. Thus, his injury would not have been covered prior to the 1972 Amendments, pursuant to *Nacirema*, 396 U.S. 212, and is not covered post-1972 pursuant to *Perini*. The administrative law judge's reliance on *Kehl*, 34 BRBS 121, for this proposition was proper. The Board also held that *LeMelle*, 674 F.2d 296, 14 BRBS 609, was distinguishable in this Fourth Circuit case. *LeMelle* addressed the status element as situs was agreed to, and the claimant was injured on a bridge piling in the middle of a river. As claimant was not injured on a covered situs, the Board affirmed the denial of the claim. *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009).

Claimant was injured during his employment as a bridge vacuumer. The vacuum was connected by hose to a recycler machine on a spudded barge beneath the bridge. The Board rejected claimant's assertion that his work constituted "loading" the barge, citing *Mungia*, 999 F.3d .808, 27 BRBS 103(CRT). Well-established law establishes that work on a bridge is not inherently maritime, and the vacuumed debris did not "enable" the barge to "engage in maritime commerce." As claimant was not engaged in "maritime employment," the administrative law judge properly denied benefits. *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

Support Services

In General

In *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977), the Third Circuit held that an unskilled laborer whose duties included general maintenance at a shipyard was not a covered employee. Citing the “integral part” test of *Caputo*, the court said such work was merely a necessary “incident” of any operation and was not a necessary “ingredient” of the shipbuilding process. Claimant’s duties had no traditional maritime characteristics but, rather, were typical of support services performed in any production entity, maritime or not. *Id.*, 567 F.2d at 595. 7 BRBS at 200-201. The court analogized claimant’s duties to those of a clerical worker who was excluded from coverage in *Maier Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977).

The Board thereafter adopted the “support service” rationale, excluding employees on the basis that they were engaged in support services performed in any business operation. In *White v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 493 (1978) (Miller, dissenting), *rev’d*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), claimant unloaded and color coded pipe in the shipyard. The Board held that claimant’s receipt and storage of raw materials and supplies are support services which must be performed in any manufacturing business. The Board therefore concluded that claimant was not engaged in shipbuilding. In *Graziano v. General Dynamics Corp.*, 13 BRBS 16 (1980) (Miller, dissenting), *rev’d*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), the Board held that a general maintenance employee is not covered under the Act as these duties are typical of support services performed in any production entity, maritime or not. *Accord Neely v. Pittston Stevedoring Corp.*, 12 BRBS 859 (1980); *Castro v. Hugo Neu-Proler Co.*, 10 BRBS 35 (1979) (Miller, dissenting).

The Board distinguished *White* in *Le Batard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979) (Smith, dissenting). In *Le Batard*, claimant, a senior pipe clerk, received requisitions for pipe, located the pipe in the storage yard, and loaded or oversaw the loading of the pipe onto trucks for transportation to the vessel under construction. The Board stated that whereas in *White*, the claimant was a warehouseman not essential to the shipbuilding process, the claimant in *Le Batard* was clearly and directly involved in an ongoing shipbuilding operation. *Le Batard*, 10 BRBS at 321.

The Board’s holdings in *White* and *Graziano* were reversed by the Fourth and First Circuits. *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). In *White*, the court stated that claimant’s regular duties affixing the color code and etching the individual pieces of pipe for identification purposes were the first steps taken physically to alter the pipe for its use in ship construction, and this work was an “integral part” and necessary “ingredient” of shipbuilding, as well as being

“directly involved.” Claimant was thus covered as a shipbuilder. In *Graziano*, the court held that maintenance and repair of structures housing shipyard machinery and in which shipbuilding operations are performed is “no less essential to shipbuilding than is the repair of the machinery itself.”

Following these decisions, as well as appellate decisions in cases involving security guards which reached similar results, *infra*, in *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983), the Board disavowed the support services test as a basis for denying coverage. Instead, in *Jackson*, the Board reviewed claimant’s duties as a maintenance worker, which included inventorying containers, maintaining terminal buildings and performing minor repairs and monthly service on the linkspan, as well as routine maintenance such as replacing light bulbs and toilet paper in the lavatories, and concluded he was covered as some of his work was maritime. *See Gilley v. Marathon LeTourneau Co.*, 15 BRBS 411 (1983) (rejecting “support services” argument, safety manager held covered as claimant’s duties played an integral role in employee safety and thus the progress of the vessel construction project).

More recent decisions have reiterated that it is irrelevant to coverage under the Act that the work the claimant performed was the same as that performed in non-covered industries. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 48, 23 BRBS 96, 99(CRT) (1989) (“it makes no difference that the particular kind of repair [claimant] was doing was traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded”); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001), *aff’g* 34 BRBS 112 (2000) (rejecting argument that claimant’s work as a shop steward was not particular to the stevedoring industry, the court stated that it is irrelevant that the particular kind of shop steward work he performed could have been performed by a shop steward at a tire plant in Kansas); *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988) (whether particular job skills are uniquely maritime is not dispositive); *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981) (rejecting employer’s argument that claimant’s work was no different than a carpenter’s work on land, the court stated that the fact that his work was similar to a carpenter who builds, for example, houses rather than vessels is irrelevant, as such work was necessary to shipbuilding and repair); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1220 (5th Cir.1980) (the purpose of the work controls and not solely the particular skills used).

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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).

Relying primarily on *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), 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. 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 *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), 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, 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) 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 (2002).

Following remand, the Board reversed 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 only rational inference, *i.e.*, 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), and *Watkins*, 35 BRBS 21, 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 decision to grant employer's motion for summary decision on the basis that claimant did not satisfy the status requirement, as 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. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008).

The Board affirmed the administrative law judge's decision granting employer's motion for summary decision on the basis that claimant, a shipyard occupational health nurse, did not satisfy the status requirement. The Board affirmed the administrative law judge's finding that claimant's work was not integral to shipbuilding, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), *Ellis*, 42 BRBS 35, *Buck*, 37 BRBS 53, and *Gonzalez*, 33 BRBS 146, as claimant presented no evidence that could support a finding that failure to perform her duties as a nurse would disrupt employer's shipbuilding operations. *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010).

The administrative law judge found that no evidence was presented to support a finding that claimant's failure to respond in his capacity as a security guard/EMT to work accidents and injuries would disrupt employer's shipbuilding process; thus, like the claimants in *Gelinas*, 44 BRBS 85, *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the administrative law judge concluded that claimant is not a maritime employee pursuant to Section 2(3). Moreover, claimant did not engage in security work on navigable waters, piers, or vessels, nor did not work as a cargo watchman. The Board affirmed the administrative law judge's decision, as he properly applied the law to claimant's employment duties and rationally determined that those duties were not integral to employer's shipbuilding process. *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013).

Security Guards

The Board initially held security guards working in maritime areas were not covered as they lacked a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. *See, e.g., Holcomb v. Robert W. Kirk & Associates, Inc.*, 11 BRBS 835 (1980) (Miller, dissenting); *Arbeeny v. McRoberts Protective Agency*, 12 BRBS 435 (1980) (Miller, dissenting); *Conlon v. McRoberts Protective Agency*, 12 BRBS 473 (1980) (Miller, dissenting). In each of these cases, the Board relied on the rationale that security guards provide support services incidental to any business operation.

The Board's decisions were reversed by the Second and Fifth Circuits. In *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983), the Fifth Circuit held claimant, a night watchman, was covered under the Act where he guarded sophisticated equipment on a vessel. The court stated that it was not holding every watchman of a vessel in navigable waters is covered, but on the facts presented, claimant was integral to and directly involved in employer's ship repair operation.

The Second Circuit, in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *rev'g* 12 BRBS 435 and 12 BRBS 473 (1980), *cert. denied*, 454 U.S. 836 (1981), reversed the Board and held that security guards whose duties included guarding unloaded cargo on piers and occasionally on board ships had status under the Act because their activities were integral to the loading and unloading process and served the maritime purpose of assuring "the safe transit of goods shipped by sea." *Id.*, 642 F.2d at 675, 13 BRBS at 181.

Similarly, the Fifth Circuit thereafter granted coverage to a claimant employed as a security guard and, subsequently, as a driver/courier who guarded detainees aboard ship, took payrolls aboard ship, and transported cargo between vessels and shore. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982), *rev'g* 12 BHBS 793 (1980). The court held that claimant's duties were all activities essential for ocean-going vessels engaged in foreign trade and were thus essential to the maritime industry.

Following the Second Circuit's decision in *Arbeeny*, the Board reviewed security guard issues on a case-by-case basis but refused to find coverage in *Vaughn v. Lansdell Protective Agency*, 13 BKBS 677 (1981) (Miller, dissenting), and *Kelly v. Marine Terminals Corp.*, 13 BRBS 609 (1981) (Miller, dissenting), because the Board stated that claimants' duties were not integral to longshoring operations. In *Vaughn* the Board stated that waterfront guards are simply not covered by the Act. The Board emphasized that security guards perform a support service necessary to all businesses and, as such, they lack the maritime characteristics required to be covered. The *Kelly* decision was reversed

by the Ninth Circuit which cited and followed the Second Circuit's decision in *Arbeeny. Kelly v. Director, OWCP*, 678 F. 2d 830, 15 BRBS 151(CRT) (9th Cir. 1982).

Thereafter, the Board found coverage for security guards, in accordance with circuit court law. See *Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984); *Conroy v. McRoberts Protective Agency*, 15 BRBS 198 (1982) (Kalaris, concurring); *GrosLouis v. American Patrol Service*, 15 BRBS 184 (1982).

The Board also vacated its own decision in *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15 (1981), which had held that a claimant who worked, *inter alia*, as the shipyard manager of the medical safety and security department was not covered during this employment as he was providing a support service incidental to any business. *Verderane v. Jacksonville Shipyards, Inc.*, BRB No. 76-244 (Oct. 16, 1984) (Order), *aff'd on other grounds*, 772 F. 2d 775, 17 BRBS 154(CRT) (11th Cir. 1985). The Order stated that claimant did perform an integral role in assuring the safety of workers and the security of employer's yard and that duties that directly involve shipbuilding safety are essential to ongoing shipbuilding operations. *Accord Gilley v. Marathon LeTourneau Co.*, 15 BRBS 411 (1983) (safety manager held covered as claimant's duties played an integral role in employee safety and thus the progress of the project).

The 1984 Amendments exclude persons "employed exclusively to perform office clerical, secretarial, security or data processing work" from coverage, provided they are covered by a state workers' compensation act. See Exclusions from Coverage, *infra*.

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The Board affirmed the administrative law judge's finding that claimant, a guard and watchman, was covered under the Act, and was 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, work 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 held 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 held 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).

The Board affirmed the administrative law judge’s finding that claimant is not excluded from the Act’s coverage pursuant to Section 2(3)(A) because he was not exclusively performing “office” security work. In this case, claimant was not confined, physically or by function, to an office or other administrative area on land, which is necessary for the exclusion to apply. Rather, his security duties, in furtherance of regulations issued by the Dept. of Homeland Security, were performed on vessels on navigable waters. As claimant was injured on actual navigable waters in the course and scope of his employment on those waters, he is covered under the Act pursuant to *Perini*, 459 U.S. 297. *K.L. [Labit] v. Blue Marine Security, LLC*, 43 BRBS 45 (2009).

In a case where the administrative law judge neither cited case precedent relevant to security guards nor discussed the evidence concerning claimant’s job duties as a security guard with an EMT certification, the Board vacated the administrative law judge’s summary decision that claimant was not engaged in “maritime employment.” On remand, the administrative law judge, without reliance on the discredited “support services” rationale, must discuss the evidence to determine whether claimant’s work is integral to the shipbuilding process. The Board affirmed as unchallenged on appeal the finding that the security guard exclusion of Section 2(3)(A) does not apply because claimant was exclusively a security guard and was not confined to an office. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).

The administrative law judge found that no evidence was presented to support a finding that claimant’s failure to respond in his capacity as a security guard/EMT to work accidents and injuries would disrupt employer’s shipbuilding process; thus, like the claimants in *Gelinas*, 44 BRBS 85, *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the administrative law judge concluded that claimant is not a maritime employee pursuant to Section 2(3). Moreover, claimant did not engage in security work on navigable waters, piers, or vessels, nor did not work as a cargo watchman. The Board affirmed the administrative law judge’s decision, as he properly applied the law to claimant’s employment duties and rationally determined that those duties were not integral to employer’s shipbuilding process. *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013).

Offshore Drilling

Offshore oil workers injured on platforms outside the three-mile limit are covered by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (OCSLA). The question of coverage under the Longshore Act concerns the coverage of workers on fixed platforms inside this area, *i.e.*, in state waters.

In addressing the status of offshore oil workers, the Fifth Circuit held in early cases that such work was maritime employment. In *Pippen v. Shell Oil Co.* 661 F.2d 378, 14 BRBS 66 (5th Cir. 1981), the court upheld a dismissal of a tort claim for damages, holding that a wireline operator injured at work on a movable drilling barge was engaged in maritime employment. The court found that at the time of his injury claimant's duties bore a significant relationship to offshore drilling, which the court held to be maritime commerce. Thus, the court ruled that claimant's recovery was under the Longshore Act and not the Jones Act. In *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 14 BRBS 1013 (5th Cir. 1982) (*en banc*), *cert. denied*, 459 U.S. 1170 (1983), the court held that claimant performing work related to petroleum extraction aboard a drilling vessel was engaged in maritime employment because he was injured on navigable waters in the course of his employment. The court rejected application of the Ninth Circuit's test for maritime employment, *Weyerhaeuser*, 528 F.2d 957, 3 BRBS 140, for employees injured on navigable waters, but held that even if a worker was required to establish a significant relationship to traditional maritime activity, this requirement was satisfied because persons in the marine petroleum business who work on drilling vessels in navigable waters are engaged in employment significantly related to maritime navigation and commerce.

While *Pippen* and *Boudreaux* involved workers injured on drilling vessels and thus on navigable waters, in *Herb's Welding v. Gray*, 703 F.2d 176, 15 BRBS 126(CRT) (5th Cir. 1983), *aff'g on other grounds* 12 BRBS 752 (1980) (S.Smith, dissenting) (holding claimant covered under OCSLA), the Fifth Circuit addressed the coverage of a claimant injured while welding a gas flow line on a fixed platform in Louisiana waters. The court initially addressed the decision of the Supreme Court in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which held that an offshore drilling platform which is permanently affixed to the ocean floor is akin to an island, albeit an artificial one, and thus an injury upon it is not upon the navigable waters of the United States. Stating that the *Rodrigue* opinion likened such structures to wharves located above navigable waters, the Fifth Circuit concluded that in view of the subsequent 1972 Amendment to the Act extending jurisdiction to wharves, 33 U.S.C. §903(a), the Act covers maritime employment performed on fixed platforms as they are similar structures. The court further held that claimant's work performing maintenance and welding on offshore platforms was an integral part of the offshore drilling process, which the court had previously held was maritime commerce in *Pippen*. Thus, the court concluded claimant was covered by the Longshore Act, and it did not address coverage under OCSLA.

In *Thornton v. Brown & Root, Inc.*, 707 F.2d 149, 15 BRBS 163(CRT) (5th Cir. 1983), *rev'g* 12 BRBS 883 (1980) and 13 BRBS 37 (1980), *cert. denied*, 464 U.S. 1052 (1984), the Fifth Circuit found status for two land-based workers on the basis that their jobs directly facilitated the offshore drilling process. Claimant Thornton worked constructing offshore stationary platforms, and Broussard worked in the construction of housing modules and heliports for offshore stationary platforms. Citing *Pippen* and *Boudreaux*, the court found both employees engaged in maritime employment.

Early Board cases had held that oil platform workers lacked any significant maritime connection beyond the fact that the platform was in navigable waters. *Toups v. Chevron Oil Co.*, 7 BRBS 261 (1977); *Anderson v. McBroom Rig Bldg. Serv., Inc.*, 5 BRBS 713 (1977). However, the Board followed the Fifth Circuit's decisions, finding status for a compressor mechanic at a barge station used in offshore drilling, *Wall v. Huey Wall, Inc.*, 16 BRBS 340 (1984), and a safety inspector on an moveable oil drilling platform construction project, *Gilley v. Marathon LeTourneau Co.*, 15 BRBS 411 (1983).

The Supreme Court, however, reversed the Fifth Circuit's decision in *Herb's Welding*, 703 F.2d 176, 15 BRBS 126(CRT). *Herb's Welding v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). The Supreme Court held that claimant, a welder, was not a maritime employee because there is nothing inherently maritime about building and maintaining pipelines and platforms. Those tasks also are performed on land and their nature is not significantly altered by the maritime environment. The Court also stated that while maritime employment is not limited to the occupations specifically listed in Section 2(3), neither can the Act be read to eliminate any requirement of a connection with the loading or construction of ships. While claimant would have been covered if injured on a floating platform, which is regarded as a vessel, *id.* at n.2, on the Outer Continental Shelf under that extension to the Act, or perhaps while traveling between platforms in a boat on actual navigable waters, *id.* at n.13, he is not entitled to coverage for work on a fixed platform in state waters. The Court left it to Congress to fill this "hole" in Longshore Act coverage.

The Board followed *Herb's Welding* in two cases within the next year. In *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986), the Board remanded the case to the administrative law judge to consider the coverage issue. Claimant was injured on a fixed offshore drilling platform, which if located in state territorial waters, would be outside the coverage of the Act, and if located further offshore, could fall within OCSLA. In *Alexander v. Hudson Engineering Co.*, 18 BRBS 78 (1986), the Board affirmed an administrative law judge's conclusion that an electrician employed in the fabrication and outfitting of fixed offshore oil production facilities was not engaged in "inherently maritime" activities. The Board also stated that any work claimant may have performed in assisting the loading of electrical equipment was clearly incidental to his participation in fixed platform construction and not integral to the loading and unloading process.

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The Board held 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).

A claimant who worked in a yard adjoining navigable waters which was used for the fabrication and repair of component parts used on fixed oil platforms as well as drilling barges and vessels used in laying pipe, and where the parts were loaded and unloaded onto vessels, was held covered by the Act. The Board held that as claimant 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, he 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). Affirming this decision, the Fifth Circuit held that claimant satisfied the status requirement where, although he was engaged in non-maritime 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).

The Fifth Circuit held that claimant, an oilfield worker, was 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).

Where claimant’s work on a fixed platform in state waters included loading crude oil from the 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), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Fifth Circuit affirmed the Board's decision that claimant was covered under the Act as he who spent 9.7 percent of his work time engaged in maritime activities involving loading oil onto transport barges and servicing equipment necessary to load the oil. Citing its decision in *Boudloche*, 632 F.2d 1346, 12 BRBS 732, in which status was upheld for an employee who spent only 2.5 to 5 percent of his employment engaged in maritime activities which were part of his regularly assigned duties, the court held that claimant in this case clearly engaged in maritime activities for more than any minimum amount of time required to confer status. That the majority of claimant's time was spent in activities relating solely to uncovered oil and gas production does not detract from claimant's routine, non-episodic maritime activities. *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Claimant worked for employer as an offshore warehouseman at its Black Bay Central Facility, a fixed platform in Louisiana state waters. Claimant's duties included shipping, receiving, warehousing, and dispatching tools and supplies to different operators for use on various satellite platforms, and loading and unloading vessels at various times throughout the day. The Board affirmed the administrative law judge's finding that claimant was engaged in maritime employment and thus, entitled to coverage under Section 2(3) based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury, i.e., unloading a CO₂ bottle from a cargo basket when it forcefully discharged. The Board stated, as the administrative law judge found, that the facts in this case are different than those in *Munguia*, i.e., claimant did not merely load his personal gear onto small transport vessels, but instead used a crane to load and unload third-party supply vessels with, among other items, pipes, valves, compressors, and repair parts. *Malta v. Wood Group Prod. Services*, 52 BRBS 31 (2018), *aff'd sub nom. Wood Group Prod. Services*, ___ F.3d ___, No. 18-60542, 2019 WL 3281417 (5th Cir. July 22, 2019).

The Fifth Circuit affirmed the finding that claimant was engaged in maritime employment based on his overall job and his job at the time of injury. Claimant spent 25 to 35 percent of his hitches loading and unloading vessels and was injured during the unloading process. The court rejected the contention that coverage was defeated because the loading and unloading process was for the purpose of oil and gas exploration and production. The court held there is no "maritime cargo" requirement in Section 2(3). The cases employer cited, *Smith*, 46 BRBS 35, *Hough*, 45 BRBS 9, and *Bazemore*, 20 BRBS 23, are distinguishable as none of those claimants engaged in loading and unloading vessels. *Wood Group Prod. Services v. Director, OWCP*, ___ F.3d ___, No. 18-60542, 2019 WL 3281417 (5th Cir. July 22, 2019).

Exclusions from Coverage

The Act as amended in 1972 contained express exclusions from coverage in Sections 2(3) and 3(a) for the master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. The 1984 Amendments incorporated these exclusions into an expanded list in Section 2(3) and deleted the exclusions from Section 3(a). Amended Section 3(b) contains an exclusion formerly in Section 3(a) for officers and employees "of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." 33 U.S.C. §903(b). New Section 3(d), 33 U.S.C. §903(d), precludes recovery for certain builders, repairers or dismantlers of small vessels as defined in that section unless the injury occurs "upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting or dry docking vessels," or unless the employee is employed at a facility receiving Federal maritime subsidies or is not covered under a state workers' compensation act. These provisions are addressed in Section 3.

Section 2(3), as amended in 1984, provides that the term "maritime employee" does not include:

- (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
- (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
- (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
- (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this Act;
- (E) aquaculture workers;
- (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
- (G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(A-H).

The applicable regulation, 20 C.F.R. §701.301(a)(12), further describes excluded individuals as follows:

(ii) The term does not include:

(A) A master or member of a crew of any vessel;

(B) Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

(iii) Nor does this term include the following individuals (whether or not the injury occurs over the navigable waters of the United States) where it is first determined that they are covered by a state workers' compensation act:

(A) Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);

(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;

(C) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;

(D) Employees of suppliers, vendors and transporters temporarily doing business on the premises of a covered employer, provided they are not performing work normally performed by employees of the covered employer;

(E) Aquaculture workers, meaning those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species;

(F) Individuals engaged in the building, repairing or dismantling of recreational vessels under 65 feet in length. For purposes of this subparagraph "recreational vessel" means a vessel manufactured or operated primarily for pleasure, or rented, leased or chartered by another for the latter's pleasure, and "length" means a straight line measurement of the overall length from the foremost part of the vessel to the aftmost part of the vessel, measured parallel to the center line. The measurement shall be from end to end over the deck, excluding sheer.

The legislative history to the 1984 Amendments states that these amendments are to be "narrowly construed. Except as specifically detailed in those amendments, it is the intention of the Committee neither to expand nor to contract the current coverage of the Longshore Act." H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2738.

In 2009, Congress amended Section 902(3)(F). The new provision excludes "individuals employed to build any recreational vessel under 65 feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel."

The Board and the Fifth Circuit have rejected an employer's argument that a claimant's status as an illegal alien precluded him from receiving benefits under the Act, holding that the Act does not differentiate between the disability compensation paid to illegal aliens and that paid to legal residents and/or citizens of the United States. 33 U.S.C. §§902(3), 909(g). Specifically, the Board observed that absent a statutory exclusion, which Congress provided for specified types of employees, claimant must be treated as other injured workers for purposes of the Act. *J.R. [Rodriguez] v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008), *aff'd sub nom. Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010). In affirming the Board's decision, the Fifth Circuit rejected employer's contention that the claimant suffered no loss in *legal* wage-earning capacity as he was an illegal undocumented worker and did not have a legal wage-earning capacity prior to his injury. The Act applies to "*any person* engaged in maritime employment" and specifically states that "aliens not residents" are entitled to the same compensation as residents. 33 U.S.C. §§902(3), 909(g). The court's decision in *Hernandez*, 848 F.2d 498 (Section 5(b) tort case) supports this result. The Fifth Circuit held that awarding workers' compensation benefits under the Act is a non-discretionary, statutory remedy and that the remedy provided by the Act is a substitute for the negligence claim that an employee could otherwise bring against his employer in tort. This result does not conflict with the Immigration Reform and Control Act of 1986. *Bollinger Shipyards, Inc. v. Director, OWCP*, 604 F.3d 864, 44 BRBS 19(CRT) (5th Cir. 2010).

Section 2(3)(A)—Office Clerical, Secretarial, Security and Data Processing

In enacting the 1972 Amendments, Congress indicated its intent to exclude employees not engaged in maritime work who may be injured on a covered situs, specifically using “purely clerical” workers as an example, stating

[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972). The Supreme Court addressed this language in *Caputo*, 432 U.S. at 271, 6 BRBS 164, stating that while “employees who perform purely clerical tasks and are not engaged in the handling of cargo” are excluded from the Act’s coverage, those who “check” items of cargo as they are loaded or unloaded are not similarly excluded.

In a pre-*Caputo* case, the Third Circuit reversed a Board decision finding coverage for a delivery clerk because it found him to be a clerical employee. *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), *rev’g* 3 BRBS 42 (1975). The court’s decision turned on the fact that claimant’s primary duties were performed in an office and did not require him to go to the pier or to board a vessel. Decisions addressing coverage of clerical workers prior to the 1984 Amendments are addressed in the occupational sections of the deskbook.

The 1984 Amendments codified the exclusion of those “employed exclusively to perform office clerical, secretarial, security and data processing work” provided they are covered by a state compensation law. The legislative history offers guidance on this provision, indicating it is intended to apply to employees in an office who are not exposed to maritime hazards, as is apparent from the following passages:

The Committee intends that this exclusion be applicable to such employees whether they are employed by maritime or by non-maritime employers, because the nature of their work does not expose them to traditional maritime hazards. The Committee intends that this exclusion be read very narrowly. First, the Committee intends that the word “exclusively” modify all four classifications of work presented. Thus, for example, if a clerical worker employed by a stevedore performed clerical work both in the office, and on the piers, wharfs or warehouses, the exemption from coverage provided by this definition would not be applicable to such worker, and that worker would be covered by the Longshore Act in all phases of

employment....Second, the Committee intends that the word “office” modify the word “clerical.” Not all clerical work is intended to be excluded—merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in “clerical” type work, but that work is done in the areas in which cargo is handled, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act jurisdiction.

H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2736-7. As reported by Congressman Miller, the amendments to Section 2(3) were intended to “narrowly exclud[e] from coverage certain employees who are not exposed to maritime hazards. ...” Thus, Congress intended that covered employees

are to be distinguished from those other employees of waterfront employers, such as office clerical, secretarial, security or data processing workers, who are not intimately concerned with the movement and processing of ocean cargo, and who themselves are confined, physically and by function, to the administrative areas of the employer’s operations.

130 Cong. Rec. H9731 (Sept. 18, 1984).

Specifically regarding clerical workers, the conference report states

As noted in both the accompanying Senate and House reports, this exemption reflects that these individuals are land-based workers otherwise covered under a State workers’ compensation law, and their duties are performed in an office. However, the conferees expressly adopt a qualification contained in both reports: The Conference substitute does not exempt employees classified as longshore cargo checkers and clerks. Therefore, cargo checkers and clerks remain fully within Longshore Act jurisdiction.

H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2772.

Consistent with these statements, the regulations make clear that cargo checkers and clerks are not excluded by providing for the exclusion of those “employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks)” 20 C.F.R. §701.301(a)(12)(iii)(A).

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Clerical Work

Since claimant's injury occurred after September 28, 1984, the Board held that the 1984 Amendments exclusions apply, and a claimant employed as a key machine operator at a shipyard was not covered as her duties involve office clerical work excluded by Section 2(3)(A). Claimant's work involved processing invoices and inspection information using a computer terminal and generating descriptive stickers and tags which were placed on parts and used in the shipyard inventory and routing process. While claimant herself did not inspect the parts or affix the inspection stickers, claimant's office was adjacent to the warehouse/inspection office, and she occasionally would have to physically go into the parts warehouse. Distinguishing *White*, 633 F.2d 1070, 12 BRBS 598, the Board held that claimant's duties involved handling paper rather than shipbuilding materials. Thus, while claimant's duties may fall within the definition of maritime employment, her job is specifically excluded from coverage. *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989).

The Board held that a claimant who primarily performed clerical duties involving handling documentation presented by truck drivers delivering cargo but was subject to reassignment as a checker was not excluded by Section 2(3)(A). The Board stated that although his injury occurred after the effective date of the 1984 Amendment exclusion of "office clerical workers," the exclusion does not apply to "cargo checkers and clerks" who have traditionally been considered to be maritime workers. Thus, "claimant, who performed clerical duties pertaining to cargo removal and who was subject to reassignment as a checker," was held covered by the Act. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989).

The Board held that claimant is excluded from coverage under both the 1972 and 1984 versions of Section 2(3), *see Caputo*, 432 U.S. 249, 6 BRBS 150, and Section 2(3)(A), as her work as a keypunch operator is purely clerical in nature. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990).

The Board held that 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, was 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).

In a longshoring case, the Board held that 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 shipyard 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, 29 BRBS 75 (4th Cir. 1995). In its unpublished opinion, the Fourth Circuit vacated the Board's decision, stating that the Board exceeded its authority in finding that claimant performed exclusively office clerical work, as the administrative law judge relied on a conclusion that claimant's work was integral to the shipbuilding process and thus did not make the necessary findings of fact as to nature of the different skills required, and whether claimant's duties were exclusively clerical and performed exclusively in a business office. The case was remanded for these findings.

In a case where the Board, citing *Williams*, had remanded the case for findings as to whether claimant performed clerical work exclusively in a business office, the Board affirmed the administrative law judge's finding on remand that claimant's duties were not performed in an office but 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).

In a longshoring case, the Board affirmed the administrative law judge's finding that claimant was excluded from coverage by Section 2(3)(A). Claimant worked 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, holding that a delivery clerk who worked in an office was not covered, was controlling. The Board noted that while the validity of *Farrell* could be questioned in light of intervening Supreme Court law, the Third Circuit reaffirmed its validity in *Rock*, 953 F.2d 56, 25 BRBS 112(CRT). Claimant, moreover, is now excluded from coverage by Section 2(3)(A), which the *Rock* court found consistent with *Farrell*. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993). *See also Maher Terminals, Inc. v. Director*,

OWCP [Riggio], 330 F.3d 162, 37 BRBS 42(CRT) (3^d Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003) (reaching different result but reaffirming validity of *Farrell*).

Observing that the instant case is analogous to *Stone*, 30 BRBS 209, the Board affirmed the administrative law judge's findings that claimant's work as a production clerk was clerical in nature, that it was performed primarily in an office setting, and that claimant's forays outside the office were merely an extension of his office work. The administrative law judge rationally distinguished this case from *Jannuzzelli*, 25 BRBS 66 (1991), because claimant 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 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) (3^d Cir. 2003), *cert. denied*, 540 U.S. 1088 (2003). Affirming the Board's decision, the Third Circuit initially rejected claimant's contention that his work as a delivery clerk, which he was performing on the day of injury, was covered, stating that such work performed exclusively in an office entering data into a computer is not covered employment pursuant to *Farrell*, 548 F.2d 476, 5 BRBS 392. In holding claimant covered, the court relied on the fact that claimant spent half of his time in covered employment as a checker, which is traditionally part of the loading process. The court stated that it must look to the regular portion of the overall tasks to which the claimant could have been assigned 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), on the ground that claimant in this case, while having different job assignments, worked only for one employer. *Maheer Terminals, Inc. v. Director, OWCP*, 330 F.3d 162, 37 BRBS 42(CRT) (3^d 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) (2^d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006). The Second Circuit affirmed the decision that decedent was not excluded from coverage by Section 2(3)(A). 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) (2^d Cir. 2005), *cert. denied*, 540 U.S. 1175 (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).

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 drawing clerk, is excluded from coverage pursuant to Section 2(3)(A). Substantial evidence supported the finding that claimant worked exclusively in an office setting, verified administrative data, retrieved requested documents from cabinets and drawers, checked out these documents and checked them back in. The Board rejected claimant’s contention that her job duties were similar to those in *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005), because the administrative law judge permissibly concluded that her duties did not require the exercise of judgment and expertise that goes beyond typical clerical work. The Board also rejected claimant’s contention that she is entitled to coverage under the Act because her job duties were integral to shipbuilding as the exclusion applies nonetheless. *Motton v. Huntington Ingalls Industries, Inc.*, 52 BRBS 69 (2018).

Security Work

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, work 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 held 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 held 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).

The Board affirmed the administrative law judge's finding that claimant is not excluded from the Act's coverage pursuant to Section 2(3)(A) because he was not exclusively performing "office" security work. In this case, claimant was not confined, physically or by function, to an office or other administrative area on land, which is necessary for the exclusion to apply. Rather, his security duties, in furtherance of regulations issued by the Dept. of Homeland Security, were performed on vessels on navigable waters. As claimant was injured on actual navigable waters in the course and scope of his employment on those waters, he is covered under the Act pursuant to *Perini*, 459 U.S. 297. *K.L. [Labit] v. Blue Marine Security, LLC*, 43 BRBS 45 (2009).

In a case where the administrative law judge neither cited case precedent relevant to security guards nor discussed the evidence concerning claimant's job duties as a security guard with an EMT certification, the Board vacated the administrative law judge's summary decision that claimant was not engaged in "maritime employment." On remand, the administrative law judge, without reliance on the discredited "support services" rationale, must discuss the evidence to determine whether claimant's work is integral to the shipbuilding process. The Board affirmed as unchallenged on appeal the finding that the security guard exclusion of Section 2(3)(A) does not apply because claimant was exclusively a security guard and was not confined to an office. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).

On remand, the administrative law judge found that no evidence was presented to support a finding that claimant's failure to respond in his capacity as a security guard/EMT to work accidents and injuries would disrupt employer's shipbuilding process; thus, like the claimants in *Gelinas*, 44 BRBS 85, *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the administrative law judge concluded that claimant is not a maritime employee pursuant to Section 2(3). Moreover, claimant did not engage in security work on navigable waters, piers, or vessels, nor did not work as a cargo watchman. The Board affirmed the administrative law judge's decision, as he properly applied the law to claimant's employment duties and rationally determined that those duties were not integral to employer's shipbuilding process. *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013).

Section 2(3)(B), (C)—Club, Museum, Restaurant, Marina and Such

Provided they are covered under a state workers' compensation law, Section 2(3)(B) excludes "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet," and Section 2(3)(C) similarly excludes "individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." The legislative history to these provisions indicates that, like subsection (A), the exclusion is to be narrowly construed. H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2737. While the original Senate and House versions limited the subsection (B) exclusion of "clubs" to non-profit organizations, this distinction was eliminated at conference. H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2772.

The House Report also states that these subsections

exclude employees because of the nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing....The Committee believes, however, that some enterprises which are provided with exclusions under sections 2(3)(B) and (C) because of the nature of the employing enterprise may in fact employ workers who should remain covered by the Act because of the nature of the work which they do, or the nature of the hazards to which they are exposed.

H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2737. The report goes on to say that the Committee has provided for coverage of such workers by adding the provision in subsection (C) for coverage of employees engaged in construction, replacement or expansion or such facilities, except for routine maintenance, giving examples of what is and is not considered routine maintenance. This portion of the report concludes with the statement that where a restaurant, museum, retail outlet or marina employs a worker to perform such work, that worker would be covered, with examples of those who would not be covered. *Id.*, at 2737-38.

The regulations incorporate these examples, providing for the exclusion of

(B) Individuals employed by a club (meaning a social or fraternal organization whether profit or nonprofit), camp, recreational operation (meaning any recreational activity, including but not limited to scuba diving, commercial rafting, canoeing or boating activities operated for pleasure of owners, members of a club or organization, or renting, leasing or chartering equipment to another for the latter's pleasure), restaurant, museum or retail outlet;

(C) Individuals employed by a marina, provided they are not engaged in its construction, replacement or expansion, except for routine maintenance such as cleaning, painting, trash removal, housekeeping and small repairs;

20 C.F.R. §702.301(a)(12)(iii)(B), (C).

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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. The court rejected claimant's argument that the fact that he was employed "by" a different company placed him outside the exclusion, holding he worked exclusively to further the concerns of an operation which was a "club" or "camp." *Green v. Vermillion Corp.*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999).

The Board affirmed 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), 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).

Where decedent, the chief engineer of employer's vessel casino, performed his work during construction of the vessel, prior to its being completed and placed into operation as a casino, the Board held that his employment by a casino operator was not determinative of his coverage under Section 2(3)(B) as he was engaged in shipbuilding operations. 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). Reversing this decision, the Fifth Circuit held that decedent was

excluded from coverage under the recreational operation exception of Section 2(3)(B), despite the facts that he was injured while the floating casino vessel was under construction and his duties, in part, furthered the construction of the vessel. The court held 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 noted 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 exposed him to hazards associated with maritime commerce. *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003).

The Board affirmed the administrative law judge's finding that claimant is excluded from coverage under the "retail outlet" provision of Section 2(3)(B). Claimant was employed by a photography company to take photographs of tourists boarding a museum vessel. The Board held 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 fact that employer's employees have duties on navigable waters is irrelevant to the applicability of the exclusion. The claimant is excluded regardless of whether the more restrictive test of *Bazor* or the decisions in *Green* and *Huff* are applied, as her actual duties lack a 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 affirmed the holding that claimant was employed by a "retail outlet." The court stated 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 under Section 2(3)(B), unless she was not covered by a state workers' compensation law. The court remanded 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).

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 Constr.*, 32 BRBS 221 (1998), *aff'd mem.*, 196 F.3d 1258 (5th Cir. 1999)(table).

Section 2(3)(D)--Vendors

This provision excludes “individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under the Act” provided they are covered by a state workers’ compensation law. The accompanying regulation essentially restates this provision. 20 C.F.R. §702.301(a)(12)(iii)(D).

The legislative history indicates that the last proviso was added “specifically to insure that subcontracting is not used as a device by which work, which might be performed by covered employees, may be done by employees of suppliers or vendors in order to evade the coverage of the Act.” H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2738.

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The Board rejected employer’s argument that claimant, a form carpenter working on an addition to a pier at Norfolk Naval Base, was excluded from coverage under Section 2(3)(D). Claimant was not “temporarily” on the site, as the 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. Employer’s interpretation would result in the exclusion of any workers employed by a subcontractor to perform construction work at a shipyard if that yard did not directly employ such workers. *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990).

The Board affirmed the administrative law judge’s finding that claimant, who worked for a company that delivered maintenance and cleaning chemicals and supplies to vessels, was not a covered employee. Claimant worked in a warehouse but also made deliveries of cleaning supplies and equipment to commercial vessels 3 or 4 times a day. Usually supplies were loaded by the ship’s crew, and the Board affirmed the conclusion that the occasional times when claimant hand-delivered items was insufficient to confer coverage. Although the Board thus held that the status test was not satisfied, the Board affirmed the administrative law judge’s conclusion that claimant was not excluded from coverage by Section 2(3)(D), because while he was employed by a vendor or supplier, he was injured on employer’s premises rather than due to his temporary presence at another location. *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, a communications consultant for a cell phone company, 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 claimant is covered and has been receiving benefits under the Louisiana State Workers' Compensation Act for his work-related injuries in this case. The administrative law judge rationally distinguished the Board's decision in *Ripley*, 23 BRBS 336, where a building contractor working under a contract to complete a construction project on a pier at a shipyard 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). On appeal, the Fifth Circuit affirmed this decision as supported by substantial evidence and in accordance with law. *Daul v. Petroleum Communications, Inc.*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999).

The Board affirmed the administrative law judge's finding that the vendor exclusion does not apply to preclude coverage to claimant, a land-based truck driver responsible for delivering groceries to a maritime site, as claimant shared some of the duties of the dock crew. As not all of the requisite elements for the vendor exclusion at Section 2(3)(D) had been met, the vendor exclusion did not apply. Nevertheless, the Board held that claimant was excluded from coverage as he was not engaged in maritime employment. *Jacobs v. G & J Land & Marine Food Distrib.*, 48 BRBS 9 (2014).

Section 2(3)(E)—Aquaculture Workers

Section 2(3)(E) excludes aquaculture workers from coverage, provided they are covered by a state workers' compensation act.

The Conference Committee Report refers to the Senate Report for a description of aquaculture operations. That report states that for purposes of this exclusion “aquaculture operations” are defined as

those commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals. The committee recognizes and intends that this definition, as established in the National Aquaculture Act of 1980, 16 U.S.C. §1801, encompasses a substantial part of the domestic shellfish cultivation and harvesting industry which utilizes municipally leased and/or private growing waters and beds for the controlled growing and harvesting of shellfish species such as oysters, clams, mussels, and abalones. In additions the controlled growing and harvesting of other aquatic species such as salmon, trout and crayfish, would also fall within the meaning of aquaculture.

S. Rep. No. 98-81, 98th Cong., 1st Sess. at 29.

The Conference Committee Report also states that, “to date, the definition of maritime employment has never been interpreted to mean the cleaning, processing or canning of fish and fish products. But to foreclose any future problem of interpretation, the term “aquaculture operations” should be understood as including such activities.” H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2773.

The accompanying regulation provides for the exclusion of “those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species.” 20 C.F.R. §702.301(a)(12)(iii)(E).

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The Board held 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). The Fourth Circuit agreed that 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).

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 (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 affirmed the administrative law judge's denial of benefits in this case where claimant worked in a fish processing company. The Board affirmed the administrative law judge's finding that employer is an "aquaculture operation." However, contrary to the administrative law judge's continued analysis, it was unnecessary to consider claimant's work activities in determining he was not a covered employee. The Fifth Circuit, within whose jurisdiction this case arose, has held that it is unnecessary to address the nature of an employee's duties when the exclusion to coverage turns on the nature of the employing entity, *see, e.g., Bazor*, 313 F.3d 300, 36 BRBS 79(CRT), and the exclusion at Section 2(3)(E) turns on the nature of the employing entity. Accordingly, because claimant worked for an aquaculture operation, he was an aquaculture employee excluded from coverage pursuant to Section 2(3)(E) of the Act. *Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012), *aff'd on recon.*, 47 BRBS 5 (2013).

The Board rejected claimant's assertion that the definition of "aquaculture worker" at 20 C.F.R. §701.301(a)(12)(iii)(E) is "merely interpretive," lacks the force of law, and should be ignored in addressing coverage. The Board explained that, in passing the 1984 Amendments to the Act, the Department of Labor published Interim Final Rules and requested written comments and then published the Final Rules implementing the 1984 Amendments. As these regulations were subject to the notice and comment provisions of the APA, they are "substantive" and not "merely interpretive." Thus, they are binding as law. The Board further rejected claimant's assertion that the regulation is inconsistent with the Act because the Act does not explicitly state the definition, explaining that the Secretary is authorized to promulgate regulations, claimant has not shown that the

Secretary's definition is overly expansive, and the definition is a permissible and consistent interpretation of the Act. Accordingly, as claimant meets the definition of an aquaculture worker, he is excluded from the Act's coverage. *Stork v. Clark Seafood, Inc.*, 47 BRBS 5 (2013), *aff'g on recon.* 46 BRBS 45 (2012).

The Board denied claimant's motion for reconsideration and affirmed that Section 701.301(a)(12)(iii)(E) defines an aquaculture worker in terms of his employment with an aquaculture operation and that Fifth Circuit law requires coverage be ascertained without addressing claimant's job duties. As claimant was injured during the course of his employment with an aquaculture operation, he is excluded from the Act's coverage. *Stork v. Clark Seafood, Inc.*, 47 BRBS 5 (2013), *aff'g on recon.* 46 BRBS 45 (2012).

Section 2(3)(F)-Recreational Vessels

Provided they are covered by a state workers' compensation law, the original provision enacted in 1984 provided for the exclusion from coverage of "individuals employed to build, repair, or dismantle any recreational vessel under 65 feet in length." 33 U.S.C. §902(3)(F). The regulation implementing this version of the Act was 20 C.F.R. §701.301(a)(12)(iii)(F).

The statutory provision was amended in 2009, and it excludes from coverage "individuals employed to build any recreational vessel under 65 feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel." New regulations were promulgated in 2011 to implement amended Section 2(3)(F). 20 C.F.R. §§701.302(c)(6), 701.501-701.505. These regulations define, *inter alia*, what is a recreational vessel, how the length of a vessel is determined, and what type of repair work is covered. The regulation at Section 701.504 defines the "time of injury" for determining the applicability of the amended statutory provision.

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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).

In a case where claimant was exposed to noise at work for employer as early as 1992 and continuing through at least April 2009, the Board held that the amended version of the recreational vessel exclusion at Section 2(3)(F) does not apply and vacated the administrative law judge's finding to the contrary. Rather, the regulations to the new version specifically provide that noise-induced hearing loss occurs over a period of time, and, if any of that exposure occurred before February 17, 2009, the enactment date, then the amended version does not apply to ascertain a claimant's status. 20 C.F.R. §701.504(a)(3). As the prior version applies here due to pre-February 2009 exposure, and as there is no evidence in the record regarding the length of the vessels on which claimant worked, the Board remanded the case to the administrative law judge for further fact-finding and application of the proper version of Section 2(3)(F). The Board affirmed the finding that claimant is covered by state workers' compensation law; therefore, if the administrative law judge finds, on remand, that claimant satisfies the exclusion at Section 2(3)(F), he is not covered by the Longshore Act. *Czikowsky v. Ocean Performance, Inc.*, 47 BRBS 35 (2013).

In this case involving a case of first impression under the 2009 version of Section 2(3)(F), the Board reversed the administrative law judge's award of benefits to a ship repairman, holding that his work on yachts used on display in boat shows and to take potential customers on sea trials constituted repair of "any recreational" vessel and is not covered by the Act. In reaching this conclusion, the Board addressed the definition of "recreational vessel" in 20 C.F.R. §701.501. Initially, the Board held that both parts of the definition, 20 C.F.R. §701.501(a), (b), must be applied to ascertain whether a vessel is "recreational," rejecting the Director's interpretation that ignored paragraph (b); the Director contended the administrative law judge properly found the vessels were used for the business purpose of generating sales and therefore were not "recreational." In applying the definition, the Board held that the vessels in question were reasonably said to be operated "primarily for pleasure" of the potential customers pursuant to subsection (a). The Board then addressed whether the vessels in question were involved in "commercial service" as defined by the regulation under paragraph (b) such that they were not "recreational vessels," and held that they were not used in "commercial service" because they were not used to transport goods or people from one place to another. *See* 20 C.F.R. §701.501(b)(2)(D). As claimant repaired only recreational vessels, and as he is covered by a state workers' compensation law, he is excluded from coverage pursuant to Section 2(3)(F) of the Act. *DeJesus v. Viking Yacht Co., Inc.*, 47 BRBS 51 (2014).

Section 2(3)(G)—Member of a Crew

The Act has historically excluded the master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. Prior to 1972, Section 2(3) defined “employee” as excluding such individuals, and also included the exclusion in Section 3(a)(1). 33 U.S.C. §§902(3), 903(a)(1) (1970) (amended 1972). The 1972 Amendments continued these exclusions in adding the expanded definition of employee and landward covered sites. The 1984 Amendments incorporated the exclusion of a master or member of a crew of any vessel as subsection (G) and deleted this language from Section 3(a). Unlike the exclusions in subsections (A) – (F), this exclusion applies regardless of whether the employee is also covered under state law.

The extensions of the Act in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1333(c)(1), and the Defense Base Act, 42 U.S.C. §1654 (DBA), also exclude the master or member of a crew of any vessel. An employer is entitled to a credit under the Act for any benefits paid pursuant to the Jones Act, 46 U.S.C. §688. 33 U.S.C. §903(e).

The Supreme Court has held that the test for determining whether an employee is a member of a crew is the same for determining seaman status under the Jones Act. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). In *Wilander*, the Court resolved an inconsistency it found in its decisions over whether an employee must aid in navigation in order to be a member of a crew, holding that the time had come to jettison this requirement. The Court described the Longshore Act and the Jones Act as a pair of mutually exclusive remedial statutes, which distinguish land-based and sea-based employment. It held that the key to seaman status is an employment-related connection to a vessel in navigation.

In addressing the “member of a crew” exclusion, the Board initially cited earlier Supreme Court decisions in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), and *Norton v. Warner Co.*, 321 U.S. 565 (1944), which were discussed in *Wilander*, in adopting a three-part test focusing on whether

1. the vessel was in navigation,
2. the worker had more or less a permanent connection with the vessel, and
3. the worker was aboard primarily to aid in navigation.

Ryan v. McKie Co., 1 BRBS 221 (1974). See *Hed v. Duncanson-Harrelson Co.*, 7 BRBS 821 (1978), *aff’d sub nom. Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 13 BRBS 308 (9th Cir. 1981) (claimant engaged in construction of a dock while on a raft is not a member of a crew); *Accord Craig v. American Dredging Co.*, 10 BRBS 1014 (1979), *aff’d*, 620 F.2d 285 (2d Cir. 1980) (table) (foreman on dredging barge engaged in widening a channel not a member of crew because not on board to aid navigation); *Freer*

v. Duncanson-Harrelson Co., 9 BRBS 888 (1979) (case history, *infra*); *Crauthers v. Northwestern Constr. Co.*, 9 BRBS 880 (1979) (S. Smith, dissenting) (a crane operator on employer's derrick barge which was being used in the construction of an extension to a dock held covered as a harbor-worker and not excluded from coverage as a member of a crew); *Pendleton v. General Constr. Co.*, 9 BRBS 755 (1978) (oiler on dredge not a member of a crew because he was maintaining equipment; he was not aboard when dredge was towed); *McIntosh v. Parkhill-Goodloe Co., Inc.*, 4 BRBS 3 (1976), *aff'd*, 550 F.2d 1283 (5th Cir. 1977) (table), *cert. denied*, 434 U.S. 1033 (1978).

Applying this test, the Third Circuit stated that the first criterion means navigation in the broad sense, that is, a vessel engaged as an instrument of commerce or transportation on navigable waters. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 2 BRBS 155 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). The court further stated that a worker on a barge whose primary duties involve the handling of cargo rather than the carrying out of required navigational responsibilities is a longshoreman and not a seaman. The Ninth Circuit also applied the three-part test in *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F. 2d 1336 (9th Cir. 1982), *aff'g in part Freer v. Duncanson-Harrelson Co.*, 9 BRBS 888 (1979), *vac. on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (9th Cir. 1983). The Sixth Circuit similarly relied on the three-part test in addressing both "member of a crew" and "seaman" status. *Peterson v. The Chesapeake & Ohio Ry. Co.*, 784 F.2d 732 (6th Cir. 1986).

The Fifth Circuit, however, adopted a two-part test. Stating that the tests for determining whether an employee is a seaman under the Jones Act and whether an employee is a member of the crew under the Longshore Act are the same, the court cited its decision in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and stated that an employee is a member of a crew:

1. if there is evidence that the injured workman was assigned permanently to a vessel or performed a substantial part of his work for the vessel and
2. if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

McDermott, Inc. v. Boudreaux, 679 F.2d 452, 14 BRBS 946 (5th Cir. 1982), *rev'g* 13 BRBS 992 (1981). See *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986). The court held, as a matter of law, that claimant, a welder and repairman aboard a pipelaying barge, was a member of the barge crew under the above test. In *Reynolds*, however, the court, in affirming the district court's grant of summary judgment for employer in a Jones Act suit, held that a ship engaged in sea trials is not engaged in navigation and without a "vessel in navigation,"

there can be no Jones Act coverage. *Id.*, 788 F.2d at 267, 19 BRBS at 17(CRT). The employee, a shipfitter, who volunteered to sail during sea trials, had the Longshore Act as his remedy.

Despite the Fifth Circuit's ruling, the Board continued to apply the three-part test, affirming an administrative law judge's finding that claimant, a deckhand on a dredge, was not a member of a crew in *Ramos v. Universal Dredging Corp.*, 15 BRBS 140 (1982), which arose in the Ninth Circuit. *See also Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990) (claimant, a rigger who was injured when he fell onto the deck of a barge 12 miles offshore was not a member of the crew under the three-part test as he performed no navigational functions; administrative law judge's decision applying the Fifth Circuit's two-part test in this Ninth Circuit case was reversed); *Curtis v. Schlumberger Offshore Services, Inc.*, 23 BRBS 63 (1989), *aff'd mem.*, 914 F.2d 242 (3d Cir. 1990) (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 OCSLA where he was not aboard the rig to aid in its navigation); *Wilson v. Crowley Maritime*, 22 BRBS 459 (1989) (claimant was not a member of a crew where 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); *Sosenik v. Lockheed California Co.*, 14 BRBS 191 (1981) (Miller, dissenting) (affirming the denial of coverage under the DBA on the basis that claimant, an inventory management specialist aboard a Navy aircraft carrier, was a member of the crew as he was aboard primarily in aid of navigation); *Jonas v. Latex Constr. Co.*, 13 BRBS 1017 (1981) (reversing determination that claimant was a member of a crew where he previously had worked aboard vessels as an oiler and as an engineer, but had been reassigned to shore-based duties and thus did not have a permanent connection with a vessel and his duties were not primarily in aid of navigation). In *Simms v. Valley Line Co.*, 17 BRBS 28 (1985), the Board noted the conflict between its test and that of the Fifth Circuit, but did not reach the issue as claimant, who assisted in the operation of employer's docking facility, had no permanent relationship with a vessel or an identifiable group of vessels.

In other cases decided by the Fifth Circuit, the court held that an employee who worked on a fixed platform was not a seaman under the Jones Act because a fixed platform is not a vessel in navigation; thus, claimant's exclusive remedy was under the Longshore Act. *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982). In *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982), and *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), the court held, respectively, that a seaplane and a helicopter are not vessels and that a pilot is not a Jones Act seaman. Thus, pilots are not excluded from coverage under the Longshore Act on the grounds that they are members of crews.

In *Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *rev'g* 14 BRBS 74 (1981), *cert. denied* 459 U.S. 1170 (1983), the court cited *Smith*, 684 F.2d 1102, reiterating that a plane is not a vessel under the Jones Act and, therefore, the pilot, a fish spotter, was not excluded from Longshore Act coverage as a member of a crew. The court found coverage under the Longshore Act because claimant was injured on actual navigable waters. In *Mungia v. Chevron Co., U.S.A.*, 675 F.2d 630 (5th Cir. 1982), an injured roustabout brought suit under the Jones Act, claiming he was a seaman. The court held that it was a material question of fact as to whether the permanency requirement was satisfied by the fact that claimant was assigned to a specific fleet of vessels. In *Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432, 17 BRBS 112(CRT) (5th Cir. 1985), the Fifth Circuit affirmed the district court's grant of summary judgment in a Jones Act case, where it was "manifestly clear" that claimant, a roustabout, performed "classic stevedoring work." (Claimant's testimony had established "only sporadic work aboard vessels and that work was part of Balfer's duties loading and unloading docked vessels...").

The Supreme Court ended the debate on the appropriate test with its decision in *Wilander*, 498 U.S. 337, 26 BRBS 75(CRT), concluding 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." *Id.*, 498 U.S. at 354, 26 BRBS at 83(CRT). The Court thus held that the employee, a paint foreman, was not excluded from coverage under the Jones Act on the basis that his duties did not aid in navigation.

The *Wilander* Court, in effect, restated the test of the Fifth Circuit in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). The Court's decision eliminated the three-part test from consideration, providing that a member of a crew must have "an employment-related connection to a vessel in navigation" and his duties "must contribute to the function of the vessel or the accomplishment of its mission."

Following *Wilander*, the Supreme Court issued a series of decisions on issues involving member of a crew/seaman status. The Court 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) is limited to a Longshore Act remedy and is precluded from filing suit under 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 under Section 2(3) 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 engaged in ship repair was not precluded as a matter of law from coverage under the Jones Act, as questions of fact existed as to seaman status, *e.g.*, whether the floating platforms were vessels in navigation, whether Gizoni's relationship to those platforms was permanent, and whether he aided in their navigation. 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. *Gizoni v. Southwest Marine, Inc.*, 909 F.2d 385 (9th Cir. 1990).

In affirming the Ninth Circuit, the Supreme Court initially stated its agreement that the district court erred in finding that the Longshore Act is the exclusive remedy for all "harbor-workers" as a matter of law. As in *Wilander*, the Court stated that the Jones Act and the Longshore Act provide mutually exclusive remedies, but determining who is a member of a crew involves a mixed question of law and fact, requiring factual determinations as to the nature of the vessel and the employee's relationship to it. The Court rejected the argument, based on Fifth Circuit precedent, that the issue is resolved as a matter of law where claimant's job fits into an enumerated category, citing the plain language of the Act which defines maritime employees and then excludes members of a crew; thus, by its terms, the Longshore Act preserves a Jones Act remedy for vessel crewmen even if employed in a shipyard. While in some cases a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status, not all ship repairmen lack this connection as a matter of law. Thus, a worker may be performing an enumerated job and still be entitled to a Jones Act remedy if he has a work-related connection to a vessel in navigation. The Court concluded that a maritime worker is limited to the Longshore Act remedy only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act. The Court also rejected employer's "primary jurisdiction" argument, under which Jones Act litigation would be stayed pending an administrative determination under the Longshore Act, and its contention that receipt of benefits under the Longshore Act precludes a Jones Act suit. Since a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission, even if it is used exclusively in ship repair, and thus qualify as a Jones Act seaman, the Court concluded that the case should have been presented to a jury. *Gizoni*, 502 U.S. at 92, 26 BRBS at 47(CRT).

The Supreme Court next decided *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), addressing the degree of "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 rejected the contention that the vessel must be on a voyage, but

held 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 adopted 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 stated that departure from this rule may be justified, where, for example, a worker's basic assignment changes before the injury. The Court also noted 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.

The Supreme Court granted *certiorari* in *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), in order to provide clarification on its statement in *Chandris*, 515 U.S. at 368 regarding the substantiality of an employee's connection to "an identifiable group of ... vessels" in navigation. The Ninth Circuit had held that summary judgment against the employee, a deckhand, in his Jones Act claim on the ground that he was not a seaman was inappropriate, as issues of fact remained as to whether he had the necessary connection with a vessel or group of vessels. The court stated that in applying *Chandris* to determine whether plaintiff had a substantial connection with a vessel (or group of vessels), the total circumstances of the employment must be considered. The court held the work performed by the employee while employed by different employers may be examined and "a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall," may be treated as a common employer for purposes of determining seaman status. The court noted that that plaintiff here also worked for the defendant employer on a dozen occasions over the 2½ month period preceding his injury as well as the day of injury. In addition, the Ninth Circuit rejected employer's contention that the employee was precluded from a Jones Act recovery because he had been awarded benefits under the Longshore Act, citing *Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT), and the fact that employer is allowed a credit to prevent double recovery.

Reversing this decision, the Supreme Court initially stated that "for the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees." The Court held that claimant was not a seaman as he failed to establish that he had a substantial connection to a vessel or identifiable group of vessels under the same ownership. The relevant inquiry is "whether the vessels are subject to common ownership or control. The requisite link is not established by the mere use of the same hiring hall which draws from the same pool of employees." Addressing

claimant's argument regarding his work with employer on vessels on 12 occasions over the 2½ months before injury, the Court rejected coverage on this basis as he did not establish that his duties were of a seagoing nature, and in any event involved the sort of "transitory or sporadic" connection to a vessel or group of vessels that does not qualify for seaman status under *Chandris*, 515 U.S. at 368. In determining whether claimant has a substantial connection to a vessel, all work customarily performed by him for an employer must be considered, rather than just the work performed at the time of the injury. The Court concluded by stating that Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea, and the substantial connection test is important in distinguishing between sea- and land-based employment; the latter is inconsistent with Jones Act coverage. Since the only connection a reasonable jury could identify among the vessels Papai worked aboard is that each hired some of its employees from the same union hiring hall where it hired him, claimant has not produced sufficient evidence to establish seaman status under the group of vessels concept and summary judgment was appropriate. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997).

The issue before the Supreme Court in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005), concerned whether a watercraft was a "vessel in navigation." The case involved the *Super Scoop*, a floating platform with a dredging bucket used to dig a trench beneath Boston Harbor. The dredge had some characteristics of sea-going vessels such as navigational lights, ballast tanks and a crew dining area, but had limited means of self-propulsion. The District Court granted summary judgment in favor of employer, and the First Circuit affirmed on the basis that the *Super Scoop's* primary function was construction and that any navigation or transportation is incidental to this primary function. Reversing this decision, the Court held that the *Super Scoop* is a "vessel" for purposes of the Jones Act. 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. In this case, the *Super Scoop* was only temporarily stationary while Stewart and others were repairing the scow; the *Super Scoop* had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport. It was a "vessel" within the meaning of both the Jones Act and the Longshore Act, specifically, Sections 2(3)(G) and 5(b).

Digests

Gizoni

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). *Cf. Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 26 BRBS 44(CRT) (1991), discussed, *supra*.

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).

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 Ninth Circuit rejected 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).

Connection to a Vessel or Fleet of Vessels

In a Jones Act case, applying its two-part test, the Fifth Circuit held that 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).

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).

The Fifth Circuit held that a switcher was not a seaman under the Jones Act where he 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).

Claimant worked as a welder repairing barges and fixed structure. While the majority of his work was on land, he had assignments on barges and his last assignment involved work on a fixed structure while aboard the *Ram-V*. The court rejected claimant's argument that his status should be determined based only on this assignment and held that as only 14 percent of his entire employment involved work on a vessel, he did not perform a substantial portion of his work for employer aboard a vessel or fleet of vessel and was thus not a seaman. *Lormand v. Superior Oil Co.*, 845 F.2d 536 (5th Cir. 1987).

The Board affirmed 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 Constr.*, 21 BRBS 59, *recon. denied*, 21 BRBS 63 (1988) (McGranery, J., concurring and dissenting).

In a suit claiming breach of warranty of seaworthiness and, alternatively, negligence of the vessel under 33 U.S.C. §905(b), the Eighth Circuit 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).

Stating that 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 found that the district court properly applied the court's three-part test, but noted that since the case was argued, the Supreme Court had issued its decision in *Wilander*. The court found that the decision that claimant is not a seaman is not inconsistent with the *Wilander* test because 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*, 503 U.S. 907 (1992).

The Board held that claimant, an airborne fish spotter, is not a member of a crew, since he was not on board a vessel. Citing *Ward*, 684 F.2d 1114, 15 BRBS 7(CRT), the Board held that an airplane is not a vessel. *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 affirmed this Board's decision, holding that claimant was not a member of a crew as 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).

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 prior holding in this case at 936 F.2d 839 (5th Cir. 1991), *vac. and rem.*, 503 U.S. 930 (1991), that those engaged in an enumerated position under Section 2(3) are excluded under the Jones Act is no longer valid in light of *Gizoni*. *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1 (5th Cir. 1992), *cert. denied*, 506 U.S. 1050 (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 as 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 affirmed the administrative law judge's finding that claimant's work satisfied both prongs of the test set out in *Robison*, 266 F.2d 769, 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).

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).

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 part*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995). Affirming this decision, the court stated that, although the administrative law judge erred in determining that the vessel on which decedent worked was not in navigation, the administrative law judge and Board rationally concluded that decedent lacked an employment-related connection with a vessel and was thus not a member of a crew. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

The Ninth Circuit held that a temporary laborer hired to perform maintenance on a vessel was not a seaman under the Jones Act as he was a land-based worker aboard the vessel only for the duration of the repairs. The fact that *if* he performed well he *might* be hired to work on the ship when it left Seward *if* there were jobs available does not change his land-based status at the time the injury occurred. *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903 (9th Cir. 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, that an employee must have a substantial and not a sporadic or transitory connection to a vessel in navigation. Decedent therefore is not excluded from coverage as a member of a crew. *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

The Board affirmed 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. The Board therefore rejected employer's contention that claimant was excluded from coverage as a member of a crew. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The Ninth Circuit held 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 Tibbitts Builders*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

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 Third Circuit 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 involves the nature of the employee's basic job assignments as they exist at the time of injury. With regard to whether the employee had a substantial connection to a vessel or fleet of vessels owned or controlled by the same employer, the court held 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 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 its mission. Claimant submitted an affidavit stating that during his five-month employment, 90 percent 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 percent 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 Constr. 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 that 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 power plants, 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). 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 Ciseriv 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 stated that whether claimant is exposed to the "perils of the sea" is not determinative of seaman status. *St. Romain v. Indus. 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), and thus claimant was not exposed to the "perils of the sea." The Fifth Circuit held that *Papai* and *Chandris*, 515 U.S. 347, 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 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 conclusion 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 (2^d 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) (2^d Cir. 2005). The Second Circuit affirmed the Board's holding that decedent was 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) (2^d 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. 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, and *Papai*, 520 U.S. 548, 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).

On remand from the Supreme Court following its decision in *Stewart*, 543 U.S. 481, 39 BRBS 5(CRT), holding that the dredge on which claimant, a marine engineer, was working when he was injured is a “vessel” under the Jones Act and the Longshore Act, the First Circuit held as a matter of law that the plaintiff met the other requirements as a Jones Act seaman. The court held 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; employer had conceded as much before the Supreme Court. Moreover, employer waived its right to raise these issues as it initially raised only 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).

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).

The Board affirmed the administrative law judge’s finding that claimant was excluded from coverage during his employment with Global in 1998, as he was a member of the crew of the *Iroquois*. Claimant was hired as a barge foreman and he worked on the barge before its voyage, while it was being towed, while it was in port in Mexico, and while it was laying pipe off the Mexican shore. The Board held that the administrative law judge properly considered claimant’s employment as a whole and did not segregate his land and sea duties. As he was hired for service on and to the *Iroquois*, and as the *Iroquois* is a vessel whether it is in motion or docked, the Board held that the administrative law judge correctly found that claimant was a member of the crew and, thus, was excluded from

coverage under the Act. Thus, the employer for whom claimant worked at this time cannot be held liable for benefits under the Act and the prior employer is liable. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

The Ninth Circuit, applying the *Chandris* framework, affirmed the finding that claimant was a member of crew as his duties contributed to the function of the vessel in navigation or to the accomplishment of its mission and that he had a substantial connection to the vessel in both duration and nature. The court rejected claimant's contention that the three week period spent in port readying the vessel should be evaluated separately. Claimant was hired as a barge foreman, his work in the yard was in service to the vessel, and he sailed with the vessel. His work was not land-based. The Ninth Circuit, therefore, held that since claimant was a member of a crew, he is excluded as an "employee" as defined by the Act. Therefore, the employer who employed claimant on this vessel cannot be held liable under the Act. *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

In a Jones Act case, the Fifth Circuit affirmed the district court's grant of summary judgment that claimant is not a seaman under the Jones Act as he did not have a substantial connection to the vessel on which he was injured. The claimant, a borrowed employee for an offshore job of two months duration, had worked for his permanent employer for 34 different customers on 191 different offshore and onshore welding jobs, and conceded he spent less than 30 percent of his time in service of any one vessel or group of vessels. Focusing on the "essence of what it means to be a seaman" pursuant to *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995), the court affirmed the district court's rejection of the Jones Act claim. The court declined to adopt a rule that borrowed-employee status automatically requires courts look to only to the worker's period of employment with the borrowing employer. *Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531 (5th Cir. 2015).

Vessel in Navigation

The Fifth Circuit held that claimant was not a seaman under the Jones Act where the drilling barge he was working on was under construction. Thus, the vessel was not in navigation at the time of his injury and the claim fell under LHWCA jurisdiction. *Garret v. Dean Shank Drilling Co., Inc.*, 799 F.2d 1007 (5th Cir. 1986).

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 test to determine member of the crew status. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 66 (1986). Following remand, the Board affirmed 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) (note that although the Board applied the three-part test, the result is consistent with later law).

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 cited other circuit cases where floating structures were held not to be vessels in navigation for purposes of the Jones Act. *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992).

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 test for 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 (2d Cir. 1996).

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, and *Ducote*, 953 F.2d 1000, 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 (1996).

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, and *Chandris*, 515 U.S. 347, 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). *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997).

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 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) (2^d Cir. 2005). Affirming this conclusion, the Second Circuit held based on the Supreme Court's decision in *Stewart*, 543 U.S. 481, 39 BRBS 5(CRT), that the three-part test it developed for "vessel" status under the Act in *Tonnesen*, 82 F.3d 30, 36, 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) (2^d Cir. 2005).

On remand from the Supreme Court following its decision in *Stewart*, 543 U.S. 481, 39 BRBS 5(CRT), holding that the dredge on which claimant, a marine engineer, was working when he was injured is a "vessel" under the Jones Act and the Longshore Act, the First Circuit held as a matter of law that the plaintiff met the other requirements as a Jones Act seaman. The court held 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; employer had conceded as much before the Supreme Court. Moreover, employer waived its right to raise these issues as it initially raised only 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), the focus is 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*, 543 U.S. 481, 39 BRBS 5(CRT), 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 result does not conflict with the holding in *Stewart.*, 543 U.S. 481, 39 BRBS 5(CRT), 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.), *cert. denied*, 555 U.S. 880 (2008).

The Supreme Court held that a “floating home” is not a “vessel” under 1 U.S.C. §3. The phrase “capable of being used as a means of transportation on water” requires practical, not theoretical, application. The structure at issue was a house on a floating platform. A reasonable observer, looking to the home’s physical characteristics and activities, would not consider it “designed to a practical degree for carrying people or things over water.” This structure had no rudder and no steering mechanism; it had no source of power other than connections to land sources. It was moved twice, only by towing, and it did not carry passengers or cargo. As the structure was not a vessel, it was not subject to federal admiralty jurisdiction. *Lozman v. The City of Riviera Beach, Florida*, 133 S.Ct. 735, 46 BRBS 93(CRT) (2013).

Claimant, a marine carpenter hired by employer to fabricate topside living quarters to be incorporated onto the tension leg oil platform *Big Foot*, did not satisfy the Section 2(3) status requirement because his work did not involve “shipbuilding.” Addressing the 1 U.S.C. §3 definition of “vessel,” and the Supreme Court’s decisions in *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 39 BRBS 5(CRT) (2005), and *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735, 46 BRBS 93(CRT) (2013), the Board affirmed the administrative law judge’s finding that *Big Foot* is not a “vessel” under the Act. Specifically, in light of *Lozman* and *Stewart*, in this “‘borderline case’ where the ‘capacity to transport is in doubt,’ it [was] necessary to consider whether *Big Foot* is ‘practically capable’ of transporting people or cargo based on the purpose for which it was created and its physical characteristics.” As *Big Foot* can float but lacks the capability of self-propulsion and will be towed to its final destination, and as its end-purpose is to be a tension leg platform for oil extraction on the Outer Continental Shelf, tethered to the bottom of the sea, a reasonable person looking at the purpose and characteristics of *Big Foot* could rationally conclude it is not a vessel. As *Big Foot* is not a “vessel,” the administrative law judge properly found that claimant was not involved in shipbuilding and is not covered under Section 2(3) of the Act. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), *aff’d sub nom. Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Fifth Circuit affirmed the Board's holding that claimant lacked status as a maritime employee. Claimant was injured while working on modules for Big Foot, which is a tension leg offshore oil platform. The circuit court held that Big Foot is not a "vessel" as it has no means of self-propulsion, has no steering mechanism or rudder, and has an unraked bow. Big Foot can be moved only by being towed, and when towed to its permanent location, Big Foot will not carry items being transported from place to place in maritime commerce, and is intended to remain anchored to the floor of the OCS for twenty years. Therefore, claimant is not a shipbuilder or otherwise engaged in maritime employment. *Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016).

The Board affirmed the administrative law judge's finding that the vessel on which claimant was injured was not "in navigation" at the time of claimant's injury. Thus, claimant was not a member of the vessel's crew and was not excluded from the Act's coverage. The vessel sustained fire damage while at sea. It sailed under its own power to Alaska, but then was towed to Seattle for repairs. Substantial evidence supported the administrative law judge's finding that the repairs were "extensive" and beyond those that would take place in order to prepare the vessel for its next journey. In addition to repairing the fire damage, major renovations were undertaken to relocate the wheelhouse and to change the dimensions and buoyancy of the hull. The repairs took more than one year and the vessel underwent sea trials when the repairs were complete. The vessel was not capable of use in maritime commerce while undergoing these "extensive repairs." The Board rejected the contention that the vessel remained "in navigation" because the purpose of the vessel was the same before and after the repairs; the vessel need not be undergoing a conversion in order to be removed from navigation. *Toukara v. Glacier Fish Co.*, 49 BRBS 89 (2016).

Eighteen Ton Exclusion

The Act has historically excluded "any person engaged by the master to load, unload or repair any vessel under 18 tons net." 33 U.S.C. §§902(3), 903(a) (1982) (amended 1984). The 1984 Amendments moved this exclusion into Section 2(3)(H). As with member of a crew, it applies regardless of claimant's coverage under a state workers' compensation law.

This exclusion has been applied with the emphasis on whether a person was "engaged by the master." Thus, it is well established that the purpose for this exclusion is to prevent the master of a such a vessel from incurring liability without the owner's consent. *Continental Casualty Co. v. Lawson*, 64 F.2d 802 (5th Cir. 1933); *Napoles v. Donzi Marine, Inc.*, 5 BRBS 685 (1977) (Hartman, dissenting), *appeal dismissed sub nom. Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978). In *Fuduli v. Maresca Boat Yard, Inc.*, 7 BRBS 982 (1978), the Board cited *Continental Casualty* and *Napoles* in holding that claimant was employed by a ship repair company,

and therefore was not “engaged by the master” of the small vessel he was repairing at the time of injury. Citing Black’s Law Dictionary, the Board defined master as “the commander of a merchant vessel...the representative and confidential agent of the owner...” Black’s Law Dictionary, 1127 (Rev. 4th Ed. 1968). The Board, in *Schwabenland v. Sanger Boats*, 13 BRBS 22 (1980), *rev’d on other grounds*, 683 F.2d 309, 16 BRBS 78(CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), determined that the “eighteen tons net” exclusion did not apply because claimant was neither “engaged by the master” nor involved in loading, unloading or repairing any vessel. The Ninth Circuit, while reversing the Board’s finding that claimant was not covered by the Act on other grounds, agreed with the portion of the Board opinion holding small recreational boat building within the Act’s coverage.

In *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981), *aff’g* 8 BRBS 224 (1978), the Fifth Circuit held that the “eighteen tons net” exception applies only to situations where the employees are "engaged by the master" to repair vessels under eighteen tons net. A person engaged by someone other than the master to repair such a vessel does not fall within the statutory exemption. Thus, a marine carpenter who repaired recreational boats and small pleasure craft was covered.

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The “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

Prior to the 1972 Amendments, “employer” was defined as:

an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

33 U.S.C. §902(4) (1970) (amended 1972). Thus, an employer was not a statutory employer if all of its employees worked on land. *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168(CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

The 1972 Amendments, however, expanded the definition of “employer” consistent with the expanded situs covered by the amendments:

The term means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §902(4). The legislative history to the 1972 Amendments indicates that there was

no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, *i.e.*, a person at least some of whose employees are engaged in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on the navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S.Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.Rep. No. 92-1441, 92d Cong., 2d Sess. 11. *See also Molee*, 710 F.2d at 997-998, 15 BRBS at 176(CRT).

Examining the purpose of the amendment, the Board held that in order to be engaged in shipbuilding, an employer must have employees engaged in the construction of vessels over navigable waters, as defined prior to the 1972 Amendments, or on a dry dock, building way, or marine railway. Thus, an employer who manufactured small boats was not engaged in shipbuilding because none of its employees worked in these areas. Claimant, therefore, was not covered by the Act. *Napoles v. Donzi Marine, Inc.*, 5 BRBS 685 (1977) (Hartman, dissenting), *appeal dismissed sub nom. Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978).

The Supreme Court noted the inconsistency between the actual wording of Section 2(4) and the expression in the legislative history indicating that a covered employer must have at least one employee on actual navigable waters, but did not endorse either interpretation. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 314 n.24, 15 BRBS 62, 73 n.24(CRT) (1983). The Third Circuit stated, however, that the language of the statute is “unproblematic,” and determined that employer was a statutory employer because its employee was engaged in maritime employment in a terminal area. *Molee*, 710 F.2d 992, 15 BRBS 168(CRT). The court held that it did not matter that employer was an agent of the consignees, and not an agent of its parent stevedoring company.

Similarly, the Fifth Circuit has stated that it is clear that Section 2(4) requires merely that an employer have at least one employee engaged in maritime employment as defined in Section 2(3) on a situs as defined in Section 3(a). *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 538 n.9, 4 BRBS 482, 485 n.9 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff’d*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978), *aff’d on other grounds sub nom. P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). If claimant fails to meet either the status or situs element required for coverage, it is immaterial whether or not employer would qualify as a statutory employer. *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

The Board has held that where an employer has an employee engaged in maritime employment, the employer is a statutory employer under Section 2(4). *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The Board seemingly has not included the situs requirement in this interpretation of Section 2(4), but in *Spencer*, situs was not at issue, and in *Perez*, the Board went on to affirm the administrative law judge’s finding of situs.

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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).

The Board reversed the administrative law judge's finding that claimant's injury was not covered by the Act because he did not work for a "maritime employer." Claimant was injured while performing his usual work on a floating hull over navigable waters, and the administrative law judge found that his presence over navigable waters was neither transient nor fortuitous. Nevertheless, the administrative law judge found that employer, an electrical contractor, was not a "maritime employer" and that this precluded coverage. The Board held that claimant's injury would have been covered prior to the 1972 Amendments to the Act and therefore is covered pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), as claimant was engaged in employment on navigable waters when he was injured. By virtue of claimant's work, employer is a "maritime employer" with at least one employee engaged in maritime employment. The Board remanded the case for resolution of the remaining issues. *Flores v. MMR Constructors, Inc.*, 50 BRBS 47 (2016).