

TOPIC 1 JURISDICTION/COVERAGE

1.1 GENERALLY

When considering the concept of “coverage” under the Longshore and Harbor Workers’ Compensation Act (LHWCA), 33 U.S.C. §§ 901 *et. seq.*, it must be kept in mind that employment is best thought of as a linear continuum with three major groupings. First, there will be situations where the employment will not be considered “maritime” at all, and therefore, not covered under the LHWCA. (Such employment would more properly be covered under a state workers’ compensation system.) Second, there will be the situation where the claimant is a longshore/harbor worker or other “maritime” worker and, thus, is clearly covered under the LHWCA. Third, there will be situations where the employment is maritime in nature, but the worker is more properly classified as a seaman attached to a vessel and entitled to a recovery under the Jones Act (Merchant Marine Act). 46 U.S.C. § 688.

Sections 2(3) (**status**) and 3(a) (**situs**) of the LHWCA set forth the requirements for coverage. “Status” refers to the nature of the work performed; “situs” refers to the place of performance. Prior to the enactment of the 1972 Amendments, the LHWCA contained only a situs test. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) (recovery was limited to those injured on navigable waters, including any dry dock). (For a complete discussion of the development of jurisdiction/coverage under the LHWCA, *see* Topic 1.4, *infra*.)

One of the motivations behind the 1972 Amendments, however, was the recognition that modern cargo-handling techniques had moved much of the longshore worker’s duties off of vessels and onto the land. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Accordingly, the covered situs of Section 3(a) was expanded, and a status test was added, extending coverage to “maritime employees,” including, but not limited to longshore workers, harbor workers, ship repairers, shipbuilders, and ship breakers. When the definition of “employee” was changed, the definition of “maritime employer” was changed accordingly.

Subsequently, the LHWCA was again amended in 1984. These amendments primarily affect the concept of jurisdiction by adding several exclusions to coverage.

[ED. NOTE: The question of status under the LHWCA is now essentially a question of fact unique to each claim. *See, e.g., Sylvester v. Bath Iron Works*, 34 BRBS 759 (ALJ, 2000) (shipyard security guard determined to be statutory employee because his duties included patrolling and investigating aboard ships); *Wakely v. Eastern Shipbuilding, Inc.*, 34 BRBS 788 (ALJ, 2000) (commercial diver determined to be self-employed subcontractor based on nature and design of his business and work performed).]

1.1.1 Standing to File a Claim

Only a claimant (injured worker or LHWCA defined dependent of a deceased worker) has the right to file a claim. Nothing in the LHWCA, nor the regulations (specifically 20 C.F.R. §§ 702.221-702.225) gives an employer or carrier the right to file a claim under the LHWCA for an injured employee. The comprehensive scheme of the LHWCA is the whole source of rights and remedies which affords specific rights and remedies by imposing specific responsibilities. Nations v. Morris, 483 F.2d 577, 588-89 (5th Cir. 1973). If no relief is stated in the LHWCA, then no relief exists. Such is the case when an employer, for strategic purposes, attempts to file a claim. Caruso v. Textron Marine, (96-LHC-400) (1997)(Unpublished). In Caruso, the injured worker filed a Louisiana state worker's compensation claim. The Louisiana statute, La R.S. 23:1035.2, dictates that the state worker's compensation scheme may not be applied where there is LHWCA coverage. Smith v. Gretna Machine and Iron Works, 646 So.2d 1096 (La. App. 5 Cir. 1994) ("La.R.S. 23:1035.2 now divests the state of concurrent jurisdiction in LHWCA situations; it has removed the choice of law forum."); see also Fontenot v. AWI, Inc., 923 F.2d 1127, 1132 (5th Cir. 1991) (injured worker's coverage by LHWCA provided an exclusive remedy and therefore barred recovery under state law.)

However, the Louisiana statute provides no insight as to how the coverage question is to be determined when the injured worker does not file a LHWCA claim. The employer in Caruso attempted to file a LHWCA claim in order for there to be a determination of coverage. The administrative law judge determined that the employer lacked standing to file a claim and that whether or not the claimant was precluded from filing a state compensation claim was a matter for the state court to decide. In this regard, it should be noted that it is axiomatic that federal tribunals "should not render advisory opinions upon issues which are not pressed..., precisely framed and necessary for decision." U.S. Alpine Land and Reservoir Co., 887 F.2d 207, 214 (9th Cir. 1989), citing United States v. Fruehauf, 365 U.S. 146, 157 (1961).

[Editor's Note: The Louisiana legislation/jurisprudence conflicts with most other jurisdictions' rulings on the issue of concurrent jurisdiction. See, e.g., All South Stevedoring Co. v. Wilson, 469 S.E.2d 348 (Ga. Ct. App. 1996), 1996 AMC 1874 (Georgia recognizes concurrent jurisdiction).]

1.2 SUBJECT MATTER JURISDICTION

In Ramos v. Universal Dredging Corp., 10 BRBS 368 (1979), a majority of the Benefits Review Board (hereinafter “the Board”) held that questions of status and situs involve the Board’s subject matter jurisdiction; therefore, these issues may be raised by the Board *sua sponte*. See also Mire v. Mayronne Co., 13 BRBS 990 (1981). Similarly, in Erickson v. Crowley Maritime Corp., 14 BRBS 218 (1981), the Board held that parties’ stipulations concerning coverage under the LHWCA are not controlling, as subject matter jurisdiction cannot be waived.

The **Ninth Circuit**, however, reversed the Board’s decision in Ramos. Ramos v. Universal Dredging Corp., 653 F.2d 1353 (**9th Cir.** 1981). The court held that questions of status and situs involve coverage under the LHWCA, not subject matter jurisdiction. The court held that the Board had jurisdiction in Ramos because the injury occurred on navigable waters.

In Perkins v. Marine Terminals Corp., 673 F.2d 1097 (**9th Cir.** 1982), *rev’g* 12 BRBS 219 (1980), the **Ninth Circuit** reiterated its ruling in Ramos. The touchstone in determining whether admiralty jurisdiction exists is whether the case “involves a significant relationship to traditional maritime activity.” Perkins, 673 F.2d at 1101; Ramos, 653 F.2d at 1359 (discussing Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972)).

The **Fifth Circuit** has also distinguished jurisdiction from coverage (status and situs). Munguia v. Chevron U.S.A., Inc., 999 F.2d 808, 810 n.2, 27 BRBS 103, 104 n.2 (CRT) (**5th Cir.** 1993), *cert. denied*, 511 U.S. 1086 (1994).

[ED. NOTE: Care must be taken, however, in order not to confuse the concepts of subject matter jurisdiction; coverage (situs and status), or as the **Ninth Circuit referred to it, “personal jurisdiction;” and the Section 20(a) presumption (a causation allotting mechanism that presumes that the claim comes within the provisions of the LHWCA). In Munguia, which cites to Section 20(a) and New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (**5th Cir.** 1981), the **Fifth Circuit** confuses these concepts. 999 F.2d 808, 810 n.2, 27 BRBS 103, 104 n.2 (CRT). One should keep in mind that there must be subject matter jurisdiction before the issue of coverage (situs and status) can be addressed, and only after it is determined that there is coverage will the Section 20(a) presumption come into play. Since the case law often uses the term “jurisdiction” to mean “coverage,” as a matter of policy, these terms will be used interchangeably and subject matter jurisdiction will be referred to as, just that, “subject matter jurisdiction.”]**

1.3

NO SECTION 20(a) PRESUMPTION OF COVERAGE

There is no presumption of coverage under the LHWCA. With rare exception, Dorn v. Safeway Stores, Inc., 18 BRBS 178 (1986), the Board has held consistently that the Section 20(a) presumption (a presumption of causation -- see Topic 20, *infra*) does not apply to coverage under the LHWCA. Sedmak v. Perini N. River Assocs., 9 BRBS 378 (1978), *aff'd sub nom. Fusco v. Perini N. River Assocs.*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). The Board derived its position from Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), wherein the **Second Circuit** stated that the Section 20(a) presumption is inapplicable to “an interpretive question of general import such as ... [coverage under Section 3(a)].” 544 F.2d at 48. Accord Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); George v. Lucas Marine Construction, 28 BRBS 230, 233 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (Table); Davis v. Doran Co. of California, 20 BRBS 121 (1987), *aff'd, mem.*, 865 F.2d 1257 (4th Cir. 1989); Boughman v. Boise Cascade Corp., 14 BRBS 173 (1981); Coyne v. Refined Sugars, Inc., 28 BRBS 372 (1994); 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); Watkins v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 01-0538)(March 5, 2002); Morrissey v. Kiewit-Atkinson-Kenny, ___ BRBS ___ (BRB No. 01-0465) (February 8, 2002).

However, the circuit courts appear split on this issue. See Topic 20.6.2 “Section 20(a) Does Not Apply–Jurisdiction,” for a complete discussion of this issue noting the respective positions of the circuit courts as well as that of the United States Supreme Court.

1.4 LHWCA v. JONES ACT

1.4.1 Generally

Although there are several federally-based, maritime-oriented, personal injury remedies for recovery (i.e., general maritime common law, unseaworthiness doctrine, the Death on the High Seas Act, 46 U.S.C. §§ 761, Admiralty Extension Act of 1948, 46 U.S.C. §740, *et. seq.*), the LHWCA and the Jones Act, 46 U.S.C. § 688, are the most prominent and account for the overwhelming number of claims. See generally *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962) (admiralty jurisdiction as applicable to LHWCA); *Interlake Steamship Co. v. Nielson*, 338 F.2d 879 (6th Cir. 1964); *Gilmore and Black, The Law of Admiralty*, (1975), Chapter 6, “Rights of a Seamen and Maritime Workers; Recovery for Death and Injury,” sec. 6-5 n.12 p. 253.

Importantly, these two acts are mutually exclusive. Thus, when dealing with a “water-based” (as opposed to “land-based”) LHWCA claim, it must be determined if the claim falls within the criteria of LHWCA coverage, or belongs more properly under the Jones Act.

[ED. NOTE: *There is always the possibility that the claim belongs under neither jurisdiction and should be decided under a state workers’ compensation act. See, e.g., Brockington v. Certified Elec.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (land-based electrician injured while riding in boat in which he had helped to load supplies and equipment for a land-based job on an island did not have status under the LHWCA; there was nothing inherently maritime about his tasks as an electrician and the “marine environment” in which he was injured had no connection to the general nature of his employment). *See Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1129 n.9 (5th Cir. 1991); *Bienvenu v. Texaco, Inc.*, 124 F.3d 692 (5th Cir. 1997) (“we again repair to our troubled efforts to define maritime employment.”), *rehearing en banc* at 164 F.3d 901 (*Held: Workman who is aboard vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under LHWCA) specifically overruling Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994)(*Had Held that the transiently/fortuitously over water issue was already covered in Fontenot and that there is coverage for workers who are transiently or fortuitously over water*). For a thorough discussion on coverage when an employee is injured over water *see* Topic 1.6.1, *infra*.]

[ED. NOTE: *The Fifth Circuit, en banc, in Bienvenu went out of its way to overrule Randall. The en banc court continued to find that there was coverage for Bienvenu and held that his work on production equipment on-board a vessel was a sufficient amount of work time on navigable waters to trigger LHWCA coverage for injuries sustained on navigable water. Thus, had it chosen, the court could have avoided addressing Randall.*]

The Jones Act, in pertinent part, reads as follows:

Any **seaman** who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the **right of trial by jury**, ... and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury. ... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688 (emphasis added).

Admiralty jurisdiction and the coverage of the Jones Act depends only on a finding that the injured was “an employee of the vessel, engaged in the course of his employment” at the time of his injury. The fact that a Jones Act petitioner’s injury occurred on land is not material. 46 U.S.C.A. § 740; Senko v. La Crosse Dredging Corp., 352 U.S. 370, 373 (1957). See also Swanson v. Marra Bros., Inc., 328 U.S. 1, 4 (1946).

The Jones Act was passed in 1920; the LHWCA was enacted in 1927 providing recovery for injury to a broad range of land-based maritime workers (only injured over water when originally enacted), but explicitly excluding from its coverage a master or member of a crew of any vessel.

The LHWCA, in pertinent part, reads as follows:

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 terms does not include--(g) a master or member of a crew of any vessel;

33 U.S.C. § 902(3).

The Jones Act does not define “seaman” just as the LHWCA does not define “master or member of a crew.” It must also be kept in mind that the **United States Supreme Court** has held that the LHWCA restricts the benefits of the Jones Act to “members of the crew of a vessel.” Senko, 352 U.S. at 371 (citing Swanson, 328 U.S. 1).

[ED. NOTE: The Fair Labor Standards Act, 29 U.S.C. § 201 et. Seq., also does not define “seaman” although its jurisprudential definition is narrower than that used in the Jones Act.]

The LHWCA and the Jones Act in theory are mutually exclusive, so that a “seaman” under the Jones Act is the same as a “master or member of a crew” of any vessel. McDermott Int’l v. Wilander, 498 U.S. 337, 26 BRBS 75 (CRT) (1991); Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988); see also Smith v. Alter Barge Line, Inc., 30 BRBS 87 (1996) (citing Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991)) (“The terms “member of a crew” under the LHWCA and “seaman” under the Jones Act are synonymous.”).

However, from a practical view the limits may not always appear so black and white. See, e.g., Simms v. Valley Line Co., 709 F.2d 409 (5th Cir. 1983) where the **Fifth Circuit** stated:

Well recognized are the difficulties faced by injured maritime workers arguably both seaman and harbor workers who must choose whether by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the [Longshore] Compensation Act, which for present purposes applies to all **but** seaman, and the Jones Act, which applies **only** to seaman, but which seem in practice to frequently overlap each other’s borders:

Thus, despite our continued insistence that a Jones Act “seaman” and a “crew member” excluded from the Longshoreman’s Act are one and the same (in other words that the statutes are mutually exclusive) we recognize that in a practical sense, a “zone of uncertainty” inevitably connects the two Acts.

Simms, 709 F.2d at 411-12.

*[ED. NOTE: Interestingly, in Simms, the claimant had filed a petition seeking review of an Order of the Board dismissing him as a party from an administrative appeal seeking a determination that the maritime worker was not a seaman. (The employer’s worker’s comp carrier had appealed the determination of non-seaman status.) Simms had a Jones Act claim pending and did not want to jeopardize his possible determination of seaman status. The **Fifth Circuit** noted his **theory of appealable adverse effects** arising out of the unique relationship of the Jones Act and the LHWCA but held that there had not yet been a **final** Board determination of non-seaman status.]*

*[ED. NOTE: For the period 1927-1946, the **Supreme Court** did not recognize the mutual exclusivity of the LHWCA and the Jones Act. Swanson, 328 U.S. 1.]*

“**Master or member of a crew**” is a refinement of the term “**seaman**” in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Wilander, 498 U.S. 337; White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984). Thus, the key requirement for Jones Act coverage (seaman status) is indirectly defined by elimination under LHWCA jurisprudence and, vice versa; the key requirement for LHWCA status is the elimination of seaman status (providing of course, the worker is a maritime employee).

Thus, there is an ever present tension between the LHWCA and the Jones Act. The Jones Act is a maritime negligence statute that gives seamen a right of recovery against a ship or employer. The LHWCA, on the other hand, covers “maritime workers” but excludes members of the crew of a vessel as noted above. The LHWCA fact-finder is the administrative law judge. Recall, that the LHWCA is to be liberally construed with a presumption of coverage.

There is also jurisprudence noting that the Jones Act is to be liberally construed as well. See Offshore Co. v. Robison, 266 F.2d 769, 773-774, 1954 AMC 2049, 2054 (5th Cir. 1959); Wilson v. Crowley Maritime, 22 BRBS 459, 460, 462 n. 3 (1989) (Jones Act, like the LHWCA is to be liberally construed in the claimant’s favor); Cf. Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc) (reversing prior longstanding circuit law, held: (1) seamen in Jones Act negligence cases are bound to a standard of ordinary prudence in the exercise of care for their own safety, not to a lesser duty of slight care; (2) Jones Act employers are not held to a higher standard of care than that required under ordinary negligence); Smith v. Tow Boat Serv. & Management, Inc., 66 F.3d 336 (9th Cir. 1995) (Unpublished) (rejecting “slight care” standard); Karvelis v. Constellation Lines, S.A., 806 F.2d 49, 52-53 n. 2 (2d Cir. 1986), cert. denied, 481 U.S. 1015 (1987) (approving jury instruction informing that both employer and employee, under the Jones Act, are charged with a duty of reasonable care under the circumstances); Robert Force, “Allocation of Risk and Standard of Care Under the Jones Act: ‘Slight Negligence,’ ‘Slight Care’?”, 25 J.Mar.L.& Comm. 1, 31 (1994). Under the Jones Act, a plaintiff making use of the “saving to suitors” clause, 28 U.S.C.A. § 1333, usually requests a jury trial in federal district court. Thus, under the Jones Act, a jury is generally the finder of fact and the issue of seaman status is a mixed question of law and fact. Robison, supra.

[ED. NOTE: Article III, § 2 of the United States Constitution extends the judicial power of the United States to “all cases of admiralty and maritime jurisdiction.” The Judiciary Act of 1789, revised at 28 U.S.C.A. §1333, gave exclusive admiralty jurisdiction to the federal district courts, “saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it.” This clause is the means by which a plaintiff in a Jones Act claim has the right to request a jury trial. For a thorough discussion of the “saving to suitors” clause, see Gilmore and Black, The Law of Admiralty, 2d Ed. (1975).]

From a practical standpoint, since the Jones Act and LHWCA focus on a worker’s employment/duties from two separate viewpoints, the outcome of a case/claim may, to some extent, depend on the forum in which it is adjudicated. But note Figueroa v. Campbell Industries, 45 F.3d 311 (9th Cir. 1995) and see infra. There will be occasions when, had the worker instituted an LHWCA claim, an administrative law judge might have found coverage under the LHWCA, but had the same worker, with the same factual situation, instituted a Jones Act claim, a federal district court jury might have found Jones Act coverage and there would not be a Judgment Not On Verdict (JNOV).

[ED. NOTE: For an example of what the Fifth Circuit has described as “a classic instance of the case that could have gone either way,” see Abshire v. Seacoast Products, 668 F.2d 832 (5th Cir.

1982). *See* however the **Ninth Circuit** where the litigation under the LHWCA and Jones Act went both ways. Ramos v. Universal Dredging Corp., 15 BRBS 140 (1982), *remanded from*, 653 F.2d 1353 (**9th Cir.** 1981) (employer could waive situs and status arguments because it only presented issues of “personal coverage”- not subject matter jurisdiction), *rev’g* 10 BRBS 368, 372 (§§2(3) and 3(a) presented issues of subject matter jurisdiction that could not be waived by either party). *Compare to* Ramos v. Universal Dredging Corp., 547 F.Supp. 661 (**D. Ha.** 1982)(claimant was a seaman as a matter of law); *see also* the recent **Third Circuit** decision where the claimant was originally awarded LHWCA benefits and then secured a jury verdict for damages under the Jones Act and general maritime law. On appeal the **Third Circuit** held that the **employee’s specific activity at the time of his or her injury is not dispositive of seaman status**. The court held, however, that the inquiry should be limited to the employee’s basic job assignment at the time of the injury. Shade v. Great Lakes Dredge & Dock Co., 154 F.3d 143 (**3d. Cir.** 1998).

And, in fact, at least under present Ninth Circuit case law the LHWCA and Jones Act seem to coexist. Figueroa v. Campbell Industries, 45 F.3d 311 (**9th Cir.** 1995). *See also* Topic 1.4.6 for a discussion on this.]

In McDermott, Inc. v. Boudreaux, 679 F.2d 452, 459 (**5th Cir.** 1982), the **Fifth Circuit** stated:

Thus, despite our continued insistence that a Jones Act “seaman” and a “crew member” excluded from the Longshoreman’s Act are one and the same (in other words that the statutes are mutually exclusive) we recognize that in a practical sense, a “**zone of uncertainty**” inevitably connects the two Acts. Confronted by conflicting evidence concerning a worker’s duties or undisputed evidence concerning an occupation that exhibits the characteristics of both traditional land and sea duties, a fact finder might be able to draw reasonable inferences to justify coverage under **either** statute. (emphasis added).

The **Fifth Circuit** in McDermott, however, went on to note that:

Even the ambiguous employee must elect a remedy, however. Section 5 of the Longshoremen’s Act, 33 U.S.C. § 905, provides that the employer’s liability under the Act is an exclusive remedy. Thus, we have held that the Longshoremen’s Act and the Jones Act are “mutually exclusive,” Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273, 274 (**5th Cir.** 1966), and that establishment of an employer’s liability under the Longshoremen’s Act “effectively abrogates any independent tort liability of the employer to its employees....” Ocean Drilling & Exploration Co. v. Berry Brothers Oilfield Service, Inc., 377 F.2d 511, 514 (**5th Cir.** 1967), *cert. denied*, 389 U.S. 849 (1967).

679 F.2d at 459 n.7.

In Simms, 709 F.2d at 411, the **Fifth Circuit** observed:

...The recognition by this circuit that the Jones Act and the Longshoreman's Act each requires a "liberal application in favor of claimant to effect its purposes," McDermott, supra, 679 F.2d at 458, has further contributed to the zone of uncertainty and to the dilemma of injured workers within it. They, in reaping the rewards of such liberality, may find as Simms asserts is true here, that a formal victory as a harbor worker serves as a practical defect of what is perceived as the greater seaman's remedy, if prevailing under the Compensation Act indeed effectively precludes a subsequent opportunity for relief under the Jones Act. See G. Gilmore & Black, The Law of Admiralty 434-36 (2d ed. 1975)); 4 A. Larson, Workmen's Compensation Law § 90.51 (1983); 1 A Benedict on Admiralty § 23 (1982); 1 M. Norris, the Law of Maritime Personal Injuries §§ 8-11 (3d ed. 1975).

While the mere acceptance of Compensation Act benefits without a formal adjudication of seaman status will not preclude a subsequent Jones Act suit, the extent to which collateral estoppel and res judicata will be applied to a Jones Act suit following a formal Board finding of non-seaman status and an award of benefits appears to be a matter of first impression in this circuit (and one about which the commentators suggest there is uncertainty).

709 F.2d 409, 411-12 (footnotes omitted).

An unsuccessful plaintiff in a Jones Act case (i.e., where there is a finding of no actual Jones Act status) may still be able to bring a claim under the LHWCA since the period for filing a claim is tolled by the filing of the Jones Act claim. 33 U.S.C.A. 913(d). See also Young & Co. v. Shea, 397 F.2d 185 (**5th Cir.** 1968) (no collateral estoppel in compensation act proceedings following jury findings of no injury in Jones Act suit).

The **Fifth Circuit** has held that where an administrative law judge issues a compensation order under the LHWCA ratifying a settlement agreement, a "formal award" is deemed to have been made and the injured party can no longer bring a Jones Act suit for the same injuries. Sharp v. Johnson Bros. Corp., 973 F.2d 423, 26 BRBS 59 (CRT) (**5th Cir.** 1992), cert. denied, 508 U.S. 907 (1993). The court reasoned that once a final, formal award is made, the parties are no longer free to seek another mutually exclusive remedy.

In the **Fifth Circuit** the entry of an order by the administrative law judge constituted a finding that the injuries were compensable under the LHWCA. By seeking and acquiescing to the

finding, the plaintiff under the Jones Act case is collaterally estopped from contesting LHWCA coverage. *Id.*; *Fontenot*, 923 F.2d at 1133 (“...a finding of LHWCA coverage sought and obtained by the injured worker from the Department should preclude any subsequent action against his employer for the same injury.”).

[ED. NOTE: See also Topic 1.4.6, infra, Jurisdictional Estoppel, which includes a discussion of the Ninth Circuit position.]

In *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), overruled by *McDermott International v. Wilander*, 498 U.S. 377 (1991), an LHWCA case, the Court held that Congress had given to the deputy commissioner (district director), an administrative officer, the authority to determine who is a “member of a crew” under the LHWCA. If there was evidence to support the deputy commissioner’s findings, they were conclusive. *Id.* In *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), overruled by *McDermott International v. Wilander*, 498 U.S. 377 (1991), the Supreme Court applied the same rule to findings by the jury in Jones Act cases. 352 U.S. at 374 (“A jury’s decision is final if it has a reasonable basis.”).

The Court in *Wilander* stated that it was not asked to reconsider this rule, but noted that the question of who is a “member of a crew” and therefore who is a “seaman” is better characterized as a mixed question of law and fact. When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard.

Significantly, the Court in *Wilander* summed up the LHWCA/Jones Act clash as follows:

It is for the court to define the statutory standard. “Member of a crew” and “seaman” are statutory terms; their interpretation is a question of law. The jury finds the facts and, in these cases, applies the legal standard, but the court must not abdicate its duty to determine if there is a reasonable basis to support the jury’s conclusion. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a “member of a crew,” it is a question for the jury. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986). In many cases, this will be true.

Wilander, 498 U.S. at 356.

The inquiry into seaman status is of necessity fact-specific; it will depend on the nature of the vessel, and the employee’s precise relation to it. See *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190 (1952) (“The many cases turning upon the question whether an individual was a ‘seaman’ demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury.”). Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion. *Anderson*, 477 U.S. at 248, 250-51; *Texas Co. v. Gianfala*, 222 F.2d 382, *rev’d per curiam*, 350 U.S. 879 (1955);

Texas Co. v. Savoie, 240 F.2d 674 (**5th Cir.** 1957); See also Abshire v. Seacoast Products, Inc., 668 F.2d 832 (**5th Cir.** 1982) (issue of seaman status under Jones Act is to be left to jury even when claim to seaman status appears to be relatively marginal one; “only rarely may a district judge conclude as a matter of law that an injured individual is not a seaman.”); Barrios v. Louisiana Const. Materials Co., 465 F.2d 1157 (**5th Cir.** 1972), citing Senko v. La Cross Dredging Corp., 352 U.S. 370 (1957); rehearing denied 353 U.S. 931; and Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958); Producers Drilling Co. v. Gray, 361 F.2d 432 (**5th Cir.** 1966) (under same circumstances workers are seaman as a matter of law); Soucie v. Trautwein Bros., 275 Cal. App. 2d. 20, 25-26 (**Cal. Ct. App.** 1969) (court held bargehand may be summarily adjudged “seaman” as a matter of law); Longmire v. Sea Drilling Co., 610 F.2d 1342 (**5th Cir.** 1980); Hansen v. Caldwell Diving Co., 33 B.R.B.S.129 (1999) (affirming ALJ’s determination that commercial diver for Caldwell was a member of the crew because claimant performed work aboard a specific barge that was substantial in nature and duration and was essential to completion of the barges mission despite the fact that the claimant did not live on board or assist in navigation); See also Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (**3d Cir.** 1998)(commercial diver hired for 10 days to work on a crane barge used for construction of an artificial reef is covered by the Jones Act since he has a substantial connection to the vessel and his work is necessary for the successful completion of the vessel’s mission; additionally he is exposed to the perils of the sea.)

However summary judgements on the issue of seaman status:

depend largely on the facts of a particular case, or as stated, or the totality of circumstances. It would be the rare factual situation where the question could be resolved as a matter of law. The **Second Circuit** put it well in Hawn v. American S.S. Co., 107 F.2d 999 (**2d Cir.** 1939):

It is impossible to define the phrase, “member of a crew,” in general terms; the words are colloquial and their fringe will always be somewhat ragged. Perhaps the best hope is that, as the successive variants appear, they will finally serve rudely to fix the borders.”

Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273, 275 (**5th Cir.** 1966).

More recently the **Supreme Court** espoused:

The seaman injury is a mixed question of law and fact, and it often will be inappropriate to take the question from the jury. Nevertheless, “summery judgement or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion.”

Harbor Tug and Barge Co. V. Papai, 320 U.S. 548 (1997), citing McDermott International, Inc. v. Wilander, 498 U.S. 337, 356 (1991) and Chandris, Inc. v. Latsis, 515 U.S. 347, 368-369.

The situation is complicated by the fact that an OALJ case is never routed through the federal district court during its appeal process. (The appeal process is as follows: Office of Administrative Law Judges to the Benefits Review Board to the appropriate circuit court to the U.S. Supreme Court.) As noted in McDermott, Inc. v. Boudreau, 679 F.2d 452 (5th Cir. 1982), this creates a “zone of uncertainty”. See, e.g., Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991).

[ED. NOTE: For a well-researched historical treatment of the tension between administrative tribunals (district director/administrative law judge) and the federal courts, see Thorne, “The Impact of the Longshore and Harbor Workers’ Compensation Act on Third Party Litigation,” Tulane University School of Law Admiralty Law Institute (1993), 68 Tul. L. Rev. 557 (1993).]

At least one commentator, Thorne, *supra*, acknowledges that a final finding of non-seaman status by an administrative law judge may bar a Jones Act suit. (Credit, in part, for this deference is attributed to the emergence of independent administrative law judges.) See Sharp v. Johnson Bros. Corp., 973 F.2d 423 (5th Cir. 1992), cert. denied, 508 U.S. 907 (1993); Fontenot v. AWI, Inc., 923 F.2d 1127, 1132 (5th Cir. 1991); Richendollar v. Diamond M Drilling Co., 784 F.2d 580, 582 n. 1 (5th Cir. 1986), aff’d in part and rev’d in part, on recon. en banc, 819 F.2d 124, cert. denied, 484 U.S. 944 (1987); Simms v. Valley Line Co., 709 F.2d 409 (5th Cir. 1983); Hagens v. United Fruit Co., 135 F.2d 842 (2d Cir. 1943). See also Harmon v. Baltimore & Ohio R.R., 560 F. Supp. 914 (D. D.C. 1983), aff’d, 741 F.2d 1398 (D.C. Cir. 1984). Cf. Vilanova v. United States, 851 F.2d 1, 4 (1st Cir. 1988), cert. denied, 488 U.S. 1016 (1989); Grijalva v. United States, 781 F.2d 472 (5th Cir. 1986), cert. denied, 479 U.S. 822 (1986).

[ED NOTE: From a practical standpoint, an injured worker may now think twice before choosing to pursue a Jones Act claim in lieu of a LHWCA claim. See Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc) (reversing prior longstanding circuit law, held (1) seaman in Jones Act negligence cases are bound to a standard of ordinary prudence in the exercise of care for their own safety, not to a lesser duty of slight care; (2) Jones Act employers are not held to a higher standard of care than that required under ordinary negligence); See also Smith v. Tow Boat Serv. & Management, Inc., 66 F.3d 336 (9th Cir. 1995) (Unpublished) (rejecting “slight care” standard); Karvelis v. Constellation Lines, S.A., 806 F.2d 49, 52-53 n.2 (2d Cir. 1986), cert. denied 481 U.S. 1015 (1987) (approving jury instruction informing that both employer and employee under Jones Act are charged with duty of reasonable care under the circumstances).

Gautreaux concluded that “[t]he reasonable person standard under the Jones Act becomes one of the reasonable seaman in like circumstances. To hold otherwise would unjustly reward unreasonable conduct and would fault seaman only for their gross negligence, which was not the contemplation of Congress.” See Robert Force, “Allocation of Risk and Standard of Care Under the Jones Act: ‘Slight Negligence,’ ‘Slight Care’?”, 25 J.Mar.L. &Comm. 1, 31 (1994). Thus, a worker preferring the security of workers compensation will file under the LHWCA coverage rather than gamble on a Jones Act claim where a finding of unreasonableness on the part of the maritime worker could deny him coverage.]

1.4.2 Master/member of the Crew (seaman)

In order to determine whether an employee is excluded under the LHWCA as a “member of a crew,” this term of art must itself be examined.

The terms “member of a crew” under the LHWCA and “seaman” under the Jones Act are synonymous. Smith v. Alter Barge Line, Inc., 30 BRBS 87 (1996) (citing Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991)). The LHWCA and the Jones Act in theory are mutually exclusive, so that a “seaman” under the Jones Act is the same as a “master or member of a crew” of any vessel. McDermott Int’l v. Wilander, 498 U.S. 337, 26 BRBS 75 (CRT) (1991); Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059 (1988).

In Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), the **United States Supreme Court** recently revised the test for determining whether an employee is a member of the crew (seaman). The new test is a refinement of the land-based/sea-based dichotomy of workers noted by the **Court** in McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991). The new test states that in order to be classified as a seaman, the following criteria must be met:

- (1) A worker’s duties must **contribute to the function of the vessel or to the accomplishment of its mission; and**
- (2) A seaman must have a connection to a **vessel in navigation** (or to an identifiable group of such vessels) that is **substantial** in terms of **both** its duration and its nature.

*[ED. NOTE: Naturally subsumed within this test is the requirement that there must be a “vessel”. For a definition of “vessel” see Topic 1.4.3, infra. Also, note that in Papai the **Court** has now defined what an “identifiable group of vessels” or “fleet” actually is. See infra at Topic 1.4.3]*

A variation of this test was first developed by the **Fifth Circuit** in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959), and refined in McDermott, 679 F.2d 452. In Wilander, the **Supreme Court** adopted this test as defined in McDermott, and recently, and most significantly, this test was revised by the **Court** in Chandris.

In Wilander, the **United States Supreme Court** addressed the type of activities that a seaman must perform and held that under the Jones Act, a seaman’s job need not be limited to transportation related functions that directly aid in the vessels navigation as required by the Seventh Circuit. See Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984). The **Court** determined that, although “it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel,...a seaman must be doing the ship’s work.” Wilander, 498 U.S. at 355. The **Court** concluded that under both the Jones Act and general maritime law “all those with that ‘peculiar

relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform." Id. at 354.

Specifically, the Wilander Court stated:

We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's **connection to a vessel in navigation**. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. ... It is not the employee's particular job that is determinative, but the **employee's connection to a vessel**.

498 U.S. at 354 (emphasis added).

In Chandris, the **Court** clarified what **employment-related connection to a vessel in navigation** is necessary for a maritime worker to qualify as a seaman under the Jones Act. The Chandris Court determined what relationship a worker must have to the vessel in navigation regardless of the specific tasks the worker undertakes, in order to obtain seaman status.

The Chandris Court articulated **two basic principles of seaman status**:

(1) "'seamen do not include land-based workers'" 515 U.S. at 358 (quoting Wilander, 498 U.S. at 348); and (2) "Jones Act coverage...depends 'not on the place where the injury is inflicted...but on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters.'" Id. (quoting Swanson v. Marra Bros., 328 U.S. 1, 4 (1946)). Further, the Chandris Court acknowledged that cases under the LHWCA "recognize the converse: land-based maritime workers injured while on a vessel in navigation remain covered by the LHWCA." Id. at 2186. The **Court** added: "A maritime worker does not become a 'member of a crew' as soon as the vessel leaves the dock." Id.

Thus, the **Court**, in Chandris, developed a status-based standard, that although it determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury, nevertheless best furthers the Jones Act's remedial goals. As set out above, to qualify as a seaman under the Jones Act (and therefore be excluded under the LHWCA), the worker's duties must **contribute to the function of the vessel or to the accomplishment of its mission**, and the worker must have a **connection to a vessel in navigation** (or an identifiable group of vessels) that

is **substantial** in **both** duration and nature. 515 U.S. 347. Thus, the employment connected to a vessel in navigation must be substantial both in terms of the nature of the work done and in terms of duration for there to be seaman status.

Importantly for LHWCA purposes, the Chandris Court noted the **Fifth Circuit's** “**temporal gloss**” of Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (**5th Cir.** 1986) (en banc), wherein a worker whose regular duties require him to divide his time between vessel and land, had to have his crew status determined in the context of his entire employment with his current employer. Citing the **rule of thumb** used by the **Fifth Circuit** in ordinary cases, the **United States Supreme Court** stated: “a worker who spends less than about **30 percent** of his time in the service of a vessel in navigation” is not performing a substantial portion of work “on board” and the worker is not a crew member. 515 U.S. at 372; see Barrett, 781 F.2d at 1075; see also id. at 1077 (Rubin, J., dissenting). In Roberts v. Cardinal Services, Inc., 266 F.3d 36, (**5th Cir.** 2001) the **Fifth Circuit** re-affirmed its position that a worker who spends less than about 30 percent of his time in the service of a vessel, in navigation, should not qualify as a seaman under the Jones Act. See also Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340 (**5th Cir.** 1999).

However, the **Court** cautioned that “seaman status is not merely a temporal concept” but rather is one element to be considered. Chandris, 515 U.S. at 370. The **Ninth Circuit** has noted that “the duration of time aboard a vessel is not enough, standing alone, to determine status as a seaman under the Jones Act.” Boy Scouts of America v. Graham, 76 F.3d 1045 (**9th Cir.** 1996); See also Heise v. Fishing Co. Of Alaska, Inc., 79 F.3d 903 (**9th Cir.** 1996) for a **Ninth Circuit** application of the Chandris formula. See also O’Hara v. Weeks Marine, Inc. 928 F.Supp. 257 (**E.D.N.Y.** 1996) for an application of Chandris by a district court in the **First Circuit**. The Chandris Court declared that “[t]he ultimate inquiry is whether the worker in question is a member of the vessel’s crew or simply a land-based employee who happens to be working on the vessel at a given time.” 515 U.S. at 370.

In Wilson v. Crowley Maritime, 30 BRBS 199 (1996), the Board followed Chandris in holding that although a claimant spent 75% of his time aboard employer’s barges, as a “**cargo operations manager**,” claimant was not a seaman since most of his duties consisted of preparing for and supervising the loading of employer’s dock-tied barges and claimant’s duties upon completion of this task. Thus, the Board found that claimant’s duties with employer were those traditionally associated with longshore work. Moreover, claimant was a land-based employee in that he lived on shore, had a shore-based office, and except for a few occasions, in emergency situations, never went to sea with the barges.

See also Smith v. Alter Barge Line, Inc., 30 BRBS 87 (1996) (decendent who worked as a welder repairing barges and as a mate trainee/deckhand on tugboat was covered under LHWCA because most of his work was as a welder).

The **United States Supreme Court** also rejected the “**voyage test**” (anyone working on board a vessel for the duration of a “voyage” in furtherance of the vessel’s mission has the necessary

employment-related connection to qualify as a seaman). The voyage test would have allowed the worker's activities at the time of the injury to be controlling. This voyage test relied on previous **Court** statements that the Jones Act was designed to protect maritime workers who are exposed to the "special hazards" and "particular perils" characteristics of work on vessels at sea. 515 U.S. at 370. ("Seaman status is not coextensive with seaman's risks." *Id.*) In McCaskie v. Aalborg Ciseru Norfolk, Inc., 34 BRBS 9 (2000), the Board affirmed an ALJ's determination that the claimant did not have a connection to the vessel that was substantial in duration and nature and that the claimant was therefore a land based worker entitled to coverage under the LHWCA. In reaching its conclusion the Board relied on the notion that the Supreme Court has rejected the idea that an employee becomes a seaman merely because he is assigned to the vessel for the duration of its voyage. Moreover, the Board agreed with the ALJ that the claimant was not usually an employee of the vessel, but a land based worker placed on the vessel for the duration of specific job.

Chandris approved the "**fleet seaman doctrine**" under which a worker who works on several vessels is a seaman only if he works on a fleet of vessels under common control. See, e.g., Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1995 AMC 352 (**3d Cir.** 1994); Vowell v. G & H Towing Co., 870 F.Supp. 162 (**S.D.Tex.** 1994); Harbor Tug and Barge Co. v. Papai, 520 U.S. 548 (1997) (refined fleet doctrine). Prior employments with independent employers can not be considered in making the seaman status inquiry since that would undermine "the interest of employers and maritime workers alike in being able to predict who will be covered by the Jones Act...before a particular work day begins." Papai, supra. The **Court** went on to state that there would be no principled basis for limiting which prior employments are considered for determining seaman status. **It does not matter that all of the worker's employment was through the same hiring hall or that the union agreement classified claimant as a deckhand.** For more on fleeting doctrine, see Topic 1.4.3, infra.

In Anders v. Ormet Corp., 874 F.Supp. 738 (**M.D.La.** 1994), a worker who accepted compensation benefits after an ALJ found him not to be a seaman was collaterally estopped from claiming seaman status. But see Figueroa v. Campbell Indus., 45 F.3d 311 (**9th Cir.** 1995) (example of dual coverage where court found that while the LHWCA is the exclusive remedy for a covered "employee," "employee" does not include "crew member/master," and therefore employee was allowed to recover both LHWCA benefits and pain/suffering under the Jones Act because a substantial portion of employment occurred on the tug).

In Foster v. Davison Sand & Gravel Co., 31 BRBS 191 (1997), the Board held that an employer was not estopped from contesting whether a claim arose within the jurisdiction of the LHWCA even though it had voluntarily made payments for a number of years. Specifically, the Board stated that "employer's payments may be not be viewed as a stipulation of coverage as the parties may not stipulate to coverage under the Act." The claimant had worked as a welder on a vessel, and he argued that because the vessel was docked during the entirety of his employment, his claim was covered under the LHWCA. The Board, however, upheld the ALJ's finding that the claimant was a seaman and, therefore, his claim was covered by the Jones Act. Citing Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 37 (**3d Cir.** 1975), in whose jurisdiction this claim

arose, the Board concluded that “the fact that the dredge was docked at the time of the injury, and for the duration of claimant’s employment, does not preclude a finding that claimant was a ‘member of a crew.’” In support of its holding, the Board noted that the claimant “was permanently and exclusively assigned to the vessel” and his duties as a welder “were to continue after the vessel returned to the middle of the river in the spring.”

Similarly, in In re Endeavor Marine Inc., 234 F.3d 287 (5th Cir. 2000), the **Fifth Circuit** found that a crane operator injured aboard a vessel in the Mississippi River, who had spent almost all of his time working on the vessel in the eighteen months prior to his accident, contributed to the function and mission of the “vessel in navigation” and was a seaman. The **Fifth Circuit** held that the Supreme Court’s decision in Papai did not require that a claimant go to sea, but stated only that it was “helpful” in determining whether he has the requisite connection to the vessel. The Supreme Court had begun developing this position earlier. For purposes of coverage under the Jones Act, a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside, and is “in navigation,” although moored to a dock, if it remains in readiness for another voyage. Chandris, 515 U.S. at 374. In an even earlier case, Senko v. La Cross Dredging Corp., 352 U.S. 370 (1957), the Supreme Court held that the fact that a worker’s injury occurred on land is not material as “coverage of the Jones Act depends only on a finding that the injured was ‘an employee of the vessel, engaged in the course of his employment’ at the time of his injury,” and stated that “there can be no doubt that a member of [the vessel’s] crew would be covered by the Jones Act...even though the ship was never in transit during [the] employment.” The Senko Court concluded that “the duties of a man during a vessel’s travel are relevant in determining whether he is a ‘member of a crew’ while the vessel is anchored.” Senko, 352 U.S. at 372.

In Foster v. Davison Sand & Gravel Co., 31 BRBS 191 (1997), the Board upheld the ALJ’s finding that a dredge that was “**wintered over**” at the time of the claimant’s injury was still “in navigation” during this period, as it was capable of sailing again in the spring.

1.4.3 Vessel

[ED. NOTE: While there must be a determination that there is a “vessel” for purposes of the Jones Act (and therefore, the exclusion of the right to benefit under the LHWCA), the lack of vessel status does not necessarily preclude LHWCA coverage.]

As defined by Congress, a “vessel” is “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3. See also 46 U.S.C. § 801. Obviously, this is a very broad definition. In fact, under a literal interpretation, any floating structure that could be used for transportation is a vessel. See John T. Lozier, Comment, 20 Tul.Mar.L.J. 139, 143 (1995). Thus, a barge with no mobility of its own, would fit the description. (See, however, the discussion as to whether a barge’s transportation function is primary or has become incidental to its use as a work platform, infra.)

Congress may have attempted to narrow the definition of “vessel” in the Shipping Act of 1916, where “vessel” is defined as “all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or capable of being or are intended to be used as a means of transportation on water.” 46 U.S.C. §§ 801 (1988). Unfortunately, this definition only adds to the variety of other ambiguous definitions.

The statutory definition of vessel that applies to the LHWCA is equally unhelpful. As amended in 1972, Section 2(21) of the LHWCA defines “vessel” as:

any vessel upon which or in connection with any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel’s owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21).

The jurisprudential definition of “vessel” has come to include, but is not limited to ships, barges, drilling barges, jack-up rigs, submersibles, and semi-submersibles. Note, these latter three are **not** fixed platforms, rather they are floating structures, or structures capable of flotation.

[ED. NOTE: Fixed platforms will be addressed infra.]

A **submersible** rig has hulls upon which it floats while being towed to the work site. At the site, the hulls are flooded and “submerged” until they come to rest on the bottom. The drilling deck (sometimes called the **Texas deck**) is built on long steel columns that extend upward from the hulls. Hence, the drilling deck is well above the water. Like jack-up rigs, submersibles are limited to relatively shallow water.

A **jack-up** is constructed so that it floats with its “legs” up when being moved to the work site. Once at the site, the legs are cranked down to the ocean floor. Then the hull is “jacked up” on the same legs allowing the work area to be raised about 50 feet above the water level. Jack-up rigs are limited to drilling in water depths of up to 350 feet.

A **drill barge** or **drill ship** is a barge with a drilling derrick that is towed to location and anchored in place. It is essentially shaped like any ocean-going ship. However, drilling equipment (and other modifications) make a drill ship distinctive. Drill ships are the most mobile of rigs and are often used to drill discover, or wildcat, wells in deep, remote offshore waters.

A **semi-submersible** is similar to a submersible in that it has two hulls upon which the rig floats as it is being towed to the work site. As semi-submersible is a cross between a submersible and a barge. Once at the site, the hulls are designed so that, when flooded, they do not settle on the bottom. Rather, they submerge about 50 feet after which special anchors are lowered to complete the mooring of the rig. In reality, a semi-submersible floats but not on the water’s surface.

A **workover rig bolted onto the deck of a leased barge** was found to be a vessel although it had no motor power and was moved by tugboat. Manuel v. P.A.W. Drilling & Well Service, Inc., 135 F.3d 344 (5th Cir. 1998). The barge did not contain any steering mechanisms, navigational devices, bilge pumps, or crew quarters. In finding that the test for vessel status was satisfied, the **Fifth Circuit** asked what was the purpose for which the craft was constructed and the business in which it was engaged. The court concluded that the structure was assembled for the purpose of transporting the workover rig across navigable waters to plug-in abandoned wells on navigable waters. The workover rig’s actual functions included transporting passengers, cargo, and equipment across navigable waters to service these wells. Although the rig did serve as a work platform when stationed over wellheads, the court stated that this function did not detract from the importance of its transportation function. Furthermore, the court found that the “objective ‘vessel features’” that the workover barge lacked, such as navigational aids, steering mechanisms, and crew quarters, were not determinative, but were “useful guides” and only some of the factors used to decide vessel status.

***JED. NOTE:** For illustrations and a discussion of oil-well drilling, including detailed explanations of the drilling rig and its components, see Ron Baker, A Primer of Oil-Well Drilling, Petroleum Ext. Service: The Univ. of Texas at Austin, 4th ed. 1979.]*

The basic criterion used to establish whether a structure is a vessel is “the **purpose** for which [it] is constructed and the business in which it is engaged.” The Robert W. Parsons, 191 U.S. 17 (1903). “The fact that it floats on the water does not make it a ship or a vessel...” Cope v. Vallette Dry-Dock Co., 119 U.S. 625, 627 (1887). The business or employment of a watercraft is determinative, rather than its size, form, capacity, or means of propulsion. See Cope, 119 U.S. at 629-30. See also, Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990).

While there are occasions when it seems obvious whether a structure is a vessel, see Manuel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998)(“[I]f the owner constructs or

assembles a craft for the purpose of transporting passengers, cargo, or equipment across navigable waters and the craft is engaged in that service, that structure is a vessel.”), there are other times which are not so clear. In Manuel, the **Fifth Circuit** took a common sense approach to the Gremillion test. Whether a structure is principally used to transport passengers, cargo or equipment can often be determined by looking at the structure and its features. Manuel at 350-51 (I.e., certain objective features as navigational aides, a raked bow, lifeboats, etc. logically connote vessel status although the **Fifth Circuit** cautioned against a numerical test). As to the second prong of the Gremillion test, determining the business in which the craft engages, one must evaluate the importance of the craft’s transportation function. Logically, if a significant portion of the structure’s business involves transporting cargo, equipment or passengers, then it is most likely a “vessel.” If, on the other hand, this transportation role is subordinate or incidental to the main purpose, the structure may not be a vessel.

"Fleet of vessels"

Attachment to a **fleet of vessels** may be substituted for attachment to a single vessel. Langston v. Schlumberger Offshore Servs., Inc., 809 F.2d 1192 (**5th Cir.** 1987). Working aboard 15 different vessels owned by 10 different owners, however, does not constitute working on vessels that were part of a "fleet." Id. In Harbor Tug and Barge Co. v. Papai, 520 U.S. 548 (1997), the **United States Supreme Court** narrowed the fleet concept it had developed in Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) (substantial connection or control is an important part of the seaman status test). In Papai, the **Court** further stated that there must be common ownership of the vessels for it to be considered a fleet. The **Court** explained that considering prior employments with independent employers in making the seaman status inquiry would undermine “the interest of employers and maritime workers alike in being able to predict who will be covered by the Jones Act...before a particular work day begins.” 520 U.S. 548 (1997). The **Court** went on to state that there would be no principled basis for limiting which prior employments are considered for determining seaman status. **The use of the same union hiring hall which draws from the same pool of employees is not sufficient.** Neither is a union agreement classifying the worker as a deckhand.

Thus, the **Supreme Court** reversed the **Ninth Circuit**. The **Ninth Circuit** had held that “if the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system.” Papai v. Harbor Tug and Barge Co., 67 F.3d 203, 206 (**9th Cir.** 1995), rev’d 520 U.S. 548 (1997). The **Ninth Circuit** also had held that because the worker had worked for Harbor Tug on twelve occasions during the 2.5 months before the injury, this circumstance “may in itself provide a sufficient connection” to Harbor Tug’s vessels to establish seaman status.

[ED. NOTE: While the United States Supreme Court in Papai could have simply put a gloss on Chandris’ requirement that an employee show “a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and its nature,”

Chandris, 515 U.S. at 368, it chose instead to further differentiate between land-based and sea-based workers by inquiry as to whether the employee's duties take him to sea: "This will give substance to the inquiry both as to the duration and nature and the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees." *Papai*, 520 U.S. 548 (1997). The **Court** could simply have held that there was a "controlling entity" (i.e., that employers who used the hiring hall) in order to have had this employee be successful under the seaman status inquiry. Instead, the **Court** used this case to continue effecting a major realignment of LHWCA (land based)/Jones Act (sea based) maritime law.]

The **Court** held that:

"Since the substantial connection standard is often the determinative element of the seaman inquiry, it must be given workable and practical confines. When the inquiry further turns on whether the employee had a substantial connection to an identifiable group of vessels, common ownership or control is essential for this purpose."

Papai, 520 U.S. 548 (1997).

However a strong dissent by Justice Stevens, with whom Justices Ginsberg and Berger joined, noted that if all of the deckhand's work **had** been preformed by the worker for one towing company, there "would be no doubt about [his] status as a seaman." *Papai*, *supra*. As the dissent stated, "Today, the majority apparently concludes that an employee is not necessarily protected by the Jones Act even if he was injured aboard a vessel in navigation and his work over the proceeding two years was primarily seaman's work." *Id.*

In *Robison*, the **Fifth Circuit** had listed as an alternative requirement of seaman status "substantial work" instead of being permanently assigned to a vessel. *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (**5th Cir.** 1986) (en banc), went a step further, focusing on the duration of an employee's assignment in relation to his entire employment. See also *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (**3d Cir.** 1994); *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (**8th Cir.** 1995); but see *Fisher v. Nichols*, 81 F.3d 319, 323 (**2d Cir.** 1996) (rejecting common ownership or control requirement).

[ED. NOTE: There are possibly two instances ("anchor handlers" and "river pilots") when a maritime worker might not be attached to either a vessel or technically to a fleet of vessels and yet may still have seaman status under the Jones Act. However, **the reader is cautioned** that while *Papai* did not mention "anchor handlers" or "river pilots" the same *Papai* fleet doctrine may, and in the case of pilots, probably does now apply to issues of status involving these types of work. See *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322 (**5th Cir.** 1991), *vacated*, 500 U.S. 949 (1991), *reinstated on recon.*, 947 F.2d 1290 (**5th Cir.** 1991), *cert. denied*, 504 U.S. 931 (1992), discussed *infra*. The result of applying the *Papai* test is not a **per se** exclusion of pilots from Jones Act coverage. Blue water pilots do sleep on their boats for days or weeks at a time, and thus are more likely to be found as passing the seaman's status test. This is differentiated from the brown water

pilots who tend to sleep ashore at night. The facts must be studied closely in order to determine the strength of the connection to the vessel. Thus the following discussion should be viewed cautiously.]

In Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983), cert. denied, 464 U.S. 1069 (1984), **anchor handlers** who spent all of their time aboard vessels "used" by their employer, met the fleet general exception and would be covered under the Jones Act. This case should be noted with care, however, since it is probably limited to its particular fact situation.

Indeed, in St. Romain v. Industrial Fabrication & Repair Service, Inc., 203 F.3d 376 (5th Cir. 2000), the court held that claimant was not a Jones Act seaman because he could not establish that he worked aboard an identifiable fleet of vessels. The claimant, who had been previously compensated under the LHWCA claimed that he was a Jones Act seaman because he worked on a series of vessels used by his employer in plug and abandon work offshore. The court noted that the vessels were not under common ownership or control, but rather were chartered to the various oil companies that hired employer to perform plug and abandon work. The court also held that, despite St. Romain's claim to the contrary, regular exposure to the perils of the sea is not outcome determinative of seaman status.

In Evans v. United Arab Shipping Co., 767 F. Supp. 1284 (D.N.J. 1991), the court found that, based on Wilander, **a river pilot is a Jones Act seaman** because at the time the Jones Act was passed prevailing general maritime law categorized a river pilot as a seaman. The district court concluded that if a plaintiff's position is indispensable to a vessel even though there is no permanency, the permanency can be overlooked if the person is performing an essential navigation function. The district court concentrated on the river pilot's essential navigational function and substitution for the vessel's captain/master.

In Harwood v. Partredereit, 944 F.2d 1187 (4th Cir. 1991), cert. denied, 503 U.S. 907 (1992), however, the **Fourth Circuit found the river pilot not to be a Jones Act seaman**, but rather, covered under the LHWCA. The court found that permanent attachment to a vessel or fleet of vessels was still a requirement under Wilander. The strong and well-written dissent in this case is noteworthy and makes reference to the historic position of the United States Employment Compensation Commission (the federal agency charged with compensation matters when the LHWCA was passed). Pre-1972 amendment jurisprudence held that pilots were not covered by the LHWCA.

In Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir.), vacated, 500 U.S. 949 (1991), reinstated on recon., 947 F.2d 1290, cert. denied, 504 U.S. 931 (1992), the **Fifth Circuit held that a river pilot is not a Jones Act seaman** because he is not permanently attached to a vessel or fleet of vessels. The **United States Supreme Court** vacated and remanded Bach for further consideration in light of Wilander, 500 U.S. 949 (1991) (issue of river pilot raised but not decided). The **Fifth Circuit** on remand **again found that a river pilot is not a seaman** stating: "We did not base our decision on Bach's seaman status on the relationship of his duties to navigation. Indeed,

this issue was never in doubt. Instead, we concluded that Bach was not a seaman because he was not permanently assigned to any particular vessel or fleet of vessels.” 947 F.2d at 1291.

Similarly, in Stoller v. Evergreen, 1993 A.M.C. 258 (N.D. Calif. 1992) (Unpublished), the Northern District of California held that a pilot should **not** be a Jones Act seaman because no employment relationship existed with the vessel.

*[ED. NOTE: Thus, both the **Fourth** and the **Fifth Circuits**, have held that a river pilot is not a Jones Act seaman. Since a river pilot performs his duties on navigable water aiding in navigation and maritime commerce, he should be found to be covered under the LHWCA. Ironically, a river pilot possibly may be entitled to an unseaworthiness remedy under the general maritime law as a "Sieracki Seaman." See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (longshoreman injured while working aboard a ship was classified as a "seaman" and therefore entitled to sue under the unseaworthiness doctrine). This "**Sieracki Seaman**" classification was theoretically supposed to have ended with the enactment of the 1972 amendments to the LHWCA. In return for giving up general maritime law/unseaworthiness remedies for recovery, longshore and harbor workers were to benefit from the landward extension of coverage under the amended LHWCA.]*

In the **Fifth Circuit**, the Sieracki concept (see Ed. Note, supra) is not completely obliterated. See Cormier v. Oceanic Contractors, 696 F.2d 1112 (**5th Cir.**), cert. denied, 464 U.S. 821 (1983); Aparicio v. Swan Lake, 643 F.2d 1109 (**5th Cir.** 1981). Recently, there has been a resurrection of the Sieracki seaman concept in the **Fifth Circuit** with the main focus of its current application upon river pilots and seaman plaintiffs from union hiring halls. See Erik M. Latimer, *The Offshore Oil and Gas Industry: A Jurisdictional Analysis of the Jones Act, Sieracki, and the Longshore and Harbor Workers' Compensation Act*, 1 Am.Mar. L.J. 19, 29 (1999). In Smith v. Harbor Towing & Fleeting Co., 910 F.2d 312 (**5th Cir.** 1990), cert. denied, 499 U.S. 906 (1991), however, the **Fifth Circuit** held that the remedy of unseaworthiness was available only to seamen or members of the crew of a vessel. But see Blancq v. Hapag-Lloyd, 986 F.Supp. 376 (**E.D.La.** 1997); Laakso v. Mitsui & Co. U.S.A., Inc., 1990 A.M.C. 635 (**E.D.La.** 1989) (Unpublished, but still has precedential value under **Fifth Circuit** Local Rules); Clark v. Solomon Navigation, Ltd., 631 F.Supp. 1275 (**S.D.N.Y.** 1986).

The **Third**, **Fourth**, and **Ninth Circuits** have held to the contrary. (Remedy of unseaworthiness is available to non-seamen.) Normile v. Maritime Co. of Philippines, 643 F.2d 1380 (**9th Cir.** 1981); Lynn v. Heyl & Patterson, Inc., 636 F.2d 1209 (**3d Cir.** 1980), United States Lines v. United States, 593 F.2d 570 (**4th Cir.** 1979).

The Board has held that a claimant is not a Jones Act seaman where the worker's assignment to a vessel was random, sporadic, and transitory; and where the claimant worked not only on the employer's 20 mooring launches, but also aboard tugboats and ocean-going vessels which employer had contracted to moor. Griffin v. T. Smith & Son, Inc., 25 BRBS 196 (1992). The Board reasoned that the claimant was never assigned to nor did he perform a substantial part of his work aboard any vessel; and claimant lacked any permanent connection with a fleet of vessels. Therefore, the

claimant was deemed to be a **linesman** and **boat operator** who moored vessels at docks as a linesman and who drove boats around ships as a boat operator.

"In Navigation"

Note also that the vessel must be in navigation, or capable of being in navigation, in order to be considered a vessel under the LHWCA. (This should not be confused with the status of a vessel under construction where a ship fitter is clearly covered under the LHWCA and he cannot possibly be classified as a seaman.)

The "vessel in navigation" element does not require the vessel to have been in actual operation at the moment of the injury or death in question. McDermott, Inc. v. Boudreaux, 679 F.2d 452 (**5th Cir.** 1982). A vessel is "in navigation," although moored to a pier, in a repair yard for periodic repairs or while temporarily attached to an object. Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F.2d 31, 37 (**3d Cir.** 1975), cert. denied, 423 U.S. 1054 (1976) (a non-motive barge utilized on the river to transfer coal from one area to another is considered to be a vessel in navigation for purposes of the Jones Act); Gallop v. Pittsburgh Sand & Gravel, 696 F. Supp. 1061 (**W.D. Pa.** 1988) (dredging platform operating in the river is a vessel in navigation for purposes of seaman status under the Jones Act); Foster v. Davison Sand & Gravel Co., 31 BRBS 191 (1997) (Board concluded that "the fact that the dredge was docked at the time of injury, and for the duration of claimant's employment, does not preclude a finding that claimant was a 'member of a crew'").

Fixed Platforms

A **fixed platform** is generally constructed as a semi-permanent or permanent structure. Pilings are first driven deep into the seabed and the platform is floated out and either sunk in place and permanently secured or constructed on the site. The process of securing a fixed platform is similar to constructing a building on land. Moving a fixed platform requires dismantling and reconstruction at another location. See, e.g., Rhode v. Southeastern Drilling Co., Inc., 667 F.2d 1215 (**5th Cir.** 1982).

A **fixed platform** is not a vessel. In Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), the **United States Supreme Court** interpreted Section 1333(a)(2)(A) of the Outer Continental Shelf Lands Act (43 U.S.C. § 1333(a)(2)(A)) to "deliberately eschew the application of admiralty principles" to incidents occurring on fixed platforms. The **Court** found that admiralty "no more applies to these accidents...than it would to accidents occurring in an upland federal enclave or on a natural island..." 395 U.S. at 366. Following Rodrique, courts have regarded fixed platforms as "islands" or extensions of land for admiralty jurisdiction purposes. See, e.g., Ellison v. Conoco, Inc., 950 F.2d 1196 (**5th Cir.** 1992); Ladue v. Chevron U.S.A., Inc., 733 F.Supp. 1075 (**E.D.La.** 1990), aff'd 920 F.2d 272 (**5th Cir.** 1991); Smith v. Pan Air Corp., 684 F.2d 1102 (**5th Cir.** 1982).

In cases decided by the **Fifth Circuit** dealing with the “member of a crew” (seaman) exclusion, the court has held that an employee who worked on a fixed platform on the Outer Continental Shelf is not a seaman under the Jones Act because a **fixed platform** is not a vessel in navigation; thus, the claimant’s exclusive remedy was under the LHWCA as extended by the OCSLA, 43 U.S.C. § 1333 et. seq. (Since the OCSLA incorporates the remedies and not the criteria of the LHWCA, a covered employee under the OCSLA need not be engaged in maritime employment as is required under the LHWCA.) Stansbury v. Sikorski Aircraft, 681 F.2d 948 (**5th Cir.** 1982), cert. denied, 459 U.S. 1089 (1982).

***[ED. NOTE:** The oil exploration indemnity case of Demette v. Falcon Drilling Co., 253 F.3d 840, (**5th Cir.** 2001), is principally concerned with defining the phrase “by virtue of,” which appears at Section 1333(b) of the OCSLA. However, it does provide a good general discussion of OCSLA coverage as well as a reference point for LHWCA Sections 905(b) (bars employers from indemnifying the vessel from LHWCA liability) and 905(c) (OCS exemption to LHWCA’s current proscription of indemnity agreements under § 905(b)). Here the worker was injured on a jack-up rig while doing casing work. The **Fifth Circuit** noted that, “[c]asing work is the model case of injuries ‘occurring as a result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the material resources...of the [OCS].’” The **Fifth Circuit** noted, “If the injured employee is entitled to the benefits of the LHWCA “by virtue of” section 1333(b) of the OCSLA, then section 905(c) of the LHWCA states that “any reciprocal indemnity provision between the vessel and the employer is enforceable.”]*

Floating dry docks

Whether or not a structure is a vessel frequently arises with regard to a floating structure or platform that has a specialized function in a port, harbor, or shipyard. The paradigm case is the **floating dry dock**, which is used for the repair and construction of boats, ships, and other craft. While in use, such structures are not in navigation and have virtual permanent attachment to the shore. Based upon a strict interpretation of the **purpose test** as set out in Cope v. Vallette Dry-Dock Co., these structures are normally held not to be vessels. 119 U.S. 625, 627. See also Keller v. Dravo Corp., 441 F.2d 1239, 1244 (**5th Cir.** 1971), cert. denied, 404 U.S. 1017 (1972) (As a matter of law, a **floating dry dock** is not a vessel when it is moored and in use as a dry dock). Recently, however, drydocks have been built to be mobile and, often, they are commonly towed long distances. Consequently, a drydock that is mobile and “committed to navigation” may be a vessel even where in mid-voyage, it is temporarily harbored in a fixed location. J.M.L. Trading Corp. v. Marine Salvage Corp., 501 F. Supp. 323 (**E.D.N.Y.** 1980); see also United States v. Moran Towing & Transp. Co., 374 F.2d 656 (**4th Cir.** 1967), vacated on other grounds 389 U.S. 575 (1968), on remand 302 F.Supp. 600 (**D.Md.** 1969).

It is important to note that Section 903 of the **LHWCA specifically enumerates** that a worker killed or injured aboard a **dry dock** is entitled to compensation.

Floating work platforms, barges, rigs, and rafts

In Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), the **Court** stated:

[F]loating structures have been treated as vessels by the lower courts.... [W]orkers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters.

Certain structures which are used for the exploration and production of oil and gas have produced a great amount of litigation over vessel status. In Offshore Co., Inc. v. Robison, 266 F.2d 769 (**5th Cir.** 1959), the court held that a floating submersible **jack-up** oil rig (see supra for definition) is a vessel since its inherent characteristic is the ability to be towed from place to place. Id. Since Robison, many structures designed to be moved on a regular basis have been held to be vessels. See Producers Drilling Co. v. Gray, 361 F.2d 432 (**5th Cir.** 1966) (**submersible drilling barge** designed to transport drilling equipment, submerge for drilling operation, and refloat for movement to new site, is a vessel); Hicks v. Ocean Drilling & Exploration Co., 512 F.2d 817 (**5th Cir.** 1975) (submersible oil storage facility is a vessel); Parks v. Dowell Div. of Dow Chem. Corp., 712 F.2d 154 (**5th Cir.** 1983) (**drilling tender**, capable of transporting men and equipment, which is anchored for extended periods of time to fixed offshore platform, is a vessel).

A “**movable drilling unit**” which had been moved only twice in 20 years and was attached to the bottom by pilings driven into the sea bed, though designed for navigation, was not “in navigation” at the time of injury and not intended to be moved and thus, was not a vessel. Hemba v. Freeport McMoran Energy Partners, 811 F.2d 276 (**5th Cir.** 1987); Marathon Pipe Line v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 233 (**5th Cir.** 1985) (**floating, movable jack-up drilling rig** is a vessel for purposes of admiralty law); Lewis v. Keyes 303, Inc., 834 F. Supp. 191 (**S.D. Tex.** 1993) (floating, movable jack-up drilling rig).

However, several cases illustrate that floating structures are not always what they seem to be, or what they were constructed to be. Although these cases deal primarily with barges that have become work platforms, a case dealing with a small raft has provided the basis for a loose test to determine whether or not a platform is a “vessel.” Bernard v. Binnings Constr. Co., Inc., 741 F.2d 824 (**5th Cir.** 1984).

Floating work platforms which were determined **not** to be vessels had **at least some** of the following criteria in common:

- (1) The structures were constructed/re-constructed for use primarily as work platforms;

- (2) The structures were moored/secured when the injury occurred;
- (3) Although “capable” of movement and sometimes moved, the transportation function was merely incidental to the primary purpose of serving as a work platform;
- (4) The structure generally had no navigational lights and/or navigational equipment;
- (5) The structures had no means of self-propulsion;
- (6) The structures were not registered with the Coast Guard;
- (7) The structures did not have crew quarters/galley.

This test is a composite based principally on Bernard, 741 F.2d 824, and the following noted cases. Bernard specifically set out the first three criteria. 741 F.2d at 831.

See also Green v. C.J. Langenfelder & Sone, Inc., 30 BRBS 77 (1996) (dredge, with no engine or navigational capabilities except for pull lines, which was used to excavate oysters and load them onto barges, and moored to virtually the same position during each 6-month work cycle held not to be a vessel).

See also Burchett v. Cargill, Inc., 48 F.3d 173 (5th Cir. 1995) (**midstream bulk cargo transfer barge** which was constructed/used primarily as work platform, which had been moored for ten years, and whose transportation function was incidental to its primary purpose, was **not** a vessel); Sharp v. Johnson Bros. Corp., 917 F.2d 885 (5th Cir. 1990), amended Sharp v. Johnson Bros. Corp., 923 F.2d 46 (5th Cir. 1991) (four barge assemblies, including two **spud barges** and two flat **deck barges** used in connection with rebuilding a bridge and which were frequently moved during the work could be vessels; case **remanded** to trial court for a jury determination); Ellender v. Kiva Constr. & Eng'g, 909 F.2d 803 (5th Cir. 1990) (general purpose and spud barges assembled solely to build a platform were transported to a job until its completion; a crane temporarily positioned on the spud barge is **not** equivalent to a **derrick barge**); Menard v. Brownie Drilling Co., 1991 WL 194756, 1991 U.S. Dist. LEXIS 13531 (E.D. La. 1991) (unreported) (workover rig placed on barge which was lowered and sunk until the job was finished, then floated to a new location was **not** a barge).

See also Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990) (a **quarter boat barge** specially equipped with living quarters/work area brought to a shore, and which was spudded down and moored, was **not** a vessel); Ducrepont v. Baton Rouge Marine Enters., Inc., 877 F.2d 393 (5th Cir. 1989) (cargo barge converted to a stationary work platform by permanently mooring to shore and only moved short distances due to water level changes was **not** a vessel); Davis

v. Cargill, Inc., 808 F.2d 361 (**5th Cir.** 1986) (cargo barge converted to a permanent painting and sandblasting work platform anchored to the river bed and permanently attached to land was **not** a vessel though moved to accommodate changing river tides).

See also Waguespack v. Aetna Life & Casualty Co., 795 F.2d 523 (**5th Cir.** 1986), cert. denied, 479 U.S. 1094 (1987) (small floating work platform permanently located in a slip and used to facilitate removal of grain barge covers is **not** a vessel); Blanchard v. Engine & Gas Compressor Servs., 575 F.2d 1140 (**5th Cir.** 1978), question certified, 590 F.2d 594 (**5th Cir.** 1979) (barges sunk in marsh to use as compressor station and not moved in 15 years, with no intent to move are **not** vessels); Cook v. Belden Concrete Prods., Inc., 472 F.2d 999 (**5th Cir.**), cert. denied, 414 U.S. 868 (1973) (barge which became a construction platform on which concrete barges were built, served as a stationary platform and was not a vessel).

See also Ducote v. V. Keeler & Co., Inc., 953 F.2d 1000 (**5th Cir.** 1992) (for purposes of determining whether floating structure is a “vessel,” one objective factor used to determine whether the primary purpose of the structure is that it is used for transportation, is **raked bow**. Although the mere presence of raked bow does not mean that the floating structure is a “vessel,” raked bow is a piece of evidence from which conflicting inferences could be drawn). But see Tonnesen v. Yonkers Contracting Co., Inc., 82 F.3d 30 (**2d Cir.** 1996) (**Second Circuit** disagreed with regard to the first **Bernard** factor (namely, the **Fifth Circuit’s** focus on the **original** purpose of the structure), finding that the first prong of the test should focus on the **present** purpose of the floating structure).

In this regard, it is important to note that a **floating dry dock** may serve as a **floating platform**. See, e.g., Bernard, 741 F.2d at 832. Tonnesen is also noteworthy for the fact that the **Second Circuit** reversed the district court’s summary judgement on seaman status, remanding the matter for further fact-finding as to whether the floating platform was “a vessel in navigation.” The **Second Circuit** noted several **Fifth Circuit** cases dealing with the factual determination necessary to determine vessel status. The circuit court determined that factual issues prevented summary judgement.

In Caserma v. Consolidated Edison Co., 32 BRBS 25 (1998), Claimant was injured while working on a barge used as a mobile energy generating station in New York City Harbor. The claimant’s duties included maintaining the equipment and mooring the barge in relation to movement. The ALJ denied coverage noting that the claimant needed to be injured on a vessel on navigable waters. Relying on Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983), the Board reversed. The Board found that there is no requirement that the claimant have a direct connection to navigation or commerce.

Construction and Repairs

A **ship under construction on land**, not on or in navigable waters and incapable of floating, is not a vessel. Richendollar v. Diamond M Drilling Co., 819 F.2d 124 (**5th Cir.**), cert. denied, 484

U.S. 944 (1987). (Note, however, that a person working on such a vessel would be covered under the LHWCA as a shipbuilder.)

A **hull under construction**, floating on navigable waters, but not itself navigable, which did not yet have navigation equipment installed and had not undergone dock and sea trials, and had no crew assigned to it, did not qualify as a “vessel.” Rosetti v. Avondale Shipyards, 821 F.2d 1083 (**5th Cir.** 1987), *cert. denied*, 484 U.S. 1008 (1988).

A vessel being **repaired on land** does not necessarily lose its vessel status. In Chandris, Inc. v. Latsis, the **Court** held that a vessel does not cease to be “in navigation” merely because it is taken to a dry dock or shipyard to undergo repairs. 515 U.S. 374 (1995). 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 to decide. *Id.*

One must keep in mind that Section 903 provides compensation to workers who die or are injured while repairing or building a vessel. The above cases are included in the materials to remind the reader that the lack of a vessel means there is no Jones Act coverage, not that there is no LHWCA coverage.

Helicopters, Seaplanes, etc.

An **amphibious military vehicle** known as a **LARC** has been found to be a vessel under the LHWCA. Stevens v. Metal Trades, Inc., 22 BRBS 319 (1989).

Aircraft, helicopters, and even seaplanes are ordinarily not vessels, since their purpose is to fly through the air, not to navigate on water. See Smith v. Pan Air Corp., 684 F.2d 1102 (**5th Cir.** 1982); Barger v. Petroleum Helicopters, 692 F.2d 337 (**5th Cir.** 1982), *cert. denied*, 461 U.S. 958 (1983); Herbert v. Air Logistics, Inc., 720 F.2d 853 (**5th Cir.** 1983).

A seaplane that is navigating on the water may be a vessel, however. Reeves v. Offshore Logistics, Inc., 720 F.2d 835 (**5th Cir.** 1983).

Airplane/helicopter pilots are not excluded from coverage under the LHWCA on the grounds that they are members of crews. A pilot traveling over water, however, is not automatically covered under the LHWCA as a maritime employee.

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)(Fish spotter pilot is covered under LHWCA), the **Fifth Circuit** cited Smith, 684 F.2d 1102, reiterating that a plane is not a vessel under the Jones Act and, therefore, that the **airplane pilot**, a **fish spotter**, was not excluded from LHWCA coverage as a member of a crew. The court found coverage because the claimant was injured on actual navigable waters. Importantly, the fish spotter was found to be **engaged in maritime employment** over navigable waters. See also Barnard v. Zapata Haynie Corp., 23 BRBS 267 (1990)(Held, the

injury of the claimant (a fish spotter) occurred on navigable water where his injury, depression allegedly due to stress induced by flying in congested air space over navigable waters, occurred over navigable waters in the regular performance of his work-related duties over such waters), upheld at 933 F.2d 256 (4th Cir. 1991)(noting that the plaintiff was “not merely fortuitously over water when his injury occurred”). In Barnard, the Board affirmed the ALJ’s findings that: (1) the claimant, an airborne fish spotter, was clearly engaged in traditional maritime activities over navigable water, pursuant to Section 2(3) of the LHWCA and (2) the situs test of Section 3(a) had been satisfied.

In Pickett v. Petroleum Helicopters, Inc., 266 F.3d 366, (5th Cir. 2001), 35 BRBS 101 (CRT) (2001), in an OCSLA extension act case, the **Fifth Circuit** found that a helicopter pilot was not covered because his death did not occur over the OCS. See Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (*en banc*) (There is OCSLA coverage only for employees who: 1) suffer injury or death on an OCS platform or the waters above the OCS; and 2) satisfy the “but for” status test the **Fifth Circuit** described in Herb’s Welding, Inc. v. Gray, 766 F.2d 898 (5th Cir. 1985); Accord Sisson v. Davis & Sons, 131 F.3d 555 (5th Cir. 1998).

A submerged cleaning and maintenance platform known as a **SCAMP** has been found to be a vessel. Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326 (9th Cir. 1983) (Relying on the “Bullis test,” Bullis v. Twentieth Century Fox Film Corp., 474 F.2d 392, 393 (9th Cir. 1973) the **Ninth Circuit** found that a SCAMP - a saucer-shaped unit six feet in diameter and twenty inches deep, which traveled underwater along a ship’s hull and could be operated manually by divers - was a vessel.) The Bullis test was reaffirmed by the **Ninth Circuit** in Gizoni v. Southwest Marine Inc., 909 F.2d 385 (9th Cir. 1990), aff’d, 502 U.S. 81 (1991).

It has been suggested that “three men in a tub would also fit within our definition [of vessel], and one probably could make a convincing case for Jonah inside whale.” Burks v. American River Transp. Co., 679 F.2d 69, 75 (5th Cir. 1982).

1.4.3.1 Floating Dockside Casinos

[ED. NOTE: This newly developing area of potential coverage acutely focuses attention on the pre-existing problems of coverage under the LHWCA. As with typical coverage issue cases, a worker who is able to place himself within the jurisdiction of the Jones Act will, generally, recover the most. (As will be discussed below, securing Jones Act coverage for a casino worker thus far has been an unsurmountable hurdle.) If a Jones Act action in federal district court fails, the worker will next most likely benefit from coverage under the LHWCA as opposed to state compensation coverage.]

While the LHWCA specifically denies coverage to workers employed by a “recreational operation” under section 902, there remains no appellate case law defining this phrase. (See infra for discussion on whether an employee of a dockside casino is entitled to LHWCA coverage). Nonetheless, a gambling casino seemingly falls within this exclusion. A determination of whether a floating gambling casino is a vessel necessarily follows.

The “recreational operation” exclusion to coverage, Section 2(3)(B), is without definition, though it is grouped with several other items which hint at its possible parameters. It is noteworthy that at the time of enactment of this exclusion, there were no floating gaming/gambling casinos and, therefore, no direct Congressional Record comments on point.

In consolidated appeal of Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995); and Ketzel v. Mississippi Riverboat Amusement, Ltd., 867 F. Supp. 1260 (S.D. Miss. 1994); a bartender and a cocktail waitress (respectively) on the BILOXI BELLE, a floating dockside casino, sued under the Jones Act and general maritime law to recover for injuries sustained in the course of their employment. The BILOXI BELLE was originally constructed on a barge for the purpose of supporting a floating restaurant and bar in Corpus Christi, Texas. It was later moved to Arkansas Pass, Texas, where it was moored for two and a half years before being re-outfitted as a dockside floating casino. The structure was then towed to Biloxi, Mississippi. There, the structure was indefinitely moored to shore by lines tied to sunken pylons that were filled with concrete. Its first level was connected to shore by steel ramps, its second level was joined to a shoreside building, and it was connected to shoreside utilities. It contained a faux pilot house and other purely visual effects including a nonfunctional paddle wheel turned by a small motor. The barge was documented by the United States Coast Guard and was towed to sheltered waters when Hurricane Andrew threatened on August 23, 1992. Pavone, 52 F.3d 560.

The issue presented to the **Fifth Circuit** in Pavone was whether the BILOXI BELLE was a Jones Act vessel so that the plaintiffs could assert claims as Jones Act seaman:

In particular, we examine the status of the BILOXI BELLE as of the times pertinent to the alleged injuries in these cases to determine if it was a Jones Act vessel — assuming *arguendo* that the subject craft was built and used for non-vessel purposes, was moored other than temporarily to the bank, and either had been “withdrawn from navigation” or was being used as a “work platform,” or both.

Id. at 568.

After analyzing the withdrawn-from-navigation factors and the work platform attributes, and comparing the characteristics of the Biloxi Belle with the structures which have been held as a matter of law to be non-vessels, the **Fifth Circuit** concluded that “there can be little doubt that indefinitely moored, shore-side, floating casinos, such as the BILOXI BELLE, must be added to that list.” Id. at 570. Consequently, the court held that the BILOXI BELLE was removed from navigation and was a work platform so that it did not qualify as a vessel. Id.

The weight of the trial court decisions also establish that a floating **dockside casino** is not a vessel. Ketzel v. Mississippi Riverboat Amusement, Ltd., 867 F. Supp. 1260 (S.D. Miss. 1994) (“Similar to [a] ‘floating factory’ ...and [a] ‘floating dance hall’ ..., the BILOXI BELLE is nothing

but a ‘floating casino’... it is not a ‘vessel”); In Re Biloxi Casino Belle Inc., White v. MRA, LTD, d/b/a/ Casino Belle of Tunica, 176 **Bankr.** 427 (1995).

[ED. NOTE: Ironically, the trial judge in Ketzel went further than simply making a determination that there was no “vessel” for the purposes of the Jones Act coverage. The trial judge improperly ruled on the question of LHWCA coverage: “Ketzel’s complaint alleged, alternately, that her claim stated a cause of action under the [LHWCA]. However, Ketzel’s job as a cocktail waitress is not included among the occupations intended by Congress to constitute ‘Longshoremen.’” Ketzel, 867 F.Supp. 1260, 1262 n.2]

In Chase v. Louisiana Riverboat Gaming Partnership, 747 So. 2d 115 (La. App. 2 Cir. Sept. 22, 1999) a riverboat casino located in a containment pond adjacent to, but separated from, the Red River was not a Jones Act vessel. While the vessel contained a propulsion system, a twenty-four hour crew and a chief engineer, it was, more or less permanently moored and was connected to land by utility lines (electricity, telephone cable and computer lines) and water and sewerage connections. The Louisiana court found that it was not a Jones Act vessel.

A new wrinkle recently appeared in this debate, however, namely the fact that different district courts have treated such facilities differently. An August, 2000 decision by the Southern District of Iowa held that a bartender and cocktail waitress on a riverboat could bring a Jones Act action for their injuries because a jury could reasonably find that they were maritime employees substantially connected in terms of duration and nature to a fully functioning gaming vessel located in the Missouri River. The decision went on to cite a number of other “heartland cases” which found jurisdiction for various injured riverboat workers. See Lara v. Harveys Iowa Management Co., Inc., 109 F.Supp.2d 1031, (S.D. Iowa, 2000) (citing Weaver v. Hollywood Casino, 2000 WL 705995 (N.D.Ill., 2000) (slot machine attendant injured on board gambling boat); Wiora v. Harrah’s Illinois Corp., 68 F.Supp. 2d 988 (N.D.Ill. 1999) (Waitress on riverboat); Greer v. Continental Gaming Co., 5 S.W.3d 559 (Mo. Ct. App., 1999)(injured housekeeper).

In Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379 (7th Cir. 2001), the **Seventh Circuit** found that a riverboat casino that could travel only 300 yards, between a bridge and a dam, was nevertheless a vessel. The court noted that the general character of the riverboat’s activity relates to traditional activity: “Navigation is so intertwined with gambling in this particular case that it is impossible to extricate the one from the other. Under the then-existing law the casino was required to navigate the river whenever it hosted gambling activities.”

Is There LHWCA Jurisdiction for Floating Dockside Casinos?

The OALJ has had several casino-related cases. The fact patterns are very distinguishable. In two decisions, jurisdiction was not found, while in a third, jurisdiction was found. As will become apparent, the determination as to whether or not there is coverage will be significantly affected by: 1) what type of floating casino structure (vessel or non-vessel) is involved, and 2) what the worker’s job is and for whom he/she works.

Both Arnest v. Mississippi Riverboat, Ltd., 29 BRBS 423 (ALJ) (1995) and Peters v. Roy Anderson Building Corp., 29 BRBS 437 (ALJ) (1995), administratively affirmed by the Board, (BRB No. 95-2098)(Unpublished), involved Mississippi dockside casinos. Under the Mississippi Gaming Statute, gambling can only take place on a “cruise vessel” on navigable waters. Mississippi casinos situated along the Gulf of Mexico are more or less permanently moored barges (attached to pilings) with casino structures built above the structures. See Peters, 29 BRBS at 441. While Mississippi may consider these to be “cruise vessels,” under present maritime law, these structures can not be considered vessels. Id. at 441-442 (citing Pavone v. Mississippi Riverboat Amusement, Ltd., 52 F.3d 560 (5th Cir. 1995)).

However, this does not automatically mean that there is no coverage under the LHWCA. Under the LHWCA, the term employee does not include “individuals employed by a recreational operation, restaurant, museum or retail outlet.” §2(3)(B) and 20 C.F.R. 701.301 (12)(i) and (iii). In Arnest, the administrative law judge held that, while the exclusion does not specifically list casinos, when one focuses on Congressional intent, one can readily conclude that this was the type of employment contemplated by Congress.

While there is some room for argument against this result, such an argument would be on a less than solid foundation. Arnest rests on a very solid footing for several reasons:

- (1) there were no dockside casinos in existence in 1984 when the LHWCA amendments were passed which excluded recreational operations;
- (2) the 1984 amendments were specifically intended to exclude employees in non-maritime occupations from coverage. [“The legislative history explains that the excluded activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose employees to the type of hazards normally associated with longshoring, shipbuilding and harbor work.” Cong. Rec. §11622-23 September 20, 1984.]; and
- (3) since the 1984 amendments specifically excluded restaurants and retail outlets, it would be grossly unfair to find coverage for a blackjack floor supervisor/pit manager on a dockside floating casino while disallowing coverage to the wait person serving cocktails to the blackjack table or for that matter, to the restaurant/snack bar personnel, bartenders and clerks in gift shops of these attached dockside floating casinos.

Thus, Arnest concludes that an employee of a casino working on a **completed**, attached, dockside casino is precluded from coverage by the 1984 Section 2(3)(B) amendments. In fact, the Congressional Record indicates that “the common thread running through the changes exempting certain activities...is probably the belief that these activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose employees to the type of hazards

normally associated with longshore, shipbuilding, and harbor work..”Cong. Rec. S11623 Sep. 20, 1984.

[ED. NOTE: On the other hand, using the Congressional Record cited in Arnest, one could argue that the purpose of the amendment excluding “recreational operations” was an attempt to exclude only purely water-related small enterprises such as water-paddle bicycles, etc. For example, one Senator noted that the 1972 amendments had “pushed the Longshore Program beyond reasonable limits. Coverage is now extended to nearly a million workers who, during a workday may come near the water’s edge. Even workers in the pleasure boating industry and in summer camps, marina, and maritime museum have been deemed to be covered by the Longshore Act.” Cong. Rec. s11627 (Sep. 20, 1984).]

However, as Peters illustrates, **a person working on a dockside casino helping to build and/or repair the casino, would not fall under this exclusion if such person is not employed by the recreational operation itself.** Section 2(3)(B). However, recently the Board has gone much further and has held that **a worker who was the employee of a recreational operation involved in the vessel construction phase was covered** under the LHWCA since he was a shipbuilding operator at all times when working in the vessel. The Board observed that it is the nature of the work which controls coverage, not the fact that the employer was a casino operation. Bazor v. Boomtown Belle Casino, ___ BRBS ___ (BRBS No. 00-0928B)(July 11, 2001), 2001 WL 876235 (July 11, 2001); see Green v. Vermillion Corp., 144 F.3d 332 (5th Cir. 1998); Huff v. Mike Fink Restaurant, 33 BRBS 179 (1999).

The Board has held 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, for purposes of determining whether a worker is a maritime employee covered by the LHWCA or excluded by Section 2(3)(F). The employer had urged that Coast Guard regulations be used in calculating the length. However, despite the interim federal regulation statement that the DOL’s definition of length follows that of the Coast Guard, DOL clearly omitted from its regulation the second sentence of the Coast Guard regulation which identifies vessel attachments to be excluded from the measurement. Knowing that the Coast Guard regulation excluded certain segments of a vessel from the length measurement, and yet drafting a definition which omitted the exclusions, can be reasonably interpreted as a conscious decision by the DOL to differentiate the two definitions because they serve different functions. See Powers v. Sea Ray Boats, Inc., 31 BRBS 206 (1998); see also Redmond v. Sea Ray Boats, Inc., 32 BRBS 1 (1998).

In Peters, the claimant was employed as a laborer for the general contractor building the Grand Casino in Biloxi, Mississippi. Most of the labor she performed was in the casino structure being erected on the barges on the water although she sometimes worked on adjoining land projects. On the day of her injury she was assigned to a clean-up crew and also assisted in setting up tables, booths and chairs in a restaurant area (involving bolting booths together and putting them in place.).

_____ In Peters, the ALJ determined that there was coverage. The claimant in Peters was performing “shipbuilding” work at the time of her injury. “Shipbuilding work” is one of the enumerated categories noted at Section 2(3). Even had claimant not been considered a shipbuilding worker, she could still be considered a “maritime worker.” Bienvenue v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999)(Worker who spends a “not insubstantial” amount of his work time on navigable waters triggers LHWCA coverage for injuries sustained on navigable waters.); Goleman v. Bracken Const. Co., 30 BRBS 571 (ALJ) (1996), the judge relied on Director, OWCP v. Perini North River Associates, 459 U.S. 297, 324 (1983) (worker injured upon navigable waters in the course of employment is covered under §2(3)).

Similarly, in Bazor v. Boomtown Belle Casino, ___ BRBS ___ (BRB No. 00-0928B)(July 11, 2001), the Board rejected the employer’s contention that the decedent was excluded from coverage as an employee of a recreational operation under Section 2(3)(B) of the LHWCA. The Board reasoned that since the decedent was involved solely in the vessel construction phase, i.e. a ship building operator at all times working on the vessel, there was coverage. Here again, the Board observed that it is the nature of the work which controls coverage, not the fact that the employer is a casino operation

[ED. NOTE: For a thorough discussion of coverage while injured over water see Topic 1.6.1, infra.]

In Segrave v. M M C Mechanical Contractors, 29 BRBS 222 (ALJ) (1995) the claimant was a lead plumber working on the drainage system for a parking lot at the future site of the Jubilee Casino in Mississippi at the time of the injury. He was in a ditch in the parking lot installing a pipe to a storm drain when injured, approximately 300 feet from the concrete pier. The administrative law judge held that this worker was clearly beyond the scope of Section 3(a) of the LHWCA, and was thus denied coverage under the LHWCA.

FLOATING CASINO/RIVERBOAT GAMBLING JURISDICTION TEST

(1) Who is the employer?

a. If the employer is the gambling operation, the majority view is that the LHWCA exclusion applies, and there is no LHWCA coverage. (Claimant must look to state compensation coverage or to the Jones Act if factual situation warrants).

(2) If the employer is not the gambling enterprise:

a. Was Claimant injured over water during the course of regular employment, though only transiently over water?

If yes, and in the **Fifth Circuit, or Sixth Circuit** there is LHWCA coverage.

If yes, and in the **Eleventh Circuit**, there is no LHWCA coverage.

In other circuits, the issue is undecided.

b. Was Claimant injured over water during course of **regular** employment?

If yes, it is probably “maritime employment” and there is probably coverage.

c. Did the injury/accident occur **over land** ?

If yes, regular LHWCA factors come into play and an analysis of situs and status must be performed,

1.4.4 Attachment to Vessel

To be classified as a seaman, a worker must be permanently assigned to, or perform a substantial part of his work, on board a vessel(s). See, e.g., Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (**5th Cir.** 1986) (en banc) (a welder’s helper on a jack-up barge who performed most of his duties on stationary platforms (70 to 80 per cent) and who worked 14 days on/7 days off, was covered under the LHWCA, though he was injured on the barge, because he could not fit on the caisson in this particular instance.)

The court found that the circumstances of the claimant’s injury could not be viewed in isolation but must be considered in relation to the welder’s other duties. (Judge Rubin strongly dissented arguing that a moment-of-injury test should have been applied.) Id.; see also Miller v. Rowan Cos., 815 F.2d 1021 (**5th Cir.** 1987). See also the river pilot exception, infra, at “Fleet of Vessels,” where an employee is deemed a seaman even though he is not assigned “permanently” to a vessel or fleet of vessels.

*[ED. NOTE: It is unclear whether or not Robison’s “substantial work” alternative has survived the Wilander “permanent assignment” criteria especially in lieu of Wilander’s focus on “sea-based” workers (as opposed to land-based workers) and Wilander’s “employment-related connection” to a vessel or fleet. But see Easley v. Southern Shipbuilding Corp., 965 F.2d 1 (**5th Cir.** 1992) (“substantial part of work on vessel” test used). One commentator has suggested first looking for permanent assignment, and if there is none, then applying Barrett, 781 at 1075 n.13, looking to the duration of the employee’s assignment in the context of his “entire employment” with the current employer. Allbritton, “Seaman Status In Wilander’s Wake,” Tulane Admiralty Law Institute, 68 Tul. L. Rev. 373 (1993).]*

See also Domingue v. Settoon Marine, 959 F.2d 966 (**5th Cir.**) (Unpublished), cert. denied, 506 U.S. 823 (1992); Easley v. Southern Shipbuilding Corp., 936 F.2d 839 (**5th Cir.** 1991), vacated and remanded, 503 U.S. 930 (1992), on remand, 965 F.2d 1 (**5th Cir.** 1992), cert. denied, 506 U.S. 1050 (1993) (11.5 percent of mechanic’s time spent on board a derrick barge as a substitute deckhand does not equate with performing a substantial part of his work on a vessel); Palmer v. Fayard Moving & Transp. Corp., 930 F.2d 437 (**5th Cir.** 1991) (worker who spent nineteen per cent

of her time aboard a vessel was not covered by the Jones Act as a matter of law); Buccellato v. City of New York, 808 F. Supp. 967 (E.D.N.Y. 1993) (giving lip service to Wilander, the court determined that it was a jury question as to whether a garbage worker who assisted in moving garbage barges but never leaves the dock, is a seaman or not).

The measure of LHWCA status, as opposed to Jones Act status, is the character of the employee's work taken as a whole, not in piecemeal time increments or in distinct but temporary job assignments. It is not just the work in which he was engaged at the moment of his injury that is examined, but rather, the entirety of his duties. In Gay v. Barge 266, 915 F.2d 1007, 1010 (5th Cir. 1990), the **Fifth Circuit** stated:

Focusing solely on the employee's activity at the time of injury might bar suits by a whole host of workers in other maritime occupations who are injured while temporarily performing repair work.... [T]o deny [the plaintiff] a cause of action in the morning but to grant him one in the afternoon is to make his rights under the [LHWCA] as random and indiscriminate as the sea herself.

Id. at 1010-11. Only when a worker's permanent job assignment has changed during the course of his employment is the worker entitled to have the substantiality of his vessel-related work evaluated for a period less than the total time employed by his current employer. Lormand v. Superior Oil Co., 845 F.2d 536, 540 (5th Cir. 1987), cert. denied, 484 U.S. 1031 (1988).

[ED. NOTE: As noted previously, admiralty jurisdiction and the coverage of the Jones Act depends only on a finding that the injured was "an employee of the vessel, engaged in the course of his employment" at the time of his injury. The fact that a Jones Act petitioner's injury occurred on land is not material. 46 U.S.C. § 740; Senko v. La Crosse Dredging Corp., 352 U.S. 370, 373 (1957); Swanson v. Marra Bros., Inc., 328 U.S. 1,4 (1946). See McDermott, Inc. v. Boudreaux, 679 F.2d 452, 462 (5th Cir. 1982); Guidry v. South Louisiana Contractors, 614 F.2d 447 (5th Cir. 1980) (plaintiff was held as a matter of law not to be a seaman employee of his shore-based "borrowing" employer; whether he was a seaman employee of his "lending" employer vessel owner was held to be a question of fact); Porche v. Gulf Miss. Marine Corp., 390 F.Supp. 624, 630-31 (E.D. La. 1975). Therefore one must keep in mind that, simply because an employee is injured on land, the employee does not conveniently and automatically fall into a particular classification.]

1.4.5 Function of the Vessel (mission/purpose/maintenance)

As previously noted, the **United States Supreme Court** in Wilander adopted the more liberal **Fifth Circuit Robison** test. Wilander provides an extensive synopsis of jurisprudence dealing with who is a "seaman." The liberal use of this term is apparent when one considers that a fisherman, chambermaid, waiter, and bartender have all been held to be "seamen" because their services were in furtherance of the main object of the enterprise in which the ship was engaged. As Wilander approvingly stated, general maritime law does not require that a "seaman" aid in

navigation; it is only necessary that a person be engaged on board a vessel in furtherance of its purpose. Wilander, 498 U.S. at 353.

1.4.6 Jurisdictional Estoppel

Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597 (9th Cir. 1996) citing 18 Charles A Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice and Proc. § 4477 (1981 & Supp. 1995); Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993); Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), cert. denied, 501 U.S. 1260 (1991).

This doctrine of judicial estoppel has also been referred to as “**a doctrine of preclusion of inconsistent positions.**” Rissetto, 94 F.3d at 600; Russell, 893 F.2d at 1037. See also Axelrod, “Res Judicata and Collateral Estoppel: A Sword And A Shield,” Longshore Newsletter, Vol. XIV, Issue 5 (Aug. 1996).

In Russell, the **Ninth Circuit** explained:

The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings.... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.... Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

893 F.2d 1037. In Yanez, the **Ninth Circuit** noted that the doctrine of judicial estoppel remains unsettled:

The **majority of circuits** recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation.... The **minority view**, in contrast, holds that the doctrine applies even if the Litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing “fast and loose” with the court.... In either case, the purpose of the doctrine is to protect the integrity of the judicial process.

989 F.2d at 326 (citations omitted) (emphasis added).

Despite its name, many cases have applied the doctrine of judicial estoppel where the prior statement was made in an administrative proceeding. Rissetto, 94 F.3d at 604 (“...[w]e are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial.”); see also Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1427 (7th Cir. 1993) (“Though called judicial estoppel, the doctrine has been applied, rightly in our view, to proceedings in which a party to an administrative proceeding obtains a favorable order that he seeks to repudiate

in a subsequent judicial proceeding”); Smith v. Montgomery Ward & Co., 388 F.2d 291, 292 (**6th Cir.** 1968) (position taken in workers’ compensation proceedings estopped party in subsequent personal injury action); Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 718 (**D.N.H.** 1995) (Social Security Administration disability proceeding); Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth., 731 F. Supp. 747, 750 (**E.D. La.** 1990) (Interstate Commerce Commission proceeding).

The rule of judicial estoppel has been justified on the ground that “[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.” Mullner v. Mars, Inc., 714 F.Supp. 351, 357 (**N.D. Ill.** 1989) (quoting Dept. of Transp. v. Coe, 445 N.E.2d 506 (**Ill. App. Ct.** 1983)).

As noted, maritime law permits claimants to pursue both LHWCA and Jones Act remedies for the same injury, based on inconsistent claims as to the employee’s status at the time of injury. Ryan v. McKie Co., 1 BRBS 221, 224-25 (1974). OALJ retains subject matter jurisdiction over the injured worker’s longshore claim notwithstanding the pending of a parallel Jones Act claim. See, e.g., Stubblefield v. Dutra Const. Co., 26 BRBS 774 (ALJ) (1993); Johns v. Davison Sand & Gravel, 26 BRBS 583 (ALJ) (1992); Grossman v. Weeks Marine, Inc., 26 BRBS 530 (ALJ) (1992); Kelleher v. Smith Rice Co., 24 BRBS 72 (ALJ) (1990).

As has been previously noted, the circuits are split as to whether an administrative determination vis-a-vis jurisdiction bars a subsequent Jones Act claim. Sharp v. Johnson Bros. Corp., 973 F.2d 423 (**5th Cir.** 1992) (injured maritime worker loses his right to pursue an alternative Jones Act claim once the ALJ enters a formal order granting compensation benefits.); Figuroa v. Campbell Industries, 45 F.3d 311 (**9th Cir.** 1995) (“...some maritime workers may be Jones Act seamen who are injured while also performing a job specifically enumerated under the LHWCA, and, therefore are entitled to recovery under both statutes, although double recovery of any damage element is precluded.”); Papai v. Harbor Tug and Barge Co., 67 F.3d 203 (**9th Cir.** 1995) rev’d on other grounds, 520 U.S. 548 (1997) (while accepting the issue of whether or not the litigation of a LHWCA claim bars a subsequent Jones Act claim, the **Supreme Court** neither reached nor decided this issue.); Hagens v. United Fruit Co., 135 F.2d 842 (**2d Cir.** 1943) (Jones Act award can not validly be made if Deputy Commissioner had jurisdiction when awarding LHWCA coverage; Deputy Commissioner need not specifically state that plaintiff was not a member of the crew).

See also Biggs v. Norfolk Dredging Co., 360 F.2d 360 (**4th Cir.** 1966) (employee injured aboard his employer’s ship may, on allegation that he is a seaman, sue his employer for damages under the Jones Act or general maritime law, even after deliberately obtaining compensation under the LHWCA on the allegation that he is not a seaman -- “Compensation statutes are not intended to deprive a seaman...of historic rights.”); Vilanova v. United States, 851 F.2d 115 (**1st Cir.** 1988) (Wisdom, J., sitting by designation), cert. denied, 488 U.S. 1016 (1989) (administrative determination of coverage under LHWCA bars subsequent pursuit of FTCA claim—Congress did not intend to give injured workers two chances to maximize their compensation award).

Several subsections of the LHWCA are pertinent to the discussion of whether or not an administrative determination as to jurisdiction bars a subsequent Jones Act claim. Specifically:

13(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employee within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit. 33 U.S.C. §913(d). (Emphasis added.)

3(e) Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under the Act pursuant to any other workers; compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to the recovery for injury to or death of seaman shall be credited against any liability imposed by this Act.) 33 U.S.C. §903(e). (Emphasis added.)

5(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other **liability of such employer to the employee**, his legal representative, ... and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, **except that if** an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, **may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages** on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. ... 33 U.S.C. § 905(a). (Emphasis added.)

Reading Section 13(d) broadly, a claimant has the choice as to simultaneously filing an LHWCA claim and a Jones Act claim, or filing one or the other. A claimant could pursue his Jones Act claim to its conclusion prior to filing an LHWCA claim. Successful prosecution of the Jones Act claim would likely equate to the non-filing of the LHWCA claim. But see *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc) (reversing prior longstanding circuit law, the court held: (1) seamen in Jones Act negligence cases are bound to a standard of ordinary prudence in the exercise of care for their own safety, not to a lesser duty of slight care; (2) Jones Act employers are not held to a higher standard of care than that required under ordinary negligence); *Smith v. Tow Boat Serv. & Management, Inc.*, 66 F.3d 336 (9th Cir. 1995) (Unpublished) (rejecting “slight care” standard); *Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52-53 and n.2 (2d Cir. 1986), cert. denied, 481 U.S. 1015 (1987) (approving jury instruction informing that both employer and employee under Jones Act are charged with duty of reasonable care under the circumstances);

Robert Force, “Allocation of Risk and Standard of Care Under the Jones Act: “Slight Negligence,” “Slight Care”?,” 25 J. Mar. L. & Comm. 1, 31 (1994).

If the claimant lost in the Jones Act forum, filing an LHWCA claim would still remain a viable option.

The Congressional Record indicates Congress’ intent in enacting the Section 3(e) credit provision. In the pertinent part, the Congressional Record provides as follows:

Sec. 3. Section 3(a) [of the enacting Senate bill] is amended to read as follows:

(b) Section 3 is amended by adding the following new subsection:

“(c) Notwithstanding any other provision of law, any amounts paid by any employer for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers’ compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.”

Cong. Rec. S 8656 June 16, 1983.

The Conference Report stated:

Importantly, as well, the substitute offsets longshore benefits for any other workers’ compensation or Jones Act benefits concurrently received for the same injury. The conferees amended section 3(b) by substituting the words ‘to an employee’ for ‘by an employer’ in the phrase ‘any amounts paid by an employer for the same injury, disability, or death ***.’ This change clarifies the conferees’ intent that the scope of this section be read broadly.

The offset would, therefore, apply not only to instances where the employee received State workers’ compensation, but also where he received benefits under the Federal Employees’ Compensation Act, and where the employee’s non-longshore claim is against **an employer other than the one against whom he has filed a longshore claim**. Accordingly, the court’s decision on this point in Melson v. United Brands Corporation, 594 F.2d 1068 (5th Cir. 1979) [This case is styled “United Brands Company v. Melson” by the **Fifth Circuit**.] is overruled.

The offset applies, as well, to cases paid by the special fund for any purpose for which the fund is authorized to make payment under the act.

Cong. Rec. H 9733 September 18, 1984 (Erlenborn). (Emphasis added.)

The **Fifth Circuit** in Melson v. United Brands Corporation acknowledged the existence of a “double recovery” loop hole. The Melson court’s discussion helps clarify the context under which the 1984 Section 3 credit legislation was enacted. In Melson, the claimant had two jobs--one covered by the LHWCA and one covered by state workers compensation. The evidence indicated that while at his LHWCA employer claimant experienced shortness of breath and chest pains and was unable to climb out of the ship’s hold. The evidence further indicated that claimant was totally and permanently disabled as of his last day of work at the LHWCA employer. Claimant left his day job and went to his night job (governed by state compensation legislation) where he proceeded to have a myocardial infarction. The claimant filed both LHWCA and state compensation claims against his respective employers. See Melson, 594 F.2d at 1070.

The LHWCA employer argued that the claimant’s settlement of his state compensation suit barred a LHWCA recovery under Section 33(g) of the LHWCA and that even if the claim was not barred, that claimant’s federal award should be reduced by the amount of his state award. Melson, 594 F.2d at 1074.

Agreeing with the Benefits Review Board, the **Fifth Circuit** held that Section 33(g) was limited to the situation in which the third party is potentially responsible to both the employee and the covered employer. “The instant case is simply not the case of a third party causing injury to an employee arising during the employee’s employment for a covered employer...The compensation...is not a shared liability ... and [claimant’s] compromise ... does not affect [the LHWCA employer’s] duty to [claimant].” Melson, 594 F.2d at 1074.

Important for discussion here, the **Fifth Circuit** acknowledged that in Melson, “This is a theoretical double recovery and for purposes of our analysis we must be content to call Melson’s recovery a double recovery.” Melson, 594 F.2d at 1075. The **Fifth Circuit** found that neither of the LHWCA’s two provisions [§§ 33, 14(k)] that provide for a set-off were applicable here. Nor did the **Fifth Circuit** find any overriding policy to require that the LHWCA award should be reduced:

To allow United Brands a set-off is to give United Brands a windfall in the amount of Melson’s state award. **Until Congress is moved by this unusual situation**, we think that the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker rather than allow the set-off windfall to accrue to [the LHWCA employer].

Melson, 594 F.2d at 1075. (Emphasis added.)

[ED. NOTE: Obviously Congress was moved and thus created what has become subsection 3(e). Apparently, while taking precautions to make sure a Melson situation did not reoccur, Congress realized the second employer could just as easily have been a Jones Act employer. Furthermore,

commentators have previously noted the possibility of an LHWCA action against the employer and a Jones Act action against a shipowner. *See Gilmore & Black, "The Law of Admiralty," § 6-57 p. 455 (1975 ed.).*]

As to state compensation election of remedies cases **involving one employer**, *see* Topic 85, *infra*. In Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622 (1947) and Thomas v. Washington Gas Light Co., 448 U.S. 261, 12 BRBS 828 (1980), the **Supreme Court** left no doubt that in the absence of some explicit language in a state's statute prohibiting subsequent recoveries, the claimant may seek benefits under the LHWCA subject to credit for benefits paid under the state statute.

However, in the case of a longshore claim versus Jones Act recovery suit **involving one employer**, it may be argued that the member of the crew/seaman exclusivity clauses in both LHWCA and Jones Act statutes prevent subsequent or supplementary recovery despite the approach in Figueroa v. Campbell Industries, 45 F.3d 311 (9th Cir. 1995), by the **Ninth Circuit**.

[ED. NOTE: One must keep in mind that the relationship between the LHWCA and the Jones Act is not analogous to that between the LHWCA and various state compensation acts. The purpose of the LHWCA is to "supplement the state acts." See Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980). The "supplemental award gives full effect to the facts determined by the first award." Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). As to the Jones Act, it and the LHWCA are mutually exclusive. It would be impossible, therefore, for either the Jones Act or LHWCA to supplement or give full effect to the facts determined by the other forum and there to be dual, supplemental recovery.]

In Figueroa, the **Ninth Circuit** found that the claimant, "an injured seaman, arguably acting as a person enumerated under the LHWCA at the time of his injury, is entitled to recover for his pain and suffering under the Jones Act, and additionally can recover for unpaid wages and medical expenses either by recovering those damage elements under the Jones Act although not both." 45 F.3d 311.

[ED. NOTE: The READER IS CAUTIONED that the "buffet of benefits" approach developed by the Ninth Circuit in Figueroa fails to explain how pain and suffering elements of recovery under the Jones Act can be due from the same employer who may owe workers compensation benefits under the LHWCA. It is submitted that the Ninth Circuit has missed the jurisdictional boat with its interpretation of Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991). Simply because a worker's occupation is one of those enumerated in the LHWCA does not mean he is both a LHWCA claimant as well as a Jones Act seaman. As the Fifth Circuit so aptly stated in 1967, "It is thus apparent that the [LHWCA]'s exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, thereby eliminating any basis which may have existed for indemnification on a tort theory. ODECO v. Berry Brothers, 377 F.2d 511 (5th Cir. 1967). The Supreme Court in Gizoni simply found that even though a worker's occupation was enumerated in the LHWCA, the worker would not be precluded from entitlement to Jones Act benefits if he/she

could successfully pass the seaman test which entails a much higher degree of connexity with the marine environment than is required under the parameters of the LHWCA.]

In Figueroa, the employer had argued that Gizoni's language supported preclusion in a case such as Figueroa. Particularly relied on was the Gizoni United States Supreme Court's conclusion that "[i]t is by now universally accepted that an employer who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act." The employer in Figueroa argued that the payments to the worker constituted "formal awards." Figueroa, 45 F.3d at 315.

However, the **Ninth Circuit** noted that in Gizoni, the issue of coverage had never been litigated and concluded that **without a jurisdictional determination a worker/claimant could pursue as well as receive, the mutually exclusive remedies of both acts** in a situation such as Figueroa.

Since the **Ninth Circuit** in Figueroa relied substantially on Gizoni, some scrutiny of the Gizoni case is necessary at this point. The **Ninth Circuit**, in its version of Gizoni, cited to Petersen v. Chesapeake and Ohio Railway Co., 784 F.2d 732 (**6th Cir.** 1986) as addressing the question as to whether the LHWCA provides the sole remedy for a ship repairman injured as a result of his employer's negligence. The **Ninth Circuit** stated:

We join the **Sixth Circuit** in rejecting the notion that any person whose work involves ship repair is necessarily restricted to coverage under the LHWCA. Whether an employee is covered by the LHWCA or the Jones Act should be determined by looking to the nature of the claimant's work and the intent of Congress in enacting these compensation schemes, not by looking to the claimant's job title. Moreover, by its terms, the LHWCA does not cover a master or member of a crew of any vessel." ... Thus [the worker] is covered by the LHWCA only if he is not a seaman.

909 F.2d at 389.

[JED. NOTE: While the statements of the Ninth Circuit noted above are generally correct, the Ninth Circuit was incorrect in applying Petersen's general substantive law to the specific jurisdictional issue at hand in Gizoni. Petersen only involved a Jones Act filing; there was never an LHWCA claim filed in Petersen. (The employer in Petersen had argued that the worker was not a seaman, but rather, was covered by the LHWCA.) Despite the misapplication of Petersen, in Gizoni, the Ninth Circuit reached the proper conclusion for Gizoni's particular factual scenario. The Supreme Court affirmed the judgment of the Ninth Circuit in Gizoni. (Coverage under the LHWCA or the Jones Act does not depend on a claimant's job title, but rather on the nature of the claimant's work; an employer whose work involved ship repair is not necessarily restricted to a remedy under the LHWCA if he qualifies as a seaman within the meaning of the Jones Act.)]

Although in Gizoni, the claimant had filed an LHWCA claim, there was never a formal adjudication of coverage under the LHWCA. The claimant was receiving voluntary benefits. In Gizoni, the **Supreme Court** stated:

It is by now “universally accepted” that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. ... This is so, quite obviously, because the question of coverage has never actually been litigated. Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA.

502 U.S. at 91.

Thus, while the **Ninth Circuit** reached the proper result in Gizoni, its reliance on Petersen and its analysis in Gizoni should not properly be extended to the factual pattern of Figueroa. Gizoni is distinguishable from Figueroa. Figueroa involved an OWCP approved settlement of an LHWCA claim, whereas Gizoni involved a voluntary payment of LHWCA benefits.

[ED. NOTE: Query: Nevertheless, could Figueroa be the “proper” result since there was not an adjudication of the jurisdictional issue? See Nielsen, “The Jones Act and the LHWCA: What’s New in the Galaxy of Crossover Claims,” 1995 Longshore Claims Assoc. Seminar. Since adjudication, and fact finding for that matter, begin at the OALJ level, are all OWCP level settlements potentially at risk of not being considered “final” for Jones Act purposes? Perhaps Figueroa can best be explained as involving an Office of Workers Compensation Programs’ settlement of an LHWCA claim and not a formal adjudicatory level settlement order by an ALJ wherein a jurisdictional/factual determination could more formally be made.

*In the wake of Figueroa one must ask whether or not an OWCP settlement compensation order (as opposed to a finding of fact by an ALJ) is sufficient to entitle one to jurisdictional estoppel. See, e.g., Anders v. Ormet Corporation, 874 F.Supp. 738 (M.D. La. 1994) (ALJ held a formal hearing with one of the express issues being whether or not the claimant qualified as a seaman at the time of his injury. [Subsequently the U.S. District Court granted the employer’s motion for summary judgment in a Jones Act case; the worker had been injured on his employer’s towboat.]); Welch v. Elevating Boats, 516 F. Supp. 1245 (E.D. La. 1981) (Summary motion granted; plaintiff is collaterally estopped from claiming seaman status in light of the decision to the contrary by the ALJ); the pre-1972 amendment case (and therefore, pre-OALJ) of Young & Company v. Shea, 397 F.2d 185 (5th Cir. 1968) (collateral estoppel inapplicable because there was substantial variance in standard and proof required to establish facts before **commissioner** in this longshore proceeding and jury in court action--jury had found no accident had occurred.).]*

The **Ninth Circuit’s** proceedings in Papai also merit some scrutiny. First, the procedural history of Papai should be noted:

- 1) Jones Act suit filed.
- 2) Summary Judgment of Jones Act granted on behalf of Employer on grounds Claimant was not a seaman.
- 3) LHWCA claim filed, hearing held and Decision and Order issued awarding compensation. (This Decision and Order was not appealed and thus became final.)
- 4) Plaintiff/Claimant in Jones Act appealed Summary Judgment.
- 5) **Ninth Circuit** holds error to grant Summary Judgment on Jones Act claim and that Jones Act claim was not rendered moot by reason of Plaintiff's receipt of compensation benefits under LHWCA.

Next, one must look to the interpretation of the **United States Supreme Court's** Gizoni decision by the **Ninth Circuit** in Papai. The **Ninth Circuit** acknowledged the **basis of the Gizoni Court's holding was that the LHWCA claim was never actually litigated.**

However, the **Ninth Circuit** went on to quote additional Gizoni Court language which it found applicable to Papai:

Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA.

67 F.3d at 207, quoting 502 U.S. at 91. By "preclusive effect," the Gizoni Court is clearly referring to the suggestion by Southwest Marine that an employee's receipt of benefits under the LHWCA should preclude subsequent litigation under the Jones Act. As previously noted, the court answered that argument by noting that it is universally accepted that an employee who receives voluntary payments under the LHWCA **without a formal award** is not barred from subsequently seeking relief under the Jones Act.

Finally in Papai, the **Ninth Circuit** noted that the Gizoni Court, in a footnote addressing an equitable estoppel argument made by an amicus brief, stated that "[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended." 67 F.3d at 207, quoting 502 U.S. at 91 n.5.

However, these statements by the **Court** must be read in context. While the worker in Gizoni filed a preliminary claim under the LHWCA and received voluntary benefits, it was actually the Jones Act claim which was actively pursued. By pursuing the Jones Act claim to its conclusion, the claimant does eventually make a *de facto* election of remedies. The Jones Act tort remedy in all probability will be substantially greater than the claimant would have recovered under the LHWCA. But see Gautreaux v. Scurloack Marine, Inc., 107 F.3d 331 (**5th Cir.** 1997) and other cited cases, previously noted in this subsection, noting the standard of care to which seaman are held.

[ED. NOTE: In any case, it must be realized that the claimant can always control the course of the two prong litigation by where and when he/she actually files claims/suits. Additionally, the regulations provide for the withdrawal of an LHWCA claim for a “proper purpose”--a term not yet addressed by the circuits. For additional discussion on withdrawal of claims see Topic 8.11, infra.]

Thus, one should proceed cautiously before applying the **Ninth Circuit’s** present position beyond the borders of that circuit. In fact, even within the **Ninth Circuit**, one should proceed cautiously. The **Ninth Circuit** has not been consistent in applying its philosophy. See Rissetto v. Plumbers & Steamfitters, Local 343, 94 F.3d 597 (**9th Cir.** 1996). In this employment law case, based on judicial estoppel, the **Ninth Circuit** affirmed the dismissal of discrimination claims explaining that the doctrine of judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts. The **Ninth Circuit** determined that judicial estoppel applies to a prior inconsistent position taken by a litigant in an administrative proceeding, even though that position was not actually previously litigated by the parties. See Axelrod, “Res Judicata and Collateral Estoppel: A Sword And A Shield,” Longshore Newsletter, Vol. XIV, Issue 5 (Aug. 1996). While acknowledging the doctrine’s application to administrative proceedings and to workers compensation proceedings, the **Ninth Circuit** has not explained why it has not applied it in a LHWCA/Jones Act context.

In Sharp v. Johnson Bros. Corp., 973 F.2d 423 (**5th Cir.** 1992), the **Fifth Circuit** noted that the district court had reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the LHWCA and that by seeking, and acquiescing to the finding, collaterally estopped the claimant from contesting LHWCA coverage.

The claimant in Sharp had unsuccessfully argued as follows:

- 1) Because there is a “zone of uncertainty” between the Jones Act and the LHWCA, an injured worker should be able to pursue both remedies simultaneously.
- 2) Several commentators have argued that a worker should be able to accept benefits without losing his Jones Act claim, since the purpose of the compensation and recovery schemes is to protect the worker during his time of need.
- 3) There is no danger of double recovery, as one recovery is credited against the other.
- 4) Collateral estoppel should not apply because the issue of whether the worker was a seaman or a harbor worker was not litigated--only a consent judgment was entered in his case with the ALJ reviewing the agreement only for fairness, not jurisdiction.

In Sharp the **Fifth Circuit** specifically noted the holding of the **Supreme Court** in Gizoni and found that Sharp was distinguishable since Gizoni involved voluntary payments. The **Fifth Circuit**, in reference to Sharp stated:

It is beyond cavil that merely accepting voluntary payments under the LHWCA without a formal award does not bar a worker from filing a Jones Act suit. [Citation omitted.] Here, though, Sharp obtained a settlement agreement and a

compensation order issued by the ALJ. We have treated such an agreement and order as a “formal award.” See Newkirk v. Keyes Offshore, Inc., 782 F.2d 499, 501-02 (5th Cir. 1986); see also Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 955, 958-59 (2d Cir. 1980), aff’d 451 U.S. 596 (1981).

Sharp, 973 F.2d at 426.

The **Fifth Circuit** went on to state:

It is true that LHWCA coverage was never litigated in an adversarial proceeding. But Sharp availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage. He filed a claim for LHWCA benefits, invoking the jurisdiction of the DOL. Pursuant to 33 U.S.C. § 908(i)(1), the ALJ considered Sharp’s testimony, as well as the parties’ stipulations and their settlement, before issuing its findings of fact and order extinguishing [Employer’s] liability for LHWCA benefits.

Having obtained the order of the ALJ and the aegis of the DOL to ratify and enforce his settlement, Sharp ensured that his rights were more secure under the agreement than they would have been if the settlement were considered merely a contract between the parties. It follows that where the ALJ issues a compensation order ratifying a settlement agreement, a “formal award” should be deemed to have been made under Gizoni, and the injured party no longer may bring a Jones Act suit for the same injuries.

Our holding is consistent with the purpose of the LHWCA, as outlined in Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991). The LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. [citations omitted.] Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work unfairness, because, as here, employers often have different insurance carriers for workers’ compensation claims and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Nor is our holding inconsistent with Gizoni. In that case, the Court held that an injured maritime worker did not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. There is a difference, though, between saying a plaintiff may pursue only one remedy and declaring that he may receive only one award.

We agree that Congress did not intend that a worker forfeit his right to pursue one remedy when he pursues another. Otherwise, a plaintiff might fail to receive a LHWCA award, because the ALJ considered him a seaman, but be barred from Jones Act relief because he pursued what he believed were his remedies under the LHWCA.

Nor should an employer be able to avoid Jones Act liability by voluntarily paying LHWCA benefits that a needy worker can not but accept while awaiting trial [citations omitted.] **But Congress did not intend that the worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a “stepping stone on the way to a jury award.”** [citation omitted.]

Sharp, 973 F.2d at 426-27. (Emphasis added.)

The **Fifth Circuit** has acknowledged that, while there may be occasions that a fact-finder might be able to draw reasonable inferences to justify coverage under either the Jones Act or the LHWCA (see, e.g., Abshire v. Seacoast Products, Inc., 668 F.2d 832, 835 (**5th Cir.** 1982)), “[e]ven the ambiguous employee must elect a remedy.” McDermott, Inc. v. Boudreaux, 679 F.2d 452, 459 n.7 (**5th Cir.** 1982). The establishment of an employer’s liability under the LHWCA “effectively abrogates any independent tort liability of the employer to its employees....” Ocean Drilling & Exploration Co. v. Berry Brothers Oilfield Services Inc., 377 F.2d 511, 514 (**5th Cir.** 1967) cert. denied, 389 U.S. 849 (1967).

Gilmore and Black, in their treatise on Admiralty Law, acknowledge that “the plaintiff who attempts to bring a Jones Act action following a compensation award in a contested proceeding may find himself barred in a court which takes *res judicata* and **collateral estoppel** seriously.” See Gilmore & Black, The Law of Admiralty, § 6-52, at 435 (2d ed. 1975). However, these commentators suggest, “[O]n grounds of policy the argument can be plausibly advanced that the injured worker should be entitled to try for his Jones Act recovery no matter how properly his status as a non-seaman may have been adjudicated in a contested compensation proceeding.” Id.

[ED. NOTE: While Gilmore and Black go on to argue, for humanitarian reasons, that the worker should be able to pursue both remedies (“The provision of compensation during this period would serve the function of the traditional maritime remedy of maintenance and cure....”), the commentators forget that there is a vast difference between the compensation/tort distinction on the one hand, and the maintenance and cure/damages recovery on the other. While maintenance and cure are “supplemental” recoveries rooted in sea-based maritime law, “compensation,” a land-based recovery, has never been treated as supplemental in nature. In fact, compensation has always been viewed as an alternative recovery, not a bonus remedy.]

Professor Larson, in his The Law of Workmen’s Compensation treatise, has indicated that in his opinion an administrative approval of benefits should only be *res judicata* where the eligibility

issue is actually litigated: “[N]o one has a right to demand that the same issue between the same parties be litigated and decided twice. This certainly does not mean that a person cannot demand that the issue be genuinely litigated and decided once.” 3 Larson, Workmen’s Compensation § 90.51.

In this regard, Kalesnick v. Seacoast Ocean Services, Inc., 866 F. Supp. 36 (D. Maine 1994) merits discussion. Kalesnick is a Maine Workers’ Compensation/Jones Act jurisdictional estoppel case. In Kalesnick, there was a settlement of a Maine worker’s compensation claim specifically approved “on the basis of Maine law” as a final adjudication of the claim. Maine workers’ compensation law specifically excludes those “engaged in maritime employment or in interstate or foreign commerce who are within the exclusive jurisdiction of admiralty law or the laws of the United States.” 39 A M.R.S.A. § 102(11)(A)(1) (mirroring the definition of exclusive federal jurisdiction in Southern Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917)).

In Kalesnick, the U.S. District Court dismissed the Jones Act claim stating that an approved agreement for compensation has the force of a final adjudication to the extent of the facts agreed upon and the conditions considered by the parties as a basis for the compensation to be paid. “Applying this principle, we have held that an approved agreement for compensation conclusively establishes the existence of an initial compensable injury.” 866 F.2d Supp. at 38. Kalesnick specifically found that Maine’s law of *res judicata* includes matters that “might have been litigated.” Id.

The district court noted that Kalesnick met the Maine standards/criteria for the application of principles of *res judicata*: (1) the parties were identical; (2) the state workers’ compensation board approval was a final adjudication under the state legal system; and (3) the claimant’s status as a non-maritime employee could have been litigated (but was nevertheless implicit) in the earlier determination approving benefits. Importantly, the district court also noted that no approval of benefits was possible unless the parties and board thought that the person was eligible and board approval is implicitly a conclusive determination that the claimant did not come within the maritime exclusion.

[JED. NOTE: Query: How can one determine that there is jurisdiction to approve a settlement without also finding that there is jurisdiction under the LHWCA? In this regard, see Topic 1.2, supra, on Subject Matter Jurisdiction.]

The Board first addressed the broader issue of pursuing both an LHWCA claim and a Jones Act suit in Ryan v. McKie Co., 1 BRBS 221 (1974) (“The law permits the claimant to pursue both [an LHWCA claim and a Jones Act suit] of these remedies for the same injury, based on inconsistent claims as to his status at the time of the injury.”)

However, as support for its conclusion, the Board stated that: “A seaman employee who is injured aboard his employer’s vessel or on a vessel owned by a third party may recover compensation from his employer and still sue his employer and/or the third party for negligence or unseaworthiness.” For this proposition, the Board cited several cases including Reed v. S.S. Yaka,

373 U.S. 410 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The Board failed to note that it was Sieracki which brought about the 1972 amendments to the LHWCA which took away a non-seaman maritime worker's right of recovery for unseaworthiness. But see Blancq v. Hapag-Lloyd, 986 F.Supp. 376 (E.D.La. 1997); Laakso v. Mitsui & Co. U.S.A., Inc., 1990 A.M.C. 635 (E.D.La. 1989) (Unpublished but still has precedential value under **Fifth Circuit** Local Rules); Clark v. Solomon Navigation, Ltd., 631 F.Supp. 1275 (S.D.N.Y. 1986). One must keep in mind that in the context of the issue at hand, an LHWCA claim (compensation action) and a Jones Act suit (negligence action) involve the same parties and the same cause of action.

In Ryan, the Board did specifically state that “[i]t is clear that the [ALJ] had jurisdiction of this claim and was entitled to make a determination of whether the claimant was covered by the [LHWCA], notwithstanding the action pending in U.S. District Court. 1 BRBS at 225.

In Green v. C.J. Langenfelder & Sons, Inc., 30 BRBS 77 (1996), a Jones Act/LHWCA case, the Board failed to mention the issue of judicial estoppel. In Green, the claimant was injured while fixing a conveyor belt on an oyster harvesting dredge. He filed both LHWCA and Jones Act claims but settled the Jones Act claim. The ALJ granted summary judgment in favor of the employer on the issue of status. The employer had argued that the claimant was a member of the crew and, therefore, excluded under subsection 2(3)(G) of the LHWCA. The Board remanded for further factual development before making a legal conclusion on status.

The employer had alternatively argued that even if the worker did not meet the Jones Act seaman test, claimant would nevertheless be excluded from LHWCA coverage because of the aquaculture exclusion. See Section 2(3)(E) of the LHWCA. The ALJ had limited his decision to the status/Jones Act issue. On remand, the Board instructed the ALJ that, in the event the seaman exclusion was found inapplicable after following the Board's guidelines as to making a determination of Jones Act coverage, the aquaculture issue was to be considered.

Attempts by employers to out-manuever claimants as to **choice of forum** have thus far been unsuccessful. In General Construction Co., Inc. v. Embry, 1993 W.L. 137413 (N.D. Cal. 1993) an employer attempted to get an “advisory opinion” by filing a motion for a declaratory judgment in federal district court where the worker's widow had filed an LHWCA claim, but had not yet filed a Jones Act claim. The district court reviewed this request for a declaratory judgment as: (1) an attempt at an “end run” around the claimant's choice of hearing; and (2) as fostering piecemeal litigation.

[ED. NOTE: There is no overriding reason why the doctrine of judicial estoppel should not apply to LHWCA/Jones Act situations at least at the ALJ level and where jurisdiction has been specifically determined. Both the parties, as well as the causes of action, are identical. While at first glance, one may argue that the evidentiary standards and levels of proof may appear to be at variance, see Young & Company v. Shea, 397 F.2d 185 (5th Cir. 1968) (collateral estoppel inapplicable because there was substantial variance in standard and proof required to establish facts before commissioner in this longshore proceeding and jury in court action; jury had found no accident had

occurred.), one should keep in mind that the choice of forum (as well as the order of forums) remains in control of the claimant.

*While in Young & Company v. Shea, a **pre-1972** amendment (and therefore pre-OALJ) case, the **Fifth Circuit** found there to be “A substantial variance in the burden of proof” between the LHWCA and the Jones Act proceedings, the **Fifth Circuit** in Sharp v. Johnson Bros. Corp., 973 F.2d 423 (5th Cir. 1992) (post-1972 amendment case), did not have such a concern.]*

1.5 DEVELOPMENT OF JURISDICTION/COVERAGE

1.5.1 Generally

Any history of jurisdiction/coverage must begin prior to the enactment of the LHWCA in 1927. Prior to the enactment of the LHWCA, there was a division between federal and state jurisdiction over maritime injuries. In 1917, a sharp line was drawn at the water's edge. South Pacific Co. v. Jensen, held that a state compensation system could not reach longshoremen injured seaward of the water's edge. 244 U.S. 205 (1917). The **Supreme Court** opined that the federal government had sole power, under the admiralty clause of the Constitution, to regulate occurrences on the navigable waters of the United States. Application of state workers' compensation law would "conflict with the general maritime law, which constitutes an integral part of the federal law under Article III, § 2 of the United States Constitution."

In turn, a "maritime but local" doctrine emerged in 1921, when the Court modified the Jensen rule. A worker injured on navigable water was then accorded a state remedy **if** neither his general employment nor his activities at the time of the accident had any direct relationship to navigation or commerce (maritime employment).

In 1927, the first version of the LHWCA was enacted to compensate for the states' constitutional inability to provide remedies for employment injuries occurring on navigable waters. It stated that:

...[C]ompensation would be payable 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)...

33 U.S.C. § 903(a) (1927). (This is the origin of the concept of "**situs**" and should be thought of as a geographical concept.)

Even this first version of the LHWCA stated that an "employee" could not be a member of a crew. It defined an "employer" 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...."

The "**maritime employment**" phrase was rarely referred to since the worker injured while working on the water was assumed to be the requisite "maritime" worker. The necessary maritime connection was established even if the particular employment on the water was the kind of job typically performed on land. See Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334 (1953); Nogueira v. New York, N.H. & H. R. Co., 281 U.S. 128 (1930).

A predominantly non-maritime worker was covered as a maritime employee if he received his injury while temporarily assigned to work on the water. Parker v. Motor Boat Sales, 314 U.S.

244 (1941) (janitor's death covered because he drowned when riding in a boat, "a clearly maritime activity," during the course of employment).

1.5.2 Navigable waters

[ED. NOTE: See also Topic 2.9 "United States."]

The LHWCA does not define the term "navigable waters." In The Daniel Ball, 77 U.S. 557 (1871), overruled by United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940), the **United States Supreme Court** defined navigable waters as those forming "a continued highway over which commerce is or may be carried on with other States or foreign countries...." See also The Montello, 78 U.S. 411(1871); LePore v. Petro Concrete Structures, Inc., 23 BRBS 403 (1990). For instance, where a claimant had been working on a non-navigable lake at the time of his injury, the LHWCA's situs requirement was not satisfied. Williams v. Director, OWCP, 825 F.2d 246 (9th Cir. 1987).

[ED. NOTE: For an explanation of the term "navigable waters of the United States" see infra at Topic 2.9, "United States" for the discussion of Weber v. S.C. Loveland Co., 28 BRBS 321 (1994) (Initial hearing) (Claimant injured in the port of Kingston, Jamaica, while walking on employer's catwalk on barge, was covered under the LHWCA;) ; Weber v. S.C. Loveland Co.(Weber II), 35 BRBS 75 (2001)(Second hearing) (Board adheres to former holding that claimant's injury occurred on a covered situs as being the law of the case.); Weber v. S.C. Loveland Co. (Weber III), ___ BRBS ___ (2002) (Third hearing) (Board leaves intact its prior jurisdiction holding). This is NOT an extension act case. Also, for a good discussion of "navigable waters" see Stratton v. Weedon Engineering Co., 34 BRBS 549 (ALJ) (2000), finding of situs upheld at 35 BRBS 1 (2001).]

In Kaiser Aetna v. United States, 444 U.S. 164, 171-73 (1979), the **Supreme Court** pointed out that the concept of navigability may be used for different purposes. Examples include defining the scope of Congress' regulatory authority under the Interstate Commerce Clause, determining the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, and establishing the limits of the jurisdiction of federal courts conferred by Art. III, § 2, of the **United States Constitution** over admiralty and maritime cases. The **Supreme Court** warned that any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of navigability was invoked in a particular case.

The LHWCA derives its legitimacy over admiralty and maritime cases from Art. III, § 2 of the **Constitution** (the admiralty power), Nogueira v. New York, N.H. & H. R. Co., 281 U.S. 128 (1930), and not the Commerce Clause (Art. I). Washington v. W.C. Dawson & Co., 264 U.S. 219, 227 (1924); South Pac. Co. v. Jensen, 244 U.S. 205 (1917). Congress has power to alter, amend, or revise the **maritime law** by statutes of general application. Nogueira, 281 U.S. 128.

The federal admiralty jurisdiction is founded upon the need for a uniform body of governing law with respect to navigation and commercial maritime activity. Three Buoys Houseboat

Vacations, Ltd. v. Morts, 878 F.2d 1096, 1099 (8th Cir. 1989), vac'd, 497 U.S. 1020, adhered to on recon., 921 F.2d 775 (8th Cir. 1990), cert. denied, 502 U.S. 898.

Navigability, for purposes of the LHWCA, depends on **actual present navigation** or susceptibility to future navigation with reasonable improvements. Three Buoys, 878 F.2d at 1099; Land & Lake Tours v. Lewis, 738 F.2d 961, 963 n.3 (8th Cir.), cert. denied, 469 U.S. 1038 (1984); Livingston v. United States, 627 F.2d 165 (9th Cir. 1980), cert. denied, 450 U.S. 914 (1981) (comparison of admiralty jurisdiction, which requires present navigability in fact for commercial shipping, with commerce clause jurisdiction, which requires historical navigability); Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975); George v. Director, OWCP, 86 F.3d 1162 (Table) (9th Cir. 1996); Chapman v. United States, 575 F.2d 147 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978) (a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not “navigable waters” for purposes of jurisdiction).

See also Rizzi v. Underwater Construction Corp., 84 F.3d 199 (6th Cir. 1996), 28 BRBS 360 (1994) (diver who was injured in an underground reservoir tank located under a paper mill failed the situs test as required under Section 3(a) of the LHWCA as the tank did not constitute “navigable waters” pursuant to the section; it is irrelevant to a determination of navigability that water rushed in and out of tank and that claimant was subject to “maritime hazards”; nor did the tank constitute an “adjoining area” as there was no evidence to suggest that it was “used to load, unload, repair, dismantle, or build a vessel”). In Rizzi, the **Sixth Circuit** based its holding on the need for the ability of the body of water in question to function as a container highway for commerce between ports. The Montello, 78 U.S. 411 (1871).

The phrase “**any dry dock**” has been construed by case law to include marine railways, building ways, graving docks, and similar structures actually located on land. Paul v. General Dynamics Corp., 16 BRBS 290 (1984). This phrase includes land-based building ways similar to dry docks which are used for new ship construct. Murphy v. Bethlehem Steel Corp., 17 BRBS 148 (1985). Employees injured on “dry docks” during the construction of new ships are covered, as well as those claimants injured on “dry docks” while repairing vessels. See Maes v. Barrett & Hilp, 27 BRBS 128 (1993); Paul v. General Dynamics Corp., 16 BRBS 290 (1984).

The term “**pier**” as used in the LHWCA denotes a physical structure rather than a functional concept. Hurston v. Director, OWCP, 989 F.2d 1547, 26 BRBS 180 (CRT) (9th Cir. 1993), rev'd on other grounds [lack of status] at 181 F.3d 1008 (9th Cir. 1999)(structure built on pilings that reaches from land to navigable water is a “pier;” “If Congress had wanted to restrict ‘any adjoining pier’ to cover only those piers used for maritime purposes, it could have easily said so. Or, it could have eliminated the phrase ‘other adjoining area,’ so that ‘pier, wharf, dry dock, terminal, building way, [and] marine railway’ would also have been modified by ‘customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel []. Likewise, the drafters could have put a comma after ‘other adjoining area’ had they wished ‘any adjoining pier’ to be modified by ‘customarily used.’”). In Hurston v. Director, OWCP, 29 BRBS 127 (1995), on remand from

Hurston v. McGray Construction Co., 989 F.2d 1547, 26 BRBS 180 (CRT) (9th Cir. 1993), rev'g Hurston v. Mc Gray Construction Co., 24 BRBS 94 (1990), recons. en banc denied, BRB No. 88-4207 (Aug. 13, 1991), the Board held that a worker replacing sheet piling on the sides of a pier is covered under the LHWCA since “pier” is an enumerated situs regardless of its function. The pier was a rectangular structure which was entirely on the beach at low tide and which extended partly into the ocean at high tide. Oil well fluids produced on a nearby structure are piped to the pier where automated equipment separates the well fluids into gas, water, and crude oil, and where the processed crude oil is stored in a tank located on the structure. The stored crude oil was pumped in a pipeline, on a weekly basis to a marine terminal for later shipment to Los Angeles. The **Ninth Circuit** determined that a structure built on pilings that reaches from land to navigable water, and used only for oil production, is a pier. The court found that this structure was a covered situs under Section 903(a), even though it is not used for traditional maritime activity such as the loading or repair of vessels.

Although the LHWCA’s status requirement restricts coverage to only those employees engaged in maritime employment under Section 2(3), the LHWCA’s situs requirement does not require that any pier adjoining navigable waters of the United States be used as a navigational aid or for boat hook-ups or the like in order to be covered under Section 3(a). Thus, it is the type of structure, rather than its function, which defines “any adjoining pier” under the LHWCA.

Similarly, in Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980), an **uncompleted pier** under active construction was held to be a covered situs, albeit uncompleted. The **Fifth Circuit** explained that “Congress now expressly prescribes that situs is satisfied for injuries occurring upon any pier adjoining navigable waters.” Id. at 1219.

Previously, however, the **Fifth Circuit** had taken a contrary position in Jacksonville Shipyards v. Perdue, 539 F.2d 533 (5th Cir. 1976), vac'd sub nom. Director, OWCP v. Jacksonville Shipyards, 433 U.S. 904 (1977), on remand, 575 F.2d 79 (5th Cir. 1978). There, the **Fifth Circuit** applied a functional test. The court read Section 3(a) as permitting courts to “look past an area’s formal nomenclature and examine the facts to see if the situs is one customarily used by an employer in loading, unloading, repairing or building a vessel.” Jacksonville, 539 F.2d at 541.

It should be noted that Jacksonville pre-dated Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Caputo, emphasizing expansive situs coverage, held that an adjoining pier used only for storage is a covered site, regardless of the fact that it was not used to load or unload vessels. Thus, Jacksonville’s approach, which depends on construing the phrase “any adjoining pier” to be modified by customarily used ... in loading, unloading, repairing, dismantling, or building a vessel,” should not be relied upon.

As a result, an employee was compelled to make a jurisdictional guess as to whether he should bring a claim under the state “maritime but local” doctrine, or file a claim under the LHWCA. An error could foreclose the forum due to the statute of limitations. Finally, in Davis v. Department of Labor & Industry of Washington, 317 U.S. 249 (1942), the **Court** decided that this case by case

determination must stop. This goal was accomplished by **allowing concurrent jurisdiction** to put an end to the “**jurisdictional twilight zone.**” Id. at 256.

In Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), the Court held that the LHWCA comprehended all injuries sustained by employees on navigable water, without regard to whether the locus of an event was “maritime but local” and hence within the scope of state compensation provisions. A **judicial gloss** thus was placed on the term “**on navigable waters.**” A worker who, in the course of his duty was obliged to go on navigable waters, however briefly or sporadically, and who suffered an injury while in that historical maritime locality, was covered by Calbeck’s simple test:

- (1) the worker was on navigable waters at the time of the injury;
and
- (2) the employer employed one or more workers; and
- (3) said workers labor on navigable waters.

This approach led to the view that “maritime employment” includes even in a non-technical, general sense, employment upon the navigable waters. Thus, situs equaled instant status. In the pre-1972 jurisprudence, an injury in maritime employment included all work injuries of amphibious workers over navigable water. Pier injuries, however, were not covered in this pre-1972 period. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). Thus, a sharp jurisdictional line could still be drawn.

1.5.3 1972 Amendments

Congress extensively amended the LHWCA in 1972, moving federal coverage ashore in an attempt to provide continuous coverage for amphibious workers. The description of “navigable waters” in the coverage provision was enlarged to encompass certain areas shoreward of the Jensen line:

Compensation shall be payable ... if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading repairing or building a vessel)....

33 U.S.C. § 903(a) (1972).

Although this extension of coverage shoreward solved some jurisdictional problems, it created others. Longshore workers, shipbuilders, and other amphibious workers who had walked

in and out of coverage during their working day under the old act now were covered. Caputo, 432 U.S. 249. Workers with a transitory or incidental employment presence in the newly covered area, however, were not included. The definition of “employee” was amended to include only:

person[s] engaged in maritime employment, including any longshoremen 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 intent of the amendments was to add additional workers to coverage, not to exclude from coverage any employee who is injured in employment on actual navigable waters and who therefore would have been covered under the original act. The categories of occupations and activities expressly listed in Section 2(3) are **not** an exhaustive definition of the term “maritime employment.” Trotti & Thompson v. Crawford, 631 F.2d 1214 (5th Cir. 1980).

However, a string of **Supreme Court** decisions addressing Section 2(3) has left it “clearly decided that, aside from the specified occupations, land-based activity occurring within the Section 3 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.” Munguia v. Chevron U.S.A., Inc., 999 F.2d 808, 811 (5th Cir. 1993) (citing Chesapeake & Ohio R.R. v. Schwalb, 493 U.S. 40, 45 (1989)). See also P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 80 (1979); H.R.Rep. No. 92-1441, p.11 (1972); S.Rep. No. 92-1125, p.13 (1972), U.S.Code Cong. & Admin.News 1972, p. 4708.

The **United States Supreme Court**, in Herb’s Welding, stated:

Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is ‘clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered.’

470 U.S. at 423 (quoting Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267 (1977)).

1.6 SITUS

1.6.1 “Over water”

Although the intent of the amendments was to add to coverage rather than to exclude workers already covered, the jurisprudence has moved towards a stricter scrutiny of just what “maritime” employment is; i.e., is it simply work done over navigable water, Bienvenu v. Texaco, Inc., 124 F.3d 692 (5th Cir. 1997) (“We again repair to our troubled efforts to define maritime employment;” transiently or fortuitously over water equals coverage), reconsidered en banc at 164 F.3d 901 (5th Cir. 1999)(workman who is aboard vessel simply transiently or fortuitously, even though technically in course of his employment, does not enjoy coverage under LHWCA), overruling Randall v. Chevron U.S.A., Inc., 13 F.3d 888 (5th Cir. 1994)(transiently or fortuitously over water equals coverage); Director, OWCP v. Perini North River Assoc.(Churchill), 459 U.S. 297 (1983)(over water in course of employment equals coverage); Interlake Steamship Co. v. Nielson, 338 F.2d 879 (6th Cir. 1964); or is it more likely any work performed on the water that has a **realistically significant relationship** to navigation or commerce? Fusco v. Perini N. River Assocs., 622 F.2d 1111 (2^d Cir. 1980), cert. denied, 449 U.S. 1131 (1981); Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), rev’g 1 BRBS 180 (1974), cert. denied, 429 U.S. 868 (1976).

The **Fifth Circuit** answered this question in part when it reconsidered Bienvenu en banc. Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999) (en banc). That decision overruled Randall, supra, holding that 1) a worker who is aboard a vessel either transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA; and 2) an employee’s work on production equipment on board a vessel constituted significant work on navigable waters to trigger LHWCA coverage for injuries sustained on navigable waters. The **Fifth Circuit** declined, however, to set an exact amount of work on navigable waters sufficient to trigger LHWCA coverage, leaving that task to case by case development. In Bienvenu, the worker worked 8.3 % of his time on navigable waters.

The Board then applied Bienvenu in determining situs for the claimant in Ezell v. Direct Labor, Inc., 33 BRBS 19 (1999). In Ezell the Board held that applying the Bienvenu test, it was clear that the claimant suffered his injury on navigable waters during the course and scope of his employment. It was unclear, however, how often the claimant was required to travel by boat over navigable water in the course and scope of his employment and therefore whether his presence on water at the time of his injury was transient and fortuitous. The Board remanded for consideration of this question.

*[ED. NOTE: To the extent that Weyerhaeuser and Fusco held there must be a realistically significant relationship to navigation or commerce when the worker is working **over water**, one can argue that they have been indirectly overruled by Director, OWCP v. Perini North River Association, 459 U.S. 297 (1983). There need only be a “realistically significant relationship” to navigation or commerce when the worker is over land.]*

Ironically, the restrictive views of the **Ninth and Second Circuits** were founded on the **Supreme Court's** decision in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 11 BRBS 320 (1979), a case which dealt with land-based employees who, by definition, were not covered under the pre-1972 LHWCA. Ford's conclusion, taken out of context, was that "maritime employment" is an occupational concept based on the nature of a worker's activities, precluding any application of the 1972 LHWCA to an employee whose activities do not bear a significant relationship to navigation or commerce on navigable water.

The Board, reversed by Weyerhaeuser, overruled previous Board decisions that held that the 1972 Amendments did not reduce traditional coverage of the LHWCA. See Sedmak v. Perini N. River Assocs., 9 BRBS 378 (1978), aff'd sub nom. Fusco v. Perini N. River Assocs., 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981). These previous decisions had held that if one injured over navigable water would have been covered before the 1972 Amendments, one should continue to be covered after the 1972 Amendments.

Eventually, Weyerhaeuser gained widespread acceptance, except in the **Fifth Circuit**. See Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. Unit A 1982), cert. denied, 459 U.S. 1170 (1983). The courts elsewhere reverted to almost a case-by-case application of a status test.

The **Supreme Court** "clarified" the issue in Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983). The Court stated:

In holding that we can find no congressional intent to affect adversely the pre-1972 coverage afforded to workers injured upon the actual navigable waters in the course of their employment, we emphasize that we in no way hold that Congress meant for such employees to receive LHWCA coverage merely by meeting the situs test, and without any regard to the maritime employment language. We hold only that when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing of course, that he is the employee of a statutory "employer" and is not excluded by any other provision of the Act. We consider these employees to be 'engaged in maritime employment' not simply because they are injured in a historical maritime locale, but because they are required to perform their employment duties upon navigable waters.

Id. at 324.

Perini dealt with a construction worker injured while performing his job on the deck of a cargo barge being used in the construction of a sewage treatment plant extending over the Hudson River. Writing for the majority, Justice O'Connor held that a maritime construction worker working

on navigable waters and injured while on navigable waters would have been covered under the 1927 LHWCA and is covered today. In his concurrence, Justice Rehnquist noted that the claimant was engaged in unloading materials from a supply barge to a cargo barge, just as a longshoreman does, and therefore was in maritime employment.

Perini held that the 1972 Amendment did not disclose any Congressional intent to withdraw coverage from those workers injured on navigable waters in the course of their employment who would have been covered by the LHWCA before 1972. Perini states that before 1972, there was little litigation concerning whether an employer was “in maritime employment” for purposes of being the employee of a statutory employer.

The **Court** in Perini went on to state:

Indeed, the constant interpretation given to the LHWCA before 1972 by the Director, the Deputy Commissioner, the courts, and the commentators was that (except for those workers specifically exempted in the statute), **any** worker injured upon navigable waters in the course of employment was “covered...without any inquiry into what he was doing (or supposed to be doing) at the time of the injury.

459 U.S. at 311 (quoting Gilmore and Black, The Law of Admiralty at 429-430).

Importantly, the **United States Supreme Court** offered no opinion on whether coverage extends to workers injured while transiently or fortuitously on actual navigable waters. Id. at 324 n.34. The **Court** noted that its holding extends only to those persons “traditionally covered” before the 1972 amendments and that the **Court** expresses no opinion at the time of the Perini ruling as to whether coverage extends to workers injured while transiently or fortuitously upon actual navigable waters. 459 U.S. at 324 n. 34. The **Court** stated that its holding was a recognition that a worker’s performance of his duties upon navigable waters is necessarily a very important factor in determining whether he is engaged in “maritime employment.” Id.

It should be noted that while the history is sparse, there are several **Supreme Court** cases that predated Perini and also provide a background lending support to the Perini approach. Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962) (workers injured while working on launched and floating yet uncompleted drilling barges were covered under the LHWCA); Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941) (janitor who drowned while riding in employer’s motorboat keeping watch for obstacles was covered; unanimous **Court** held covered without any further inquiry whether the injured worker’s employment had a direct relation to navigation or commerce); Davis v. Dept. of Labor & Industry of Washington, 317 U.S. 249 (1942) (in *dicta*, the **Court** indicated that a worker engaged in dismantling a bridge across a navigable river who fell from a barge and drowned could be covered under the LHWCA).

In Calbeck, the **Court** specifically recounted the history of the pre-1972 LHWCA and stated that, “[I]t appears that the **Longshoreman’s Act was designed to ensure that a compensation**

remedy existed for all injuries sustained by employees on navigable waters...” 370 U.S. at 124 (emphasis added). In fact, the Calbeck Court notes that an original version of the proposed Longshore Act contained language which excluded “...employment of local concern and of no direct relation to navigation and commerce.” 370 U.S. at 122. Ultimately, the phrase was taken out because the Congressional committee thought the clause was vague and would be subject to continual litigation. 370 U.S. at 123. In Perini, the **Court** noted that in Calbeck the **Court** had made “it clear to employers that if they required their employees to work upon actual navigable waters, those employees would be covered by the LHWCA.” 459 U.S. 308, n.18.

In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), the **Court** stated, “Previously [to the 1972 amendments taking the LHWCA landward] so long as a work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class [i.e. master or member of a crew], the worker would be eligible for federal compensation provided that his or her employer had at least one employee engaged in maritime employment.” 432 U.S. at 265. While the Caputo Court went on to state that after the definition of navigable waters was legislatively changed in 1972, a requirement was added that the injured worker be “engaged in maritime employment,” (which was defined to include “any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker...”) this was *dicta* since the Caputo issue involved employees injured on land.

Randall, which was **overruled by Bienvenu v. Texaco, Inc.**, 164 F.3d 901 (5th Cir. 1999), had gone a step further than Perini and had extended LHWCA coverage “to workers injured while transiently or fortuitously upon actual navigable waters...” and held that anyone doing his/her work over water is covered under the LHWCA. In Randall, the claimant was a mechanic on a fixed platform in the Gulf of Mexico. As a tropical storm was approaching, a vessel came to evacuate the platform. Randall swung by rope to the deck of the vessel which fell away from him and he dropped into the water and drowned. He was a mechanic who performed all of his work duties on a fixed platform and had no assigned duties on navigable waters. He was simply transported to and from his work station—a statutory platform—by boat. In holding that the deceased was a “maritime employee,” in Randall, the **Fifth Circuit** discussed Perini and concluded “situs” at the time of injury can satisfy the “status” requirement. In other words, because Randall was injured/drowned on navigable waters in the course of his employment he was engaged in maritime employment. Based on Perini, his place of injury/death satisfied “status”.

The Randall court had read Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991) to base coverage under the LHWCA solely upon Fontenot’s injury on navigable waters without regard to the extent of his duties on navigable waters. (Fontenot was a wireline operator employed by an oil field service company as a pipe recovery specialist who spent equal parts of time on shore, on fixed platforms, and on oil exploration/production vessels, and who was injured while on a crewboat was covered under the LHWCA). It therefore concluded that Fontenot had decided that workers injured while transiently or fortuitously upon navigable waters are covered by the LHWCA.

The **Fifth Circuit**, sitting *en banc* in Bienvenu, reigned in coverage, aligning the circuit with the **Eleventh Circuit** and **Fourth Circuit**. Brockington v. Certified Elec., Inc., 903 F.2d 1523 (**11th Cir.** 1990), *cert. denied*, 498 U.S. 1026 (1991) (land-based electrician injured while riding in boat in which he had helped load supplies and equipment for a land-based job on an island did not have status under the LHWCA; there was nothing inherently maritime about his task as an electrician and the “maritime environment” in which he was injured had no connection to the general nature of his employment.); *see also* Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 260 (**4th Cir.** 1991)(noting that the plaintiff was “not merely fortuitously over water when his injury occurred”).

*[ED. NOTE: Perhaps the Randall philosophy of broad coverage had its origins in earlier **Fifth Circuit** jurisprudence. *See* Radcliff Gravel Co., Inc. v. Henderson, 138 F.2d 549 (**5th Cir.** 1943) (workers who trimmed sand and gravel as it was loaded on barges after being dredged from the bed of navigable waters and who drowned upon the capsizing of their boat as they returned to shore, were engaged in maritime employment and were covered under the LHWCA.); Nalco Chemical Corp. v. Shea, 419 F.2d 572 (**5th Cir.** 1969) (delivering chemicals to oil platforms by boat was sufficiently maritime to render employer an “employer” within the LHWCA and therefore provide coverage under the LHWCA.); and Boudreaux v. American Workover, Inc., 680 F.2d 1034 (**5th Cir. Unit A** 1982) (*en banc*) (worker injured while performing marine petroleum exploration and extraction work aboard a drilling vessel located offshore but in state territorial waters, was engaged in maritime employment under the LHWCA; 1972 amendments did not disturb previous test that the LHWCA covers all injuries on navigable waters of employees whose employers employed one or more workers to labor on navigable waters.)*

*The **Sixth Circuit’s** position had also tracked that of the pre-Bienvenu **Fifth Circuit**. *See* Interlake Steamship Co. v. Nielsen, 338 F.2d 879 (**6th Cir.** 1964).]*

Two years after Perini, in Herb’s Welding v. Gray, 470 U.S. 414, 17 BRBS 78 (CRT) (1985), the **Supreme Court** stated that, “[w]hile ‘maritime employment’ is not limited to the occupations specifically mentioned in Section 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships.” *But see* Ward v. Director, OWCP, 684 F.2d 1114 (**5th Cir.** 1982), *cert. denied sub nom.* Zapata-Haynie Corp. v. Ward, 459 U.S. 1170 (1983) (fish spotter pilot is covered); Holcomb v. Robert W. Kirk & Assocs., 655 F.2d 589 (**5th Cir. Unit B** 1981), *cert. denied*, 459 U.S. 1170 (1983); Fusco v. Perini N. River Assoc., 601 F.2d 659 (**2d Cir.** 1979), *vac’d*, 444 U.S. 1028 (1980); Tri-State Terminals v. Jesse, 596 F.2d 752 (**7th Cir.** 1979); Jacksonville Shipyards v. Perdue, 539 F.2d 533 (**5th Cir.** 1976), *vac’d sub nom.* Director, OWCP v. Jacksonville Shipyards, Inc., 433 U.S. 904 (1977).

In Herb’s Welding, however, the **Court** again expressly reserved the issue of whether the LHWCA applies to a worker injured while “transiently or fortuitously” upon navigable waters, although it noted in passing a “substantial difference between a worker performing a set of tasks requiring the worker to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.” Herb’s Welding, 470 U.S. at 427 n.13 This is ironic in lieu of the fact that the claimant in Herb’s Welding was not injured over water, but rather on a fixed

platform (artificial island). . Herb's Welding gave rise to a coverage test (when not injured on navigable waters the claimant must show that his employment had some connection with the loading, unloading, repair, or construction of ships). Id. at 1133.

The overruled Randall opinion remains illustrative of the ongoing difficulty in determining whether or not there is coverage. For instance, when referring to coverage when there is an injury on the actual navigable waters, the Randall court had stated:

We have some difficulty with this analysis, specifically in the Fontenot court's conspicuous omission of the "in the course of his employment" element of Perini in its application of Perini to Fontenot's case. Part of the difficulty, however, stems from the language of Perini itself. In one passage in Perini, the **Supreme Court** strongly suggested that even workers who are injured on navigable waters are required to show that "they are required to perform their employment duties upon navigable waters." Perini, 459 U.S. at 324 (footnote omitted); see also Herb's Welding, 470 U.S. at 424 n.10 (pointing out that Perini was "carefully limited" to coverage of an employee injured while performing his job upon actual navigable waters). Yet, at the same time, the Perini Court insisted that the addition of the "status" test to the LHWCA by the 1972 Amendments did not diminish the LHWCA's traditionally broad coverage of workers injured on actual navigable waters. Perini, 459 U.S. at 315, see also Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 6-51, at 428 (2d ed. 1975) (observing that, at least before the 1972 Amendments, "workers who are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment'").

Had the Fontenot court relied on the fact that Fontenot was employed on vessels, i.e., on actual navigable waters, some thirty percent of the time as well as on the day of his accident, its holding would be within the Perini rule. Instead, the court chose to rely solely on the situs of Fontenot's injury:

The **Court** [in Herb's Welding] did not address the status of an oil field employee injured while in transit on navigable waterways, or one who spent a substantial period of his time working on drilling vessels, rather than fixed platforms. Id. at 1130.

Randall, 13 F.3d at 897.

As previously noted, the **Fifth Circuit** overruled Randall in Bienvenu v. Texaco, Inc., 164 F.3d 901 (**5th Cir.** 1999) and brought itself in line with the **Eleventh Circuit**. Relying on Herb's Welding and Caputo, the **Eleventh Circuit** came to a contrary result in Brockington v. Certified Elec., 903 F.2d 1523 (**11th Cir.** 1990), cert. denied, 498 U.S. 1026 (1991), when a land-based electrician was injured over navigable water. The **Eleventh Circuit** looked at the claimant's basic employment and found that he did not meet the status test:

Although [the claimant] was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel, and his *de minimis* connection to maritime activity is simply insufficient to fulfill the "status" requirement of the LHWCA.

Brockington, 903 F.2d at 1528.

The **Eleventh Circuit** had held that Section 2(3) extends coverage to occupations beyond those specifically named by the statute. Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085 (**11th Cir.** 1988) (union representative covered under LHWCA). However, at least two other circuits asserted that the Sanders decision was an anomaly. See Sea-Land Services, Inc. v. Rock, 953 F.2d 56 (**3^d Cir.** 1992) (disagreed with Sanders decision); see also Coloma v. Director, OWCP, 897 F.2d 394 (**9th Cir.** 1990) (declined to follow Sanders decision). The **Eleventh Circuit** recognized that the Sanders decision was problematic and has since abrogated its effect. See Atlantic Container Service, Inc. v. Coleman, 904 F.2d 611 (**11th Cir.** 1990).

The **Fifth Circuit** has held that a night watchman of a naval landing craft temporarily in a repair yard who was injured during the scope of his employment was covered under the LHWCA. The watchman's duty was primarily to ensure the safety of the vessel, and he was injured while walking from one end of the vessel to the other as another ship passed the vessel. The ALJ and the Board denied benefits, but the **Fifth Circuit** reversed, "A watchman of a vessel docked in navigable waters at a ship repair yard for the purpose of being readied for sea who is injured aboard ship while in the performance of his duties is surely within 'maritime employment.'" Holcomb v. Robert W. Kirk & Associates, Inc., 655 F.2d 589, 593-94 (**5th Cir. Unit B** 1981). The court, however, noted that not "every watchman of a vessel in navigable waters comes under the Longshoremen's Act." Id. at 594. The **Fifth Circuit** reasoned the claimant's "work was certainly an 'integral part' of and 'directly involved in an ongoing ship repair operation'" Id.

Place of Inception Is Critical

The Board has held that in determining whether an injury occurs on navigable waters, the place of inception is the critical element of an injury - causing occurrence. Kennedy v. American Bridge Co., 30 BRBS 1 (1996); Crapanzano v. Rice Mohawk, U.S. Construction Co., 30 BRBS 81 (1996).

The Board had previously decided Gilmore v. Weyerhaeuser Co., 1 BRBS 180 (1974) (worker sorting logs and walking about on floating walkway and logs while feeding them into a mill was covered), similarly to what would eventually become the **United States Supreme Court's** position in Perini. Once the Board was reversed by the **Ninth Circuit** in Weyerhaeuser, the Board overruled its previous position and held that the 1972 amendments had changed the concept of "coverage" as it related to workers injured on navigable water. See Sedmak v. Perini North River Assoc., 9 BRBS 378 (1978), aff'd sub nom. Fusco v. Perini N. River Association., 622 F.2d 111, 12 BRBS 328 (**9th Cir.** 1980), cert. denied, 449 U.S. 1131 (1981).

Now, the Board has again shown movement back towards its pre-Weyerhaeuser position in Griffin v. McLean Contracting Co., (BRB No. 96-0759) (Jan. 29, 1997) (Unpublished), where the sole issue was one of coverage.

While in Griffin, the Board found that there was not coverage because the worker was working on a roadway not considered an "adjoining area" (because it was not used for maritime purposes), the *dicta* in Griffin is noteworthy. The Board noted the LHWCA as it existed prior to the enactment of the 1972 amendments and stated that in amending the LHWCA in 1972, Congress did not intend to withdraw coverage of the LHWCA from workers injured on navigable waters who would have been covered by the LHWCA before 1972. Perini, 459 U.S. 297 (1983).

The Board noted that the Perini Court held that when a **worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3)**. The Board stated, "**Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision.**" (emphasis added.) Griffin at slip op. p. 2. Again, also in *dicta*, the Board in Griffin stated that, "...injury on actual waters is sufficient to establish coverage under both sections 2(3) and 3(a) of the Act..." Griffin at slip op. p. 3.

Finally, in Griffin the Board clearly explained its position:

Section 3(a) provides coverage for disability resulting from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railroad or other adjoining area customarily used by an employer in loading, repairing, dismantling, or building a vessel.) 33 U.S.C. §903(a)(1988). **Accordingly, coverage under Section 3(a) is determined by the nature of place of work at the moment of injury.**

Griffin at slip op. p. 3 (emphasis added).

Recently the Board has continued this trend, holding that a trainman whose job included removing train cars from barges using a float bridge satisfied the maritime situs requirement. The claimant in Turk v. Eastern Shore Railroad, Inc., 34 BRBS 27, (2000) worked as a trainman for employer. Part of the employer's operations involved moving train cars across the harbor between

Norfolk Virginia and the Eastern Shore. Barges were used to transport the cars, and loading or unloading them required trainmen to attach the barge to a float bridge and then couple the cars to a “reach car” which could then be used to pull the car off the barge. The claimant was injured while he was helping to secure a barge to the float bridge. The Board held that the claimant satisfied the situs requirement for two reasons. First, the definition of “pier” in Hurston, 989 F.2d 1547, 26 BRBS 180 (CRT), was sufficiently broad to include the float bridge. Second, absent the analogy with the pier, the float bridge would be covered because it qualifies as an “other adjoining area customarily used by an employer in loading, unloading, [etc.]”

The group of workers who traditionally had been covered as maritime employees prior to the 1972 amendments by virtue of work on navigable waters includes such diverse occupations as marine construction workers, pile drivers, barge workers, deckhands, divers, airplane pilots (fish spotters), roustabouts and security guards. See The Longshore Textbook, 4th ed. 1999.

1.6.2 “Over land”

“Situs” was extended landward in 1972 under Section 3(a)’s “adjoining” clause. This “**adjoining area**” concept has been broadly interpreted to include land that is not contiguous to the navigable water, provided certain conditions are met:

- (1) the suitability of the site for maritime purposes,
- (2) the use of adjoining properties,
- (3) proximity to the navigable waterway,
- (4) whether or not the site is as close to the waterway as is feasible, given all of the circumstances.

In Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141, 7 BRBS 409, 411 (9th Cir. 1978), the court was more concerned with a “**functional relationship**” than it was with physical contiguity. The “functional relationship test” was later adopted by the Board in Bennett v. Matson Terminals, 14 BRBS 526 (1981), aff’d sub nom. Motoviloff v. Director, OWCP, 692 F.2d 87 (9th Cir. 1982).

The Board recently affirmed application of the Herron test in Waugh v. Matt’s Enterprises, Inc., 33 BRBS 9 (1999). The Board held the ALJ’s application of the test was rational based on location of the site, use of the surrounding area, relationship to the unloading process, and attachment to a waterfront facility.

The Board held in McCormick v. Newport News Shipbuilding & Dry Dock Co., 32 BRBS 207 (1998), that a claimant injured while obtaining parts from a shipyard’s warehouse that was

physically separated from navigable waters by more than ½ mile was not covered under the LHWCA because he lacked situs as defined by the **Fourth Circuit**. In affirming the ALJ, the Board decided that because the building in question was physically separated from the employer's shipyard by public streets and a security gate, it was a separate and distinct piece of property. This is consistent with Sidwell v. Express Container Services, Inc., 71 F.3d 1134, 29 BRBS 138 (CRT) (**4th Cir.** 1995), cert. denied, 518 U.S. 1028 (1996); Parker v. Director, OWCP, 75 F.3d 929, 30 BRBS 10 (CRT) (**4th Cir.** 1996), cert. denied, 519 U.S. 812 (1996); Bianco v. Georgia Pacific Corp., ___ BRBS ___, (BRB Nos. 00-00953 and 00-0953A)(June 20, 2001) (Situs not met where injuries occurred within a separate manufacturing facility and not part of the Brunswick Port; buildings where injuries occurred were used solely in the manufacturing process rather than as a step in the chain of unloading raw materials.).

Likewise, the Board in Arjona v. Interport Maintenance Co., Inc., 34 BRBS 15 (2000), supported an ALJ's application of the Herron factors to a case involving an employee of an intermodal container terminal. The claimant was a container repairman who was injured while using an electric saw to repair a container at the employer's facility in the Oak Island Conrail Yard. The facility was located one quarter mile from the Newark Bay and one half mile from the Port Newark/Port Elizabeth Terminal. Applying Herron, the ALJ found that claimant did not establish that employer's facility was a maritime situs because the site had only minimal relation to and was not particularly suited to maritime use. The Board affirmed because it also felt that employer's facility did not have a sufficient functional nexus to maritime commerce.

To the contrary, Texports Stevedore Co. v. Winchester, 632 F.2d 504 (**5th Cir.** 1980), cert. denied, 452 U.S. 905 (1981), held that although an adjoining area need not be directly contiguous to navigable water, it must have a **maritime nexus**. The **Fifth Circuit** stated:

The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. Jacksonville Shipyards, Inc., 539 F.2d at 541. Just as we disapprove of a test that disposes of the question based totally on the presence of intervening or surrounding maritime facilities, we also reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.

Texports, 632 F.2d at 513-14.

The court went on to analyze the parameters of “**adjoining**” as follows:

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

Id. But see Stratton v. Weedon Engineering Co., 35 BRBS 1 (2001) (holding that ALJ properly applied Textports Stevedoring v. Winchester when ALJ determined that gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of navigable waterways, it was as close to the docks as feasible, and it had a nexus to maritime activity.)

Importantly, the situs inquiry looks to the nature of the place of work at the moment of injury. Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977). A site adjacent to navigable waters or in a neighboring area customarily used in loading or unloading a vessel satisfies the situs test even though it is not used exclusively for maritime purposes. See Zeringue v. McDermott, Inc., 32 BRBS 275 BRB No.98-435 (1998) (yards with a functional and geographical nexus to navigable waters that are used for loading vessels are sufficient to give Claimant situs); see also Gavronic v. Mobil Mining and Minerals, 33 BRBS 1(1999) (geography of facility adjacent to docks where barges are loaded and unloaded and occurrence of significant maritime activity at that facility in the form of loading and unloading of barges sufficient to support conclusion that injuries occurred in a covered situs); Uresti v. Port Container Industries, Inc., 34 BRBS 127 (2000) (Board overturned ALJ decision and found that there was a covered situs because rail warehouse was used as a step in the unloading process and facility’s proximity to navigable waters satisfied Fifth Circuit’s geographic requirement), reconsideration denied, Uresti v. Port Container Industries, Inc., 34 BRBS 127 (2000); but see Stroup v. Bayou Steel Corp., 32 BRBS 151 (1998) (worker injured in a warehouse shipping bay at a steel manufacturing plant was not injured on a covered situs).

In Hagenzeiker v. Norton Lilly & Co., 22 BRBS 313 (1989), the Board held that an accident on a public road within the port complex occurred on a covered situs as the entire port complex was used for importing and exporting cargo. Compare with Kerby v. Southeastern Public Service Authority, 31 BRBS 6 (1997), aff’d, 135 F.3d 770 (4th Cir. 1998) (Table).

A claimant who was engaged in maritime employment, but who was injured when he was struck by an automobile while returning from a restaurant located 1.5 miles from employer’s terminal, was not injured on a maritime situs. Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), aff’g, Humphries v. Cargill, Inc., 19 BRBS 187 (1986), cert. denied, 485 U.S. 1028 (1988). See also Cabaleiro v. Bay Refractory Co., 27 BRBS 72 (1993); McConnell v. Bethlehem Steel Corp., 25 BRBS 1 (1991).

Where a lineman, who ties up ships, is on call twenty-four hours a day, seven days a week and sustains injuries in an automobile accident which occurred in the course of his employment, on a public road thirteen miles from a job site, he is nevertheless not covered under the LHWCA because he lacks situs. Morris v. Portland Lines Bureau, (BRB No. 96-0472)(Nov. 21, 1996)(Unpublished) (“The specific employment requirements concerning the use of claimant’s car and the use of public roads between his residence and the docks do not automatically bring the location of claimant’s injury on a public road within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury to navigable waters.”).

The breadth of the requirements of a claimant’s employment does not enlarge situs under the LHWCA. Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. See Nelson v. Gray F. Atkinson Construction Co., 29 BRBS 39 (1995), aff’d sub nom., Nelson v. Director, OWCP, 101 F.3d 706 (9th Cir. 1996) (Table).

The specific employment requirements concerning the use of a claimant’s car and the use of public roads between the employee’s residence and the docks do not automatically bring the location of the claimant’s injury on a public road within the coverage of Section 3(a). The situs inquiry looks to the relationship of the place of injury to navigable waters. See generally Brown v. Bath Iron Works Corp., 22 BRBS 384, 389(1989); Davis v. Doran Co. of California, 20 BRBS 121, 124-125 (1987), aff’d mem., 865 F.2d 1257 (4th Cir. 1989) (Table); Lasofsky v. Arthur J. Tickle Engineering Works, Inc., 20 BRBS 58, 60 (1987), aff’d mem., 853 F.2d 919 (3d Cir. 1988) (Table).

[ED. NOTE: Compare the Board’s position in Morris with the Third Circuit’s position in Curtis v. Schlumberger Offshore Serv., 849 F.2d 805 (3d Cir. 1988) (OCSLA case wherein the circuit court found that the OCSLA does not contain a “situs” requirement, that it covers injuries “arising out of or in connection with” an OCSLA operation). Cf. Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (en banc.)]

In Kerby v. Southeastern Public Service Authority, 31 BRBS 6 (1997), aff’d, 135 F.3d 770 (4th Cir. 1998) (Table), wherein the claimant worked at a power plant which provided electricity and steam for shipbuilding and ship repair at a shipyard. However, since the power plant was separated from the shipyard by a fence around the shipyard, a private railroad spur, and a fence around the power plant, and since the power plant was not contiguous with navigable water the Board determined that the claimant did not satisfy the Section 3(a) situs requirement, though there was a covered status.

The fact that the power plant was located on Naval property adjacent to the naval shipyard in order to efficiently provide steam and electricity was of no consequence. The Board also noted that employer’s power plant personnel do not have immediate access to Norfolk Naval Shipyard by virtue of their employment status with the employer. To enter the shipyard, employer’s power plant employees need to obtain a special pass from the shipyard and must be escorted into the shipyard.

[ED. NOTE: While the Board here is contained by Sidwell v. Express Container Service, Inc., 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996) (an area is “adjoining” navigable water only if it is contiguous with, or otherwise touches navigable waters; to be included as an “other area” under the LHWCA, the area must be a designated shoreside structure or facility which must be “custodially used by employer in loading, unloading, repairing, dismantling, or building a vessel.”), this decision would most probably have been the same in other circuits, if one relies on the shipyard’s personnel practices (i.e. security passes, escort) as a crucial element of analysis.]

Interestingly, the Board noted that the fact that surplus electric power was sold off for non-shipyard commercial use was not dispositive.

In Griffin v. Newport News Shipbuilding & Dry Dock Company, 32 BRBS 87(1998), the Board affirmed the ALJ’s finding that (in the **Fourth Circuit**) a parking lot owned by the employer, but located across a public road from the shipyard, is not a covered situs under the **Fourth Circuit’s** decision in Sidwell v. Express Container Services, Inc., 71 F.3d 1134, 29 BRBS 138 (CRT) (**4th Cir.** 1995), cert. denied, 518 U.S. 1028 (1996). The Board analogized to the decision in Kerby v. Southeastern Public Service Authority, 31 BRBS 6 (1997), aff’d mem., 135 F.3d 770 (**4th Cir.** 1998) (table) (the claimants were injured at a power plant owned by an employer, which provided electricity in part for employer’s shipyard, did not satisfy the situs requirement.). In the instant case, the Board noted that the parking lot is physically separated from the shipyard by a public street as well as a security fence and concluded that it must be deemed to be a separate and distinct piece of property rather than part of the overall shipyard facility.

The situs requirement is not met solely because an employer’s facility was customarily used and particularly suited for its ship-repair work, since any test which focuses only on whether the facility is used for a maritime purpose and whether a claimant is a maritime employee would effectively eliminate the situs requirement of Section 3(a). Davis v. Doran Co., 20 BRBS 121 (1987), aff’d mem., 865 F.2d 1257, 22 BRBS 3 (CRT) (**4th Cir.** 1989) (Table).

In Davis, the Board noted that this marine propeller repairing company did not front on water (one mile away by air, two miles by water) and “was in an area not primarily maritime as indicated by the presence of a bottling company, a linen service, an auto body shop, a public park, office buildings and residential housing in the area.” The evidence disclosed that this structure was chosen simply because it would contain an overhead crane and would permit the movement of ship propellers throughout the facility. Its proximity to water was fortuitous, according to the Board.

As to **occupational diseases**, the expanded situs requirement (after the 1972 Amendments) applies to employees and their survivors, even though the employee was exposed to the hazardous stimuli before the effective date of the Amendments, in an area that was not a covered situs before the 1972 Amendments. Insurance 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) (Date of manifestation of

occupational disease with long latency period, rather than date of last exposure, determines whether LHWCA as amended, applies to employee or survivor seeking benefits.).

In Nelson v. Guy F. Atkinson Construction Co., 29 BRBS 39 (1995), the Board found that the claimant failed to satisfy the situs requirement under Section 3(a) where, at the time of his injury, he was preparing and excavating, through the use of explosives, an area of dry land that would eventually become a navigational lock. **The fact that the site of an injury will be navigable at some point in the future does not render the site navigable at the time of the injury.** *Id.*

Furthermore, as there was no evidence that the site of the claimant's injury was used by employer for maritime activities **at the time of claimant's injury**, the site did not constitute an "adjoining area." (Section 3(a) provides coverage for a disability resulting from an injury occurring on an "adjoining area"). Nelson, 29 BRBS at 41-42 (citing Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141, 7 BRBS 409, 411 (9th Cir. 1978)).

See also Rizzi v. Underwater Construction Corp., 84 F.3d 199 (6th Cir. 1996), *aff'g*, 28 BRBS 360 (1994) (diver who was injured in an underground reservoir tank under a paper mill failed the situs test as required under Section 3(a) of the LHWCA as the tank did not constitute "navigable waters" pursuant to the section; it is irrelevant to a determination of navigability that water rushed in and out of tank and that claimant was subject to "maritime hazards"; nor did the tank constitute an "adjoining area" as there was no evidence to suggest that it was "used to load, unload, repair, dismantle, or build a vessel").

A worker injured on board a ship in Alaskan navigable waters who is assisting in the clean up of the massive VALDEZ oil spill meets the situs test and the fact that some of the clean up work might have occurred on land adjacent to the water would not adversely affect the situs test. Fontenot v. Industrial Clean-up, Inc., (92-LHC-971)(August 17, 1992)(Unpublished), appealed as Industrial Clean-up, Inc. v. U.S. Dept. of Labor, BRB, (appeal pending).

The jurisprudence involving multi-use facilities continues to evolve. The Board had stated that, for the purposes of determining situs a facility should not be divided into two functioning areas, maritime and non-maritime. Brickhouse v. Jonathan Corp., (BRB Nos. 95-1556 and 96-1278) (1996)(Unpublished), *citing* Sidwell v. Express Container Services, Inc., 71 F.3d 1134, 1140 n. 11, 29 BRBS 138, 144 n.11 (CRT) (4th Cir. 1995) (situs inquiry is concerned with whether the parcel of land adjoins navigable waters, "not the particular square foot on that parcel upon which a claimant is injured."). [However, on appeal at Jonathan Corp. v. Brickhouse, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), the **Fourth Circuit** (in a de novo ruling on a question of law) overturned the Board's finding of situs.] The Board had limited the application of the holding in Sidwell to cases arising within the **Fourth Circuit**. Arjona v. Interport Maintenance Company, Inc., 31 BRBS 86 (1997). However, the Board has recently expounded on this issue, specifically holding that where a site contains both areas used for loading and unloading, and a non-maritime manufacturing concern, the manufacturing portion of the facility is not a covered situs. See Bianco v. Georgia Pacific Corp., 35 BRBS 99 (2001); Jones v. Aluminum Co. of America, 35 BRBS 37 (2001).

In Parker v. Director, OWCP, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996), the **Fourth Circuit** noted that to be included as an “other area” under the LHWCA, the **area** must be custodially used by the employer in loading, unloading, repairing, dismantling, or building a vessel.”

According to the Board, the emphasis in Brickhouse was on the “area”. The facility was on a 90 acre site adjoining a navigable river. While the majority of the work done at the facility was not maritime related, a “significant amount” was. Large completed projects were shipped out by barges which dock at the facility. The building in which claimant’s injury occurred was about 800 feet from the river’s **edge**. A **third** of the building was used for shipbuilding construction contracts. The Board, in Brickhouse, concluded that “situs will be conferred, even where an injury occurs on a non-maritime portion of a facility, if the overall facility upon which claimant is injured constitutes an “adjoining area” under Section 3(a).” Brickhouse, slip op. at 4.

However, the **Fourth Circuit reversed** the Board’s affirmance of situs in Brickhouse. The court noted that the facts were not in dispute and thus, its ruling would be on a question of law. In discussing the situs requirement in general, the court stated that “The link between the navigable waters and the land side facilities [added to the Act in 1972] is thus established under the statute by (1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen’s work on ships.” 142 F.3d at 221, 32 BRBS at 89 (CRT). The **Fourth Circuit** stated that the claimant’s injury did not occur on an enumerated situs, that is, a “pier, wharf, dry dock, terminal, building way, or marine railway.” The court then held that the site is not an “other adjoining area customarily used...” for loading or unloading cargo onto ships on navigable waters, or for building, repairing or dismantling ships. The court emphasized that the employees worked at a steel fabrication plant, and that this work did not routinely or customarily take them from the plant onto the adjoining river. It stated that when the employees worked at the steel plant, their work was unaffected by the plant’s contiguity with navigable waters, as such contiguity was merely fortuitous, since the components had to be shipped elsewhere to be installed.

In an *en banc* decision, the Board has continued to follow the **Fourth Circuit’s** Brickhouse philosophy. Sowers v. Metro Machine Corp., ___ BRBS ___ (BRB No. 00-1141) (Jan. 3 2002).

The **Third Circuit** found situs under the Act for a bulldozer driver working on a beach moving a sand-dredging pipeline. The worker moved the pipeline up and down the beach in order to strategically deposit the sand and waded in water to adjust valves and add sections to the pipeline. He also moved the sand from where it was pumped in those waters adjacent to the beach to the shore and then graded the sand on the beach with his bulldozer. The court reasoned the proper situs test is whether the beach on which claimant was injured qualified as an adjoining area customarily used by at least one maritime employer to unload a vessel. The **Third Circuit** held that an unimproved beach falls within the plain meaning of the word “area.” See Nelson v. American Dredging Co., 143 F.3d 789 (3d Cir. 1998).

Also, the **Third Circuit** found that the word “customarily” in Section 3(a) of the LHWCA modifies the phrase “adjoining area ... used by an employer,” not simply the phrase “adjoining area.”

Thus, one must look to whether the employer customarily uses a beach for loading or unloading rather than whether the beach “customarily is used” for “loading” or “unloading.” In this regard, the **Third Circuit** looked to the specific operations of the employer. It noted the employer was in the business of dredging channels and reclaiming beaches. The geographical area in question was an area contiguous to navigable waters. It and similar beaches were customarily used by this employer to unload its hopper dredge vessel. See Nelson, supra.

In Loyd v. Ram Industries, Inc., ___ BRBS ___, (BRB No. 00-1089)(Aug. 7, 2001), the Board upheld the ALJ’s reliance on Nelson in finding situs and status for pipeline worker engaged in dredging operations in a ship channel. The decedent inspected and maintained the land portion of the pipeline and removed debris from the pipeline and at the dumpsite. In Loyd, the injury occurred in an area adjoining navigable water which was customarily used by the employer to unload dredged material (satisfying situs test). The decedent’s duties were an intergral part of the unloading process (satisfying the status test). In a footnote, the Board also observed that the decedent’s job was similar to a harbor worker.

In Shivers v. Navy Exchange, 144 F.3d 322 (4th Cir. 1998), a **parking lot** maintained by the employer for its employees was considered part of the employer’s premises for purposes of the LHWCA’s “course of employment” requirement. Although the Navy Exchange did not actually own the parking lot property, it did direct its employees to park there and had an active hand in controlling the lot. The Navy Exchange exercised significant control over where its employees parked. Therefore, the lot bore a significant connection to the Navy Exchange’s workplace such that the parking lot should be considered part of its premises for purposes of recovery under the LHWCA.

1.7 STATUS

1.7.1 “Maritime Worker” (“Maritime Employment”)

As previously noted, the amendments to the LHWCA moved coverage landward to a limited degree. The **United States Supreme Court** in Perini, 459 U.S. 297, indicated that the 1972 Amendments were not intended to apply a status test to maritime workers injured over actual navigable waters who would have been covered before 1972.

[ED. NOTE: By referring to these workers as “maritime” workers injured over water, it can be argued that Perini did apply a status test of sorts. However, the reverse argument is that a worker, working over water, is by definition, a “maritime” worker.]

Several **Supreme Court** cases have interpreted the “status” requirement of the 1972 LHWCA. The first major case was Northeast Marine Terminal v. Caputo, 432 U.S. 249 (1977). Under Caputo, a claimant need not be engaged in maritime employment at the time of injury to be covered by the LHWCA. The **Court** noted that it was not Congress’ intent that a claimant walk in and out of coverage during a day’s work. 432 U.S. at 266 n.27.

In Caputo, the Court rejected the “moment of injury” test for purposes of excluding claimants from coverage. The “moment of injury” test looked to a claimant’s duties at the time of injury in determining whether status is established. See also Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978), aff’g 1 BRBS 273 (1975); Christensen v. Georgia-Pacific Corp., ___ F.3d ___ (No. 00-35922) (9th Cir. Nov. 9, 2001) (claimant “was engaged as a stevedore and routinely worked at loading and unloading cargo from ships. Therefore, he is covered by the LHWCA.”).

In its desire for uniformity of coverage, the LHWCA focuses on occupation, rather than on duties at the time of injury. The **Supreme Court** stated that Congress intended to cover “persons whose employment was such that they spent at least some of their time in indisputably longshore operations and who, without the 1972 Amendments, would be covered for only part of their activity.” 432 U.S. at 273.

It is noteworthy that the **Court** did not decide whether the claimant in Caputo was engaged in duties at the time of injury that were maritime, since he was a longshoreman by occupation and could have been assigned to covered or uncovered duties. (The worker was actually putting goods already unloaded from a ship or container onto a delivery truck.) See Southwest Marine v. Gizoni, 502 U.S. 81, 26 BRBS 44 (CRT) (1991).

The **Fourth Circuit**, in In Re CSX Transportation, Inc., 151 F.3d 164 (4th Cir. 1998), held that a worker who engages in unloading activity 15% of the time, but was not engaged in maritime activity at the time of his injury, is nevertheless “covered” under the LHWCA (“While the status test properly inquires whether the employee was engaged in maritime employment at the time of his injury, this does not mean that his particular duties at the time of injury needed to be maritime in

nature. Rather, the status test turns on whether the employee's occupation at the time of injury was maritime."'). Citing to **Fifth Circuit** case law, the court noted that the worker was assigned maritime work as needed at the maritime terminal and that his maritime work was not merely "momentary or episodic." The court further noted that this maritime work was an assigned portion of his duties necessary for the employer to function at the terminal efficiently. Similarly, the Board held in Zeringue v. McDermott, Inc., 32 B.R.B.S.275 (1998) that while the claimant's main job was that of a bulldozer operator, his duties included sufficient regular participation in load-outs to qualify him as engaged in maritime employment. This amounted to participation in indisputable maritime activity as part of the claimant's regular duty assignments.

When a claimant's duties are temporary in nature, he may be found not to have status. Moon v. Tidewater Const. Co., ___ BRBS ___, (BRB No. 00-1138)(Aug. 22, 2001)(civilian employee of a contractor hired by U.S. Navy to build a warehouse at a naval base had only a temporary connection to the base which would terminate when he completed his portion of construction of the warehouse, which was not uniquely maritime in nature.); Weyher/Livsey Constructors Inc. v. Prevetire, 27 F.3d 985 (4th Cir. 1994).

Accordingly, the Board has also noted that the **Fifth Circuit** uses the "moment of injury" test to broaden coverage under the LHWCA, not to narrow it. Based on that note, the Board has held that although claimants were not working in maritime tasks when they were injured, their regular participation in maritime work is sufficient to meet the status requirements of Section 2(3). See Gavranovic v. Mobil Mining and Minerals, 33 BRBS 1 (1999); Uresti v. Port Container Industries, Inc., 33 BRBS 215 (2000) (claimant engages in covered employment as long as some portion of his activities constitute covered employment and those activities are more than episodic, momentary, or incidental to non-maritime work), reconsideration denied, Uresti v. Port Container Industries, Inc., 34 BRBS 127 (2000); Turk v. Eastern Shore Railroad, Inc., 34B.R.B.S. 27 (2000) (holding that despite the fact claimant performed railroad functions claimant was engaged in maritime employment because he operated a hydraulic float bridge sitting on a navigable body of water to move train cars about, thus his duties included maritime activities.); Ruffia v. Newport News Shipbuilding & Dry Dock Co., 34 BRBS 153 (2000) (holding that a worker who engaged in general cleaning duties could not be excluded as a matter of law based on the nexus of her duties to loading/unloading or shipbuilding. Whether a claimant's duties are integral to the shipbuilding process should be the focus, rather than on the description of a claimant's duties.).

In P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979), the **Court** emphasized that Section 2(3) contains occupational, not geographical, requirements. Moreover, it 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." Id. at 334 n.7. (But see Editorial Note on Gizoni discussion, infra.)

Ford dealt with two workers who were land-based, one moving goods from a warehouse to a terminal, the other fastening vehicles onto railroad cars. Holding that they were "maritime

workers,” the **Court** adopted a definition of “maritime employment” that reached any worker who facilitated in the movement of cargo between a ship and land transportation (and vice versa). Such a view allows for a more predictable approach in determining status. However, once cargo exits “maritime commerce,” its transport inland is not a covered employment under the LHWCA. Zube v. Sun Refining & Marketing Co., 31 BRBS 50 (1997) (while the movement of petroleum products between a barge and storage containers is covered, the cargo’s movement between the storage tanks and a tanker truck for transport to service stations is land transportation and not covered). It must be kept in mind, however, that mere involvement in a manufacturing operation in which raw materials arrive by ship, or the finished product leaves by ship, is insufficient to confer coverage under Section 2(3). See Coyne v. Refined Sugars, Inc., 28 BRBS 372 (1994) (worker at sugar refining facility who would unload bags of sugar from a conveyor belt and deliver them to a warehouse or place them onto a truck for surface transport to a ship, is not covered); Garmon v. Aluminum Co. of America, 28 BRBS 46, aff’d on rem., 29 BRBS 15 (1994) (bulldozing activities were not covered as they “involved the movement of bauxite as part of the process for manufacturing aluminum, rather than as part of the process of unloading the bauxite from a vessel”); but see Waugh v. Matt’s Enterprises, Inc., 33 BRBS 9 (1999) (upholding finding of status for the claimant truck driver whose position involved transporting metal from barges to a scrap field which qualified as an intermediary storage site).

The Board has also held that mere involvement in activity which supports the construction of vessels is not sufficient to grant the claimant status. In Gonzalez v. Merchants Building Maintenance, 33 BRBS 146 (1999), the Board held that the claimant’s job involving restocking of restrooms and portable toilets throughout a shipyard including aboard ships was not essential to the overall building, repairing, loading, or unloading of vessels. The Board cited Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96 (CRT)(1989) in reaching this decision.

As noted in the Congressional Record, there is no legislative definition of “maritime employment:”

Without firm direction from Congress, courts must continue to grapple with defining the parameters of maritime employment. Conflicts among the circuit courts of appeal no doubt will continue to arise, and the **Supreme Court** will have to resolve these conflicts.

Cong. Rec. S11623 Sept.20, 1984.

In Chesapeake & Ohio Railway Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96 (CRT) (1989), the **United States Supreme Court** held that land-based claimants at a relevant situs, engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the LHWCA. Here two laborers were injured while doing housekeeping and janitorial services while cleaning spilled coal from loading equipment (one of their job duties). A pier machinist engaged in his primary duty of repairing coal-loading equipment was also injured. These injuries occurred at coal-loading facilities adjacent to navigable water.

Thus, the **Court** found that workers “who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act” even though they were not performing work essential to the loading process when they were actually injured. Schwalb, 493 U.S. at 47, 23 BRBS at 99 (CRT). The ship-loading process could not continue unless the equipment the claimants worked on was operating properly. Equipment cleaning is necessary to keep machines operating and is a form of maintenance and is only a degree removed from repair work.

In 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), the **Fifth Circuit**, after citing numerous **Supreme Court** decisions, held that a worker injured over land must show Section 2(3) activity which was an integral or essential part of loading or unloading a vessel, unless the worker falls into one of the occupations specified in Section 2(3). 999 F.2d at 811. See also Ferguson v. Southern States Cooperative, 27 BRBS 17 (1993) (mechanic who modified warehouse roof to accommodate the booms of incoming ships, assisted in docking every incoming ship, repaired machinery essential to the unloading process, and was actually performing maritime function at time of death, is covered under LHWCA); Arjona v. Interport Maintenance Company, Inc., 31 BRBS 86 (1997) (claimant injured while repairing shipping containers was doing maritime employment and thus satisfied status test.).

In Bang v. Danos Curole Marine, (BRB No. 96-0598)(Feb. 5, 1997)(Unpublished), the Board, relying on the Munguia standard, found that a claimant’s unloading duties were conducted solely to facilitate the operation of an oil and gas production facility, which it stated was not an inherently maritime operation under Herb’s Welding, Inc. v. Gray, 470 U.S. 414, 17 BRBS 78 (CRT) (1985). See also Fontenot v. AWI, Inc., 923 F.2d 1127, 1130, 24 BRBS 81 (CRT) (5th Cir. 1991). Using the status test of Herb’s Welding, the Board stated that where the employee is not over navigable water at the time of injury, then the employee is engaged in “maritime employment” only if his work is directly connected to the commerce carried on by a ship or vessel. Importantly, claimant’s overall duties were maintenance duties related to keeping a natural resources facility operational and producing gas and oil, activities which were not inherently maritime, and involved little, if any, loading and unloading of “cargo” from boats.

[ED. NOTE: Compare this with the situation where a natural resources worker aboard a drilling ship would be covered, or a roustabout who routinely unloaded supply boats at a oil production platform would be covered.]

In Gizoni, the **Supreme Court** held that a maritime worker whose occupation is one of those enumerated in the LHWCA, may, nevertheless, be a seaman within the meaning of the Jones Act. The inquiry into seaman status is fact-specific and depends on the vessel’s nature and the employee’s precise relation to it: “It is not the employee’s particular job that is determinative, but the employee’s connection to a vessel.” Gizoni, 502 U.S. at 88, 26 BRBS at 47 (CRT) (citing Wilander). In Gizoni, the claimant was a rigging foreman who worked on a floating platform and rode these platforms as they were towed into place.

[ED. NOTE: Gizoni does not, however, provide a clear, useable definition of a Jones Act “seaman.”]

Gizoni is easily distinguished from Caputo (focus on occupation, rather than duties at the time of injury) and Ford (find coverage because a claimant’s work constitutes an occupation specifically enumerated in the LHWCA, or because his work falls within the general category of maritime employment). These cases both dealt with workers injured on land who helped to facilitate the movement of cargo between a ship and land transportation.

The tests noted by the **United States Supreme Court** in Caputo and Ford examine the workers’ specific situations to determine whether or not the workers are “maritime” workers entitled to LHWCA coverage, or simply, land-based workers entitled only to a state workers’ compensation benefit.

In Gizoni, the **Court’s** inquiry was to focus on what type of maritime work Gizoni was employed to do -- that of a LHWCA maritime worker or a Jones Act seaman. Recall, the LHWCA and the Jones Act are two mutually-exclusive remedies. Not all ship repairmen meet the requisite requirements of Wilander, 498 U.S. 337, to be seamen; but all ship repairmen qualify as maritime employees and are at least entitled to LHWCA benefits, unless they fall under a specific exception to the LHWCA.

Note, the LHWCA applies to any person “engaged in maritime employment” and **does not distinguish between management and non-management personnel**. Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085 (11th Cir. 1988), *rev’g* 20 BRBS 104 (1987). The **Eleventh Circuit** has overruled Sanders in part but not as to the management/non-management distinction. See Atlantic Container Service, Inc. v. Coleman, 904 F.2d 611 (11th Cir. 1990).

*[ED. NOTE: However, this should not be confused with a single proprietorship. See Employer-Employee Relationship, *infra*.]*

A shop worker who built scale model components and battery wedges used in submarine construction is covered under the LHWCA. Peterson v. General Dynamics Corp., 25 BRBS 71 (1991).

A worker engaged by a subcontractor of Exxon Corporation to **assist in the cleaning of the massive VALDEZ oil spill** in the navigable waters off of Alaska was found by one judge to be covered under the LHWCA. Fontenot v. Industrial Clean-up, Inc., 92-LHC-971 (August 17, 1992) (Unpublished). In Fontenot, Judge Miller held that the employer, engaged by Exxon to assist in the clean-up of the spill of the tanker’s cargo of oil, was a maritime employer. The judge found that the claimant’s work was clearly a maritime activity conducted in a maritime environment. The work of cleaning up the navigable waters and shore satisfies the status test.

A worker who maintains and operates equipment at a power plant which provides electricity and steam for shipbuilding and ship repair operations at the Norfolk Naval Shipyard is covered under Section 2(3) of the LHWCA. The Board felt that since electricity and steam are mandatory components in the shipbuilding and ship repair process. Compare Peter v. Hess Oil Virgin Island Corp., 903 F.2d 935, cert. denied, 498 U.S. 1067 (1991) (Status test met where employee's connecting and disconnecting fuel hoses in loader process); Chesapeake and Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 47, 23 BRBS 96, 99 (CRT) (1989); Kerby v. Southeastern Public Service Authority, 31 BRBS 6 (1997), aff'd, 135 F.3d 770 (4th Cir. 1998) (Table).

A worker who spends 13 hours per week in work that has at most "a tangential connection with longshore work" does not meet the status requirement. Kilburn v. Colonial Sugar, 32 BRBS 3 (1998).

The **Third Circuit** found situs under the Act for a bulldozer driver working on a beach moving a sand-dredging pipeline. The worker moved the pipeline up and down the beach in order to strategically deposit the sand and waded in water to adjust valves and add sections to the pipeline. He also moved the sand from where it was pumped in those waters adjacent to the beach to the shore and then graded the sand on the beach with his bulldozer. The court reasoned the proper situs test is whether the beach on which claimant was injured qualified as an adjoining area customarily used by at least one maritime employer to unload a vessel. The **Third Circuit** held that an unimproved beach falls within the plain meaning of the word "area." See Nelson v. American Dredging Co., 143 F.3d 789 (3d Cir. 1998).

Also, the **Third Circuit** found that the word "customarily" in Section 3(a) of the LHWCA modifies the phrase "adjoining area ... used by an employer," not simply the phrase "adjoining area." Thus, one must look to whether the employer customarily uses a beach for loading or unloading rather than whether the beach "customarily is used" for "loading" or "unloading." In this regard, the **Third Circuit** looked to the specific operations of Employer. It noted the employer was in the business of dredging channels and reclaiming beaches. The geographical area in question was an area contiguous to navigable waters. It and similar beaches were customarily used by this employer to unload its hopper dredge vessel. See Nelson, supra.

The **Third Circuit** found that the claimant had status under the LHWCA as he was directly and intimately involved in unloading the hopper vessel of sand and was a "vital part of the unloading process." Sand was the cargo and "it literally was 'unloaded' as much as it would have been had it been bagged and removed from the vessel by a crane and cargo nets." See Nelson, supra.

The **Ninth Circuit** has likewise found that a claimant working as a pile driver on a pier which does not touch the water except at high tide and which is not used for the loading and unloading of vessels, does meet the situs test but nevertheless is not covered because he is not engaged in maritime employment. See McGray Construction Co. v. Director, OWCP (Hurston), 181 F.3d 1008 (9th Cir. 1999) (In dealing with the *status* issue, **Ninth Circuit** realigning its position to

conform to **Supreme Court's** decision in Papai v. Harbor Tug and Barge Co., 520 U.S. 548, 117 S.Ct. 1535 (1997)); see 989 F.2d 1547 for **Ninth Circuit's** *situs* test in this matter.

In its latest version of McGray, 181 F.3d 1008, the **Ninth Circuit** reversed its previous holdings. 112 F.3d 1025 and 989 F.2d 1547, that this worker was engaged in maritime employment although he had no maritime job responsibilities for his employer at the time of his injury, because maritime employment was his profession and he regularly and customarily performed maritime work for other employers. The claimant in McGray was hired out of a hiring hall. While his job duties at this specific employer on the particular occasion of his injury were limited to non-maritime duties, since 1958, he spent 90 percent of his working time as a marine diver and 10 percent as a pile driver. All but one of his pile driving jobs (the one on which he was injured) were performed afloat. Basically, following Papai, the **Ninth Circuit** noted that here the worker worked for various employers, just like Papai, who was also hired out of a hiring hall. Additionally, the **Ninth Circuit** found that the Board's reading of Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) was mistaken. According to McGray, the Board had interpreted Caputo to mean that a person who spent some of his time doing maritime work was covered by the LHWCA even when he took a job that was not maritime. The **Ninth Circuit** in the latest version of McGray, also define the terms "employee" and "maritime employment" narrowly.

In Loyd v. Ram Industries, Inc., ___ BRBS ___, (BRB No. 00-1089)(Aug. 7, 2001), the Board upheld the ALJ's reliance on Nelson in finding *situs* and status for pipeline **worker engaged in dredging operations in a ship channel**. The decedent inspected and maintained the land portion of the pipeline and removed debris from the pipeline and at the dumpsite. In Loyd, the injury occurred in an area adjoining navigable water which was customarily used by the employer to unload dredged material (satisfying *situs* test). The decedent's duties were an integral part of the unloading process (satisfying the status test). In a footnote, the Board also observed that the decedent's **job was similar to a harbor worker**.

1.7.2 "Harbor-worker"

The term "harbor-worker" includes "at least those persons 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)." Hurston v. McGray Const. Co., 29 BRBS 127 (1995), on remand from Hurston v. Director, OWCP, 989 F.2d 1547, 26 BRBS 180 (CRT) (**9th Cir.** 1993), reh'g Hurston v. McGray Const. Co., 24 BRBS 94 (1990), recon. en banc denied, BRB No. 88-4207 (Aug 13, 1991) (Unpublished); 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). See also Ripley v. Century Concrete Services, 23 BRBS 336 (1990); Dupre v. Cape Romain Contractors, Inc., 23 BRBS 86, 90 (1989); Olson v. Healy Tibbitts Constr. Co., 22 BRBS 221 (1989). However, in McGray Construction Co. v. Director, OWCP, 181 F.3d 1008 (**9th Cir.** 1999), the **Ninth Circuit** choose not to read "harbor workers" expansively. In reversing the Board, the **Ninth Circuit** found that a pile driver injured on

a marine situs failed to satisfy the status test. The Board had found that the worker's overall employment history was 90 percent LHWCA status and 10 percent non-LHWCA status. The Board had determined that "a person who spent some of his time doing maritime work was covered by the [LHWCA] even when he took a job that was not maritime" and that "construction work on a pier [was] maritime in nature" because "spray from the ocean often made the pier slippery and the waves affected the way pile driving was done." Citing Herb's Welding v. Gray, 470 U.S. 414 (1985) ("the required maritime employment status did not cover all those who breathe salt air"), the **Ninth Circuit** opined that this pile driving work was similar to the non-LHWCA platform construction work in Herb's Welding. The circuit court stated, "That a person has been engaged in maritime employment in other jobs, and that he is hired out of a union hall that includes maritime workers, does not bring him within the [LHWCA], if his current employment is non-maritime."

[Query: Is the Ninth Circuit's opinion based upon a misplaced analogy? In Herb's Welding the issue was whether oil drilling, i.e., mineral resource production, was by its nature, "maritime." Here, the claimant was a pile driver, hired out of a marine union hall to work on a pier that is over water at least at high tide.]

A heavy equipment operator involved in the **construction or alteration of a harbor facility** was found by the Board to be a covered harbor-worker under Section 2(3). Furthermore, the Board found that the claimant also met the status requirement of Section 2(3) on the alternate ground that he was engaged in the maintenance of shipbuilding facilities where the evidence indicated that the facility being built would eventually be used to service submarines. Hawkins v. Reid Assocs., 26 BRBS 8 (1992).

The contract under which the claimant worked was titled "**nuclear repair facility**" and involved the renovation of a former structural fabrication facility which ran along a dry dock by a 100 foot-wide area containing tracks and an underground utility system.

The maintenance of the **structures housing shipyard machinery**, and in which shipbuilding operations are carried on, is no less essential to shipbuilding than is the repair of the machinery used in the process itself. Graziano v. General Dynamics Corp., 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). See also Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 23 BRBS 96 (CRT) (1989).

In Hurston the **Ninth Circuit** determined that a pier is an enumerated situs regardless of its function. In its decision on remand in Hurston, the Board noted that the term "harbor-worker" in Section 2(3) encompasses at least those persons directly involved in the construction, repair, alteration, or maintenance of harbor facilities (which includes docks, piers, wharves, and adjacent areas used in the loading, unloading, repair, or construction of ships). Stewart v. Brown and Root, Inc. 7 BRBS 356, 365 (1978), aff'd sub. nom. Brown and Root, Inc. v. Joyner, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980).

[ED. NOTE: The Ninth Circuit Decision in Hurston specifically recognized that the 1972 amendments were not meant to cover employees who are not engaged in loading, unloading,

repairing, or building a vessel and that Herb's Welding prevents the expansive reading of the term "harbor-worker."]

In Loyd v. Ram Industries, Inc., ___ BRBS ___, (BRB No. 00-1089)(Aug. 7, 2001), the Board upheld the ALJ's reliance on Nelson in finding situs and status for pipeline worker engaged in dredging operations in a ship channel. The decedent inspected and maintained the land portion of the pipeline and removed debris from the pipeline and at the dumpsite. In Loyd, the injury occurred in an area adjoining navigable water which was customarily used by the employer to unload dredged material (satisfying situs test). The decedent's duties were an integral part of the unloading process (satisfying the status test). In a footnote, the Board also observed that the decedent's job was similar to a harbor worker.

1.7.3 Bridge Building

Although several early lower court cases found bridge construction/demolition workers covered by the LHWCA, in Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), a pre-1972 Amendment case, the **Supreme Court** stated:

[A]dmiralty jurisdiction has not been construed to extend to accidents on piers, jetties, **bridges**, or even ramps or railways running into the sea.... To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid.

Rodrigue, 395 U.S. at 360 (emphasis added).

Under specific circumstances, several courts have found certain bridge construction workers to be covered under the LHWCA. In Le Melle v. B. F. Diamond Construction Co., 674 F.2d 296 (4th Cir. 1982), cert. denied, 459 U.S. 1177 (1983), a construction worker employed in the building of a draw bridge over navigable water was granted status under the LHWCA. The court found that the bridge was designed in part as an aid to navigation. It must be noted, however, that the employer had stipulated to situs because it thought this worker was standing on a bridge piling at the time of his injury. Cf. Nold v. Guy F. Atkinson Co., 9 BRBS 620 (1979), appeal dismissed, 784 F.2d 339 (9th Cir 1986); Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd., 30 BRBS 81 (1996) (no showing bridge was used for maritime purposes because no evidence that bridge aided in navigation).

In Gilliam v. Wiley N. Jackson Co., 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), cert. denied, 459 U.S. 1169 (1983), the court held that a construction site foreman had status when, at the time of his injury, he was supervising and assisting in the removal of pilings from a barge used in the building of a bridge. The unloading of this cargo had a realistically significant relationship to

maritime activities. Importantly, the court noted that this holding did not mean that all persons injured while engaged in bridge building are covered employees.

Similarly, in Walker v. PCL Hardaway/Interbeton, 34 BRBS 176 (2000), the Board found that the claimant was covered despite his involvement in bridge building. In that case, the claimant, a form carpenter on the Chesapeake Bay Bridge Tunnel, was injured while setting steamboat jacks against the pilings of the bridge. This was part of the process of securing the work platform to the bridge after it was lifted by crane from the work barge to the side of the bridge. The ALJ concluded that because not all of the steps needed to secure the pilings had been taken, the claimant was still working from a vessel and the injury occurred over navigable waters, thus affording the claimant coverage.

In Browning v. B. F. Diamond Construction Co., 676 F.2d 547, 14 BRBS 803, (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), a bridge construction worker was covered because he was directly involved with the unloading of a vessel at the time of his death. It is noteworthy that the employer did not raise the situs issue.

In Crapanzano, the claimant worked as a journeyman ironworker constructing a bridge across a bay. His duties included: unloading a barge by hooking pre-cut concrete girders to the crane, climbing the bridge structure, and “loading” the girders (positioning them onto the pile caps); positioning reinforced beams; and bolting clips onto the girders and beams. Claimant was injured while walking along the girders on the bridge structure.

In deciding Crapanzano, the Board noted that the **Second Circuit** (wherein jurisdiction resides for this case) has held that a construction worker whose duties involved occasionally unloading a barge carrying materials for construction of a structure which reaches from the shore to a point over the water was not engaged in maritime employment as there is no sufficient relationship to navigation or commerce on navigable waters. Fusco v. Perini North River Associates, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), cert. denied, 449 U.S. 1131 (1981) (sewage disposal plant construction worker not maritime employee); See also Laspragata v. Warren George, Inc., 21 BRBS 132 (1988) (sewage treatment plant construction worker not a covered employee). Specifically, the Board stated:

Although claimant in the instant case unloaded materials from a barge, those items were for the purpose of constructing a non-maritime structure over water; therefore, his employment has no relationship to maritime commerce under the case law of the **Second Circuit**. See Fusco 622 F.2d at 1113, 12 BRBS at 332; see also Pulkoski, 28 BRBS at 303 (bridge construction worker not a maritime employee); Johnsen, 25 BRBS at 335 (bridge painter not a maritime employee); Laspragata, 21 BRBS at 135. Consequently, a claimant does not meet the Section 2(3) status requirement and cannot be classified as a maritime employee.

Crapanzano, 30 BRBS at 83.

However, the Board noted that other circuits have held that the loading and unloading of construction materials constitutes traditional longshore activities. See Browning (rig foreman involved with unloading construction materials from barge for bridge construction is a covered employee); Gillian (construction worker unloading materials from barge for bridge construction is covered); 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); Cf. Wilson v. General Engineering and Machine Works, 20 BRBS 173, 176 n. 4 (1988) (Board noted that notion of “traditional cargo” is outdated, but distinguished between maritime and military cargo). See also Kennedy v. American Bridge Co., 30 BRBS 1 (1996) (Board followed lead of **Fifth and Eleventh Circuits** in a **Third Circuit** case and held that a railroad bridge ironworker is covered because he loaded and unloaded construction materials to and from a barge).

Using Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983), one can argue that a bridge worker actually working on a barge or other “vessel” over navigable waters when injured would meet both the situs and status tests. See Gilliam v. Wiley N. Jackson Co., 659 F.2d 54 (1981).

Compare Pulkoski v. Hendrickson, 28 BRBS 298 (1994), where the Board distinguished the case from Lemelle, finding that a bridge construction worker was not covered by the LHWCA because (1) the employer “had completed all bulkhead work [on the bridge] prior to the commencement of claimant’s employment,” (2) the claimant’s employment did not bear a relationship to the loading, unloading, building, or repairing of a vessel, and (3) unlike Lemelle, where the bridge construction worker aided in improving the navigability of a river, in the case at bar, the claimant’s employment did not aid navigation, but rather made the canal less navigable due to the lower clearance of the new bridge.

See also Johnsen v. Orfanos Contractors, Inc., 25 BRBS 329 (1992) (distinguishing Lemelle, as the bridge in that case was **under construction** and thus claimant’s injury on a piling in the river was on actual navigable waters; in the instant case, claimant performed maintenance upon a **completed bridge**, which is therefore an extension of land and not within coverage of the LHWCA). See additionally, Kehl v. Martin Paving Co., (BRB No. 99-1154)(Unreported)(Aug. 10, 2000)(Bridge in use for highway traffic over Intracoastal Waterway was permanently attached to land, notwithstanding the construction project, and therefore was not a covered situs.).

In this regard the claimant’s alternative argument in Crapanzano is noteworthy. Claimant argues that the structure upon which he worked was actually a pier because it was not a completed bridge and therefore is a covered situs regardless of its use.

Importantly, in Crapanzano, the Board relying on the holding of Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) found that as a matter of law, bridges are not a covered situs. In Nacirema, a pre-1972 amendment case, the claimants were injured while they were walking on piers attaching railroad cargo to ships’ cranes for loading onto the ships. The **United States Supreme Court**, in Nacirema, noted well-settled law which, prior to the enactment of the LHWCA, considered

wharves, piers, and bridges permanently affixed to the land as extensions of land. The **Court** also acknowledged the language and purpose of the LHWCA and concluded that Congress specifically limited coverage under the LHWCA to those injuries which occurred on the seaward side of the “Jensen line.” Consequently, in Nacirema, the **Court** held that the claimants who were injured while walking on piers were not employees within the meaning of the LHWCA. Nacirema, 396 U.S. at 212.

In Crapanzano the Board opined that:

Although the piers and wharves referenced in Nacirema would not be covered under the [LHWCA] as amended in 1972, see 33 U.S.C. §903(a)(1982); Johnsen, 25 BRBS at 332 n. 1, the case still espouses good law regarding other extensions of land. In later cases, the **Supreme Court** acknowledged that the 1972 Amendments to the [LHWCA] pertaining to jurisdiction were drafted in response to its holding in Nacirema. However, it has not stated that those Amendments made its decision null and void. See Perini, 459 U.S. at 316-318, 15 BRBS at 74-75 (CRT); Caputo, 432 U.S. at 249, 6 BRBS at 150. Thus, the notion that a structure such as a bridge is an extension of land and may not constitute a covered situs is still legal precedent. See, e.g., Kennedy, 30 BRBS at 2; Johnsen, 25 BRBS at 332-333, Laspragata, 21 BRBS at 135.

Crapanzano, 30 BRBS at 84.

1.7.4 Self Employed Worker

In In Re Clarke v. Exmar Corp., 97-LHC-2459 (1998), decedent was both the owner and an employee of his off-shore drilling operation. The employer/carrier submitted that decedent was an employer under the LHWCA and that his widow, therefore, was barred from recovery. The ALJ held that decedent was both an “employer” and an “employee” under the LHWCA, and there was no clause in the LHWCA allowing a sole proprietor to opt for or against coverage for him/herself. The ALJ also noted that decedent was not a detached owner of the drilling operation, but was so engaged in the work that he was working on the facility on the day of the accident. The ALJ further noted that the fact that decedent had life insurance which was paid to his widow does not affect her entitlement to benefits under the LHWCA. Accordingly, the ALJ denied the employer/carrier’s Motion for Summary Decision on the basis that decedent was an employer under the LHWCA.

1.9 MARITIME 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).

Thus, an employer was not a statutory employer if all of its employees worked on land. See Novelties Distribution Corp. v. Molee, 710 F.2d 992 (3d Cir. 1983), cert. denied, 465 U.S. 1012 (1984).

Relying on this definition in a post-amendment case, the Board held that an employer who manufactured small boats was not engaged in shipbuilding because none of its employees were 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. Claimant, therefore, was not a shipbuilder subject to coverage under the LHWCA. Napoles v. Donzi Marine, 5 BRBS 685 (1977), appeal dismissed sub nom. Director, OWCP v. Donzi Marine, 586 F.2d 377 (5th Cir. 1978).

The 1972 Amendments greatly expanded the definition of “employer:”

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

33 U.S.C. § 2(4) (1972).

The legislative history of the 1972 Amendments suggested, however, 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 997-98.

The Board has held that if a claimant is an “employee” within the meaning of Section 2(3) of the LHWCA, then the employer is an employer within the meaning of Section 2(4) of the LHWCA. Having one employee (any employee) engaged in maritime employment was sufficient to make the employer a maritime employer. Blundo v. International Terminal Operating Co., 2 BRBS 376 (1975), aff’d sub nom. Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), aff’d sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Harris v. Maritime Terminals, 1 BRBS 301, 340 (1975), rev’d sub nom. I.T.O. Corp. of Baltimore v. Benefits Review Bd., 529 F.2d 1080 (4th Cir. 1975), rev’d on rehearing en banc, 542 F.2d 903 (4th Cir. 1976), vacated and remanded sub nom. Atkins v. I.T.O. Corp. of Baltimore, 433 U.S. 904, reinstated on remand, 563 F.2d 646 (4th Cir. 1977).

The **United States Supreme Court** noted the inconsistency between the actual wording of Section 2(4) and the expression in the legislative history, but did not endorse either interpretation. Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 314 n.24 (1983).

The **Third Circuit** stated, however, that the language of the statute is “unproblematic,” and determined that the employer was a statutory employer because its employee was engaged in maritime employment in a terminal area. Molee, 710 F.2d 992. The court stated that it did not matter that the employer was an agent of the consignees, and not an agent of its parent stevedoring company.

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 v. Perdue, 539 F.2d 533, 538 n.9 (5th Cir. 1978), aff’d on other grounds sub nom. P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979).

Thus, if a claimant can satisfy Sections 2(3) and 3(a) of the LHWCA, his employer is automatically brought within Section 2(4). A maritime employee can make his employer a maritime employer. See Hullinghorst Indus. v. Carroll, 650 F.2d 750 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

If claimant fails to meet one of the jurisdictional elements, it is immaterial whether or not employer would qualify as a statutory employer. Carroll, 650 F.2d 750.

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

The LHWCA does not define “employer” in terms of the types of entities that qualify. Instead, it defines the class of employees covered by the LHWCA and then defines “employer” as “an employer any of whose employees” are covered by the LHWCA. (When Congress extended the

LHWCA to cover oil recovery operations on the Outer Continental Shelf, it changed the class of covered employees but repeated without change the definition of employer.)

The LHWCA does not limit the type of legal entity that can qualify as an employer. Given the intent of Congress to provide coverage to all persons within the statutory definition of employee, the conclusion is inescapable that any entity capable of employing a statutory “employee” can qualify as an employer, including partnerships and joint ventures. Davidson v. Enstar Corp., 848 F.2d 574, 577, rev’d on other grounds, 860 F.2d 167 (5th Cir. 1988).

In Fidalgo v. Northeast Auto Marine, (BRB No. 97-1602) (Aug. 17, 1998) (Unpublished), the ALJ held, and the Board affirmed, that the fact that a claimant is employed by a land-based employer is not determinative of the coverage issue if the claimant’s duties are integral to the movement of cargo between land and sea transportation. See also Lewis v. Sunnen Crane Service, Inc., 31 BRBS 34 (1997). In Fidalgo, claimant was denied benefits because he was not engaged in maritime employment. The claimant’s duties involved the preparation of vehicles for sale after the vehicles had been removed from the vessel.

“Employer” is currently defined as follows:

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

33 U.S.C. § 902(4).

In In Re Clarke v. Exmar Corp., 97-LHC-2459 (1998), decedent was both the owner and an employee of his off-shore drilling operation. The employer/carrier submitted that decedent was an employer under the Act and that his widow, therefore, was barred from recovery. The ALJ held that decedent was both an “employer” and an “employee” under the LHWCA, and there was no clause in the Act allowing a sole proprietor to opt for or against coverage for him/herself. The ALJ also noted that decedent was not a detached owner of the drilling operation, but was so engaged in the work that he was working on the facility on the day of the accident. The ALJ further noted that the fact that decedent had life insurance which was paid to his widow does not affect her entitlement to benefits under the LHWCA. Accordingly, the ALJ denied the employer/carrier’s Motion for Summary Decision on the basis that decedent was an employer under the LHWCA.

1.10 Outer Continental Shelf Lands Act (OCSLA)
(See also Longshore Extension Acts, Topic 60.3.)

1.10.1 Natural Resources Workers

Congress enacted the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331, et seq., in 1953 to establish the law governing conduct on the Outer Continental Shelf (OCS), an area of intense mineral extraction activity that lacked an established legal system because it lies beyond state boundaries. Mills v. Director, OWCP, 877 F.2d 356 (**5th Cir.** 1989) (en banc). Congress enacted the OCSLA “to define a body of law applicable to the seabed, the subsoil, and the fixed structures ... on the Outer Continental Shelf.” Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

To this end Congress made non-maritime federal law applicable to the subsoil, seabed and platforms. Id. at 355-56. In the event no federal law existed on a particular issue, Congress elected to borrow the adjacent state’s law as surrogate federal law. Id.; 43 U.S.C. § 1333(a)(2)(A).

One obvious void in the Law governing the OCS was the lack of a workers’ compensation scheme for thousands of workers employed in the oilfield extraction industry. Congress filled that void in § 1333(b) when it adopted the LHWCA’s benefits provision to cover non-seamen employed in the oil patch on the OCS.

Offshore oil and gas exploration is not maritime employment. Herb’s Welding v. Gray, 470 U.S. 414 (1985). Here, the **Supreme Court** held that the claimant (a welder) was not a maritime employee because there is nothing inherently maritime about building and maintaining pipelines and platforms. Those tasks are also performed on land and their nature is not significantly altered by the maritime environment. The **Court** also noted that while maritime employment is not limited to the occupations specifically mentioned in Section 2(3), neither can the LHWCA be read to eliminate any requirement of a connection with the loading or construction of ships.

The **Supreme Court’s** decision in Herb’s Welding, must be carefully understood, however. That decision holds only that participation in offshore oil and gas exploration does not automatically provide a claimant status under the LHWCA. It does not mean that an offshore worker can never achieve status as involved in maritime employment. In fact, footnote 9 of the Herb’s Welding decision clearly states that:

This view of “maritime employment” does not preclude benefits for those whose injury would have been covered before 1972 because it occurred “on navigable waters.” Director, OWCP v. Perini North River Associates, 459 U.S. 297, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983). No claim is made that Gray was injured “on navigable waters.” Indeed, it was agreed by all counsel at oral argument that prior to 1972 Gray

would not have been covered, except arguably by operation of the Lands Act. See Tr. of Oral Arg. 11, 46, 52-54. See also 703 F.2d, at 179. . . .

Herb's Welding, Inc. v. Gray, 470 U.S. 414, 424 (1985).

With that in mind, the **Fifth Circuit** recently determined that a welder working for a casing company in the Gulf of Mexico off Louisiana qualified as engaged in maritime employment under both the LHWCA and OCSLA. It therefore held that 1) OCSLA applied to the worker's claim; 2) OCSLA's application did not employ Louisiana law as surrogate federal law, and; 3) the LHWCA was the appropriate remedy for the claim. See Demette v. Falcon Drilling Co., Inc., et al, 253 F.3d 840 (5th Cir. 2001).

The **Fifth Circuit** began its analysis in Demette by articulating the tests for the application of OCSLA to a claim. It held that section 1333(a)(1) of OCSLA operated as a situs test under that Act. The court then announced the rule that

The OCSLA applies to all of the following locations:

- (1) the subsoil and seabed of the OCS;
- (2) any artificial island, installation, or other device if
 - (a) it is permanently or temporarily attached to the seabed
 - (b) it has been erected on the seabed of the OCS, and
 - (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
- (3) any artificial island, installation, or other device if
 - (a) it is permanently or temporarily attached to the seabed of the OCS, and;
 - (b) it is not a ship or a vessel, and;
 - (c) its presence on the OCS is to transport resources from the OCS.

Demette at 6.

The court then explained that if a case meets the situs requirements of OCSLA the next question is whether OCSLA requires the incorporation of state law in this situation. The court explained that section 1333(a)(2) of OCSLA requires incorporation of the law of an adjacent state where 1) the controversy arises on an OCSLA covered situs, and; 2) federal maritime law does not

apply of its own force, and 3) state law is consistent with Federal law. See Id. at 6. In cases like the one at bar, the court explained that the circuit case law concludes that if the contract is a maritime contract, federal maritime law applies of its own force.

Finally, the **Fifth Circuit** noted that section 1333(b) extends coverage of the LHWCA to workers who are injured as a result of operations conducted on the OCS to explore for, develop, remove, or transport natural resources of the OCS. A claimant who meets both the “status” requirement of section 1333(b) and the situs requirement of 1333(a)(1) is covered by the LHWCA by virtue of OCSLA. See Demette at 7.

Using these tests, the court determined that Demette’s employer was operating and Demette was injured in an OCSLA situs. It also determined that the contract between Demette’s employer and Unocal, the site owner, was a maritime contract requiring the application of federal maritime law and excluding application of state law. Finally, it held that Demette was covered under the LHWCA by virtue of the fact that OCSLA extended coverage to him. See id. at 8-10.

A mineral resources worker is not covered for his work on a fixed platform in state territorial waters. (Generally, the first three miles off of the coast of a state.) Id., Munguia v. Chevron U.S.A., Inc., 999 F.2d 808 (1993) (relief pumper gauger is engaged in work to further the maintenance of the oil wells, not maritime employment). There may be specific circumstances, however, under which a mineral resources worker (within three miles) is covered.

The worker (within the three-mile limit) may be covered if injured on a floating platform (“a vessel”). For example, a worker, engaged by a subcontractor of Exxon Corporation to assist in the cleanup of the massive “Valdez” oil spill in the navigable waters off of Alaska was found to be covered under the LHWCA. Fontenot v. Industrial Clean-up, Inc., (92-LHC-971)(Aug. 17, 1992)(Unpublished). The jury found that the claimant’s work was clearly a maritime activity conducted in a maritime environment.

However, if a worker was more or less permanently attached to the floating platform, which was capable of being navigated and the worker’s duties were for the furtherance of the mission of the “vessel,” then the worker would not be covered by the OCSLA, 43 U.S.C. § 1331 et. seq., extension of the LHWCA; rather, he would be classified as a Jones Act seaman doing mineral resources work. See Kerr-McGee Corp. v. Ma-Ju Marine Servs., 830 F.2d 1332 (**5th Cir.** 1987); Miller v. Rowan Cos., 815 F.2d 1021 (**5th Cir.** 1987).

A worker injured on the OCS (at least three miles from shore) under the OCSLA extension to the LHWCA, would be covered. As noted previously, the OCSLA extends coverage to mineral resource workers injured on the OCS, simply because they are mineral resource workers. 470 U.S. at 441 n.13.

In Mills v. Director, OWCP, 877 F.2d 356 (**5th Cir.** 1989), the **Fifth Circuit**, *en banc*, held that LHWCA coverage as extended under the OCSLA applies to employees who (1) suffer injury or death **on an OCS platform or the waters above the OCS**; and (2) satisfy the “but for” status test described in Herb’s Welding v. Gray, 766 F.2d 898, 900 (**5th Cir.** 1985).

The court noted that the claimant, at the time of his injury, was on Louisiana soil though he was involved in the construction of a platform destined for use on the OCS. *But cf.* Curtis v. Schlumberger Offshore Serv., 849 F.2d 805 (**3d Cir.** 1988) (OCSLA platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig was covered by the OCSLA extension to LHWCA).

Finding that the bare language of 43 U.S.C. § 1333(b) of the OCSLA did not resolve the issue, the **Fifth Circuit** looked to the legislative intent and history to reach its conclusion. The **Fifth Circuit** also noted that the **Supreme Court** has recognized the geographic boundaries to the OCSLA’s coverage in both Herb’s Welding v. Gray, 470 U.S. 414 (1985), and in Offshore Logistics v. Tallentire, 477 U.S. 207 (1986) (OCS platform workers dies in a helicopter crash on the high seas).

Previously, the **Fifth Circuit** had held that, in determining whether OCSLA jurisdiction exists, the claimant’s injury need not have actually occurred on the OCS. In Thornton v. Brown & Root, Inc., 707 F.2d 149 (**5th Cir.** 1983), *rev’g* 12 BRBS 883 (1980) and 13 BRBS 37 (1980), *cert. denied*, 464 U.S. 1052 (1984), the court found status for two land-based workers on the basis that their jobs directly facilitated the offshore drilling process. One claimant worked constructing offshore stationary platforms, and the other worked in the construction of housing modules and heliports for offshore stationary platforms. Thornton was a pre-Herb’s Welding case and relied on the concept that mineral exploration is maritime employment.

Prior to the *en banc* reversal of Mills, the Board had followed the now-reversed panel decision in Mills. In Laviolette v. Reagan Equipment Co., 21 BRBS 285 (1988), the Board had remanded for consideration whether a housing superstructure was destined for the Shelf. Interestingly, the Board also held in Laviolette that a claimant who was injured building housing superstructures and, who spent, at most, eight hours during his four-month tenure offloading these structures, was not covered under Section 2(3), 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.

The **Ninth Circuit** has held that the OCSLA extends coverage to a worker injured while working as a pipe fitter/welder on a stationary offshore oil platform, under construction on the OCS, since his welding activities contributed directly to the development of natural resources of the OCS. Kaiser Steel Corp. v. Director, OWCP, 812 F.2d 518 (**9th Cir.** 1987), *aff’g* Robarge v. Kaiser Steel Corp., 17 BRBS 213 (1985).

The **Fifth Circuit** has held that a worker, injured while supervising the maintenance of a production platform which furthered mineral development, was covered because the injury would not have occurred “**but for**” the maintenance work he was performing and supervising on the platform. Recar v. CNG Producing Co., 853 F.2d 367 (**5th Cir.** 1988).

The **Fifth Circuit** has also held that an OCS worker being **transported by helicopter** to an OCS platform, and who was injured in a helicopter crash, was covered under the OCSLA extension of the LHWCA. Barger v. Petroleum Helicopters, 692 F.2d 337 (**5th Cir.**), cert. denied, 461 U.S. 958 (1982); Stansbury v. Sikorski Aircraft, 681 F.2d 948 (**5th Cir.**), cert. denied, 459 U.S. 1089 (1982) (injury would not have occurred “but for” the operations on the OCS).

The **Third Circuit** held that a **drilling rig employee injured on a highway while en route to his work site** was covered under the OCSLA extension. Curtis v. Schlumberger Offshore Serv., 849 F.2d 805 (**3d Cir.** 1988). The court noted that the OCSLA does not contain a “situs” requirement, that it covers injuries “arising out of or in connection with” any OCSLA operations, and that the employee in this case would not have been injured “**but for**” his job, which was related to operations on the OCS. But cf. Mills, 877 F.2d 356.

However, for an auto accident injury not covered by the OCSLA see Section 1.6.1. In Morris v. Portland Lines Bureau, (BRB No. 96-0472)(1996)(Unpublished), a lineman on call 24 hours per day, seven days a week, was injured in his auto thirteen miles from his work assignment and in the course of his employment. However, he was not covered under the LHWCA because he lacked situs.

It is important to note that when offshore exploration for minerals began, only state workers’ compensation act remedies were available for injuries occurring to these workers. In 1953, Congress extended the LHWCA to mineral resource workers beyond the three-mile limit on the OCS.

Herb’s Welding has left open the possibility that a mineral resource worker in state territorial waters (where fixed platforms are treated as artificial islands) doing the work of a longshore worker (i.e., assisting in the loading or unloading of equipment/supplies) could be covered under the LHWCA. In 1969, the **Supreme Court** had held that fixed offshore platforms are artificial islands and therefore are outside traditional maritime jurisdiction. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

However, in Alexander v. Hudson Engineering Co., 18 BRBS 78 (1986), the Board noted that any work an electrician may have performed in assisting in the loading of electrical equipment was clearly “incidental” to his participation in fixed platform construction and not integral to the loading and unloading process. This case notes the language in Herb’s Welding, wherein that worker was unloading his own gear upon arrival at the fixed platform. In Alexander, the Board reviewed the specific factual situation and found that the claimant’s participation was not an “integral” part of the loading and unloading process.

[ED. NOTE: When dealing with mineral resource workers care must be taken to analyze exactly what they are doing and where. *It is important both to determine (1) if the worker is on a fixed platform or a floating platform or drilling barge, and (2) whether or not the worker is on the OCS or within state territorial waters. Then ask if the worker’s particular injury happened in connection with operations on the OCS and would not have occurred “but for” the extraction of minerals on the OCS.]*

1.11 EXCLUSIONS TO COVERAGE

Sections 2 and 3 of the LHWCA contain express exclusions from coverage. Some of these exclusions were inserted when the LHWCA was originally enacted. Others have been added by the 1984 Amendments. Still others have been created by the jurisprudence itself (i.e., mineral exploration is not maritime employment under the LHWCA, though it is addressed under the OCSLA).

[ED. NOTE: The exclusions are very specific. Several examples are illustrative: (1) While a worker on a recreational vessel may not be “covered,” a worker helping to build the recreational vessel would be classified as a shipbuilder (an enumerated, covered category in the LHWCA) and therefore, would be covered. (2) Those involved in the business of building small vessels are not covered, but persons who made load or unload small vessels are not excluded. (3) Small companies or individuals who repair bulkheads to residences, may be covered if the residences are located on navigable streams. Thus, one must take care to examine whether an exclusion is in force]

1.11.1 “master or member of a crew”

This exclusion was originally found in Sections 2(3) and 3. It is presently found at Section 2(3)(G). (This exclusion has previously been dealt with at Topic 1.3).

In Landing v. Savannah Marine Services, Inc., (BRB No. 99-0289)(Dec. 6, 1999)(Unpublished), the claimant was initially assigned to travel and work aboard the employer’s tugboat. Subsequently, the claimant performed maintenance and repair tasks on the employer’s tugboats and he performed land-crew maintenance work at the employer’s warehouse, including unloading barges at the dock. The claimant suffered a pulmonary injury while aboard a tugboat when he was using an hydraulic needle gun to remove paint thereby exposing the claimant to injurious chemicals. The claimant thereafter filed both a Jones Act claim and a LHWCA claim for permanent partial disability. The claimant settled his Jones Act claim with the employer and the ALJ determined, and the Board affirmed, that the claimant was a “member of a crew” and, thus, excluded from coverage under the LHWCA.

1.11.2 “small vessel”

This exclusion originally appeared under Sections 2(3) and 3(a)(1). It now appears at Sections 2(3)(H), 3(d)(1), and 3(d)(3). This exclusion has been applied with the emphasis on whether a person was “engaged by the master.”

It is well-established that the purpose for this exclusion is to prevent the master of 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, 5 BRBS 685 (1977), appeal dismissed sub nom. Director, OWCP v. Donzi Marine, 586 F.2d 377, 9 BRBS 404 (5th Cir. 1978). In Napoles, the Board, citing Continental Casualty, found that the 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 (4th ed. 1968). More recently, the Board in Schwabenland v. Sanger Boats, 13 BRBS 22 (1980), rev’d on other grounds, 683 F.2d 309 (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**, although reversing the Board on other grounds, agreed with the portion of the Board opinion holding small recreational boat-building within the jurisdiction of the LHWCA. See also Clophus v. AMOCO Prod. Co., 21 BRBS 261 (1988).

In Mississippi Coast Marine v. Bosarge, 637 F.2d 994 (5th Cir. 1981), aff’g 8 BRBS 224 (1978), modified and reh’g denied, 657 F.2d 665 (5th Cir. 1981), the **Fifth Circuit** held that the “eighteen tons net” exception of Section 3(a)(1) only applies 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 would not fall within the statutory exemption.

Thus, a marine carpenter who repaired recreational boats and small pleasure craft was covered. [But note the recreational vessel under 65 feet in length exclusion at 2(3)(F).] See also Odom, 622 F.2d 110, and Trotte, 631 F.2d 1214.

1.11.3 Officers and agents of the federal, state, local, or foreign governments

This exclusion is found at Section 3(b) of the LHWCA. There is little case law in this area. See Evans v. Louisiana Department of Highways, 430 F.2d 1280 (5th Cir. 1970), where a district court judgment barring recovery for a state worker was affirmed.

1.11.4 Intoxication as the sole cause of injury (See also Section 20(c).)

Only when the Section 20(c) presumption (that the injury was not occasioned by the willful intention of the injured employee) is overcome by substantial evidence does this exclusion apply. Sheridon v. Petro-Drive, Inc., 18 BRBS 57 (1986); Shelton v. Pacific Architects & Eng’rs, 1 BRBS 306 (1975).

*[ED. NOTE: But see Maher Terminals v. Director, OWCP, 992 F.2d 1277, 27 BRBS 1 (CRT) (3d Cir. 1993), cert. granted sub nom. Director, OWCP v. Greenwich Collieries, 510 U.S. 1068 (1994). In Maher, the **Third Circuit** held that the Administrative Procedure Act (APA), 5 U.S.C. §§ 501 et seq., prohibits application of the true doubt rule to cases involving benefits under the LHWCA because: (1) under the APA, the claimant bears the ultimate burden of persuasion by a*

*preponderance of the evidence; and (2) the true doubt rule allows a claimant to prevail despite a failure to prove entitlement by a preponderance of the evidence. The **Third Circuit** stated that the rule's application contravenes the APA. The **Third Circuit** went on to add that because there is no express provision in the LHWCA which overrides the APA, the claimant must prove that a death/injury was related to the employee's work injury by a preponderance of the evidence.]*

In Lawson v. North American Shipyard, (BRB No. 98-1057)(April 27, 1999)(Unpublished), the ALJ found that the employer established that cocaine intoxication was the sole cause of the claimant's work accident and the claim was barred pursuant to Section 3(c) based upon (1) a physician's opinion that the amount of cocaine in claimant's body was a very significant contributing event in the accident, (2) the claimant's lack of credibility, and (3) lack of evidence of any other reasonable explanation for the claimant's fall. The Board reversed stating that "the administrative law judge determined that to hold an employer liable where an expert goes as far as rationally possible in attributing an accident to intoxication, without eliminating every obscure possibility, could not have been the intent of Congress with respect to 3(c)." In Lawson, the employer offered no evidence of the circumstances surrounding claimant's work injury; therefore, in the absence of evidence of the circumstances of the fall, other than the claimant's testimony, the employer did not established that the accident was due solely to intoxication.

[ED. NOTE: See also, Topic 2.2.2 Arising Out Of Employment.]

1.11.5 Willful Intention to injure or kill self or another. (See also Section 20(d))

*[ED. NOTE: See Maier Terminal noted supra under **Topic 1.8.4.**]*

Suicide

In Del Vecchio v. Bowers, 296 U.S. 280 (1935), the **Supreme Court** stated that, where both the employer and the claimant present substantial evidence, the issue must be resolved upon the whole body of proof pro and con. If the evidence permits an inference either way upon the question of suicide, the trier of fact must draw the inference and his decision as to the weight of the evidence may not be disturbed. If there is an absence of substantial evidence, the claimant shall have the benefit of the presumption that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself.

Where an employee's death does not stem from a "willful intent" to commit suicide, but is instead caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation. See Cooper v. Cooper Assocs., 7 BRBS 853 (1978), *aff'd in pertinent part sub nom. Director, OWCP v. Cooper Assocs.*, 607 F.2d 1385 (**D.C. Cir.** 1979). See also Voris v. Texas Employers Ins. Ass'n, 190 F.2d 929 (**5th Cir.** 1951), *cert. denied*, 342 U.S. 932 (1952); Terminal Shipping Co. v. Traynor, 243 F. Supp. 915 (**D. Md.** 1965).

In Konno v. Young Brothers, Ltd, 28 BRBS 57 (1994) the employee's suicide was covered under the LHWCA since it was due to depression resulting from a grand jury investigation into thefts of the employer's cargo and other work-related pressures associated with the supervisor's management style which made the decedent feel unappreciated and not trusted. 28 BRBS at 59. Konno relies on specific instances, shown through testimony, in which the claimant was repeatedly upset by his superior's actions. Id. at 58-59.

Konno notes that Section 3(c) does not bar compensation when the employee's death is due to an irresistible impulse. The employee's depression need not be identified or treated prior to his suicide. Id. at 60.

Intent to Harm Self

In Cyr v. Crescent Wharf and Warehouse Co., 211 F.2d 454 (9th Cir. 1954), the **Ninth Circuit** held that by the use of the term "unavoidable" the statute place upon the injured employee the "duty of using due care in regards to his injury" such that the employee's own intentions or carelessness in this regard renders the injury avoidable. The Board followed this holding in Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979) (employer can rebut the §20(a) presumption by producing substantial evidence that the injury was caused by a subsequent non-work related event which was not the natural or unavoidable result of the initial injury.) A claimant's own conduct can constitute such an event. Cyr, supra; Konno v. Young Brothers, Ltd, 28 BRBS 57, 63 (1994); Wright v. Connolly-Pacific Co., 25 BRBS 161, 164 (1991), aff'd mem. sub. nom. Wright v. Director, OWCP, 8 F.3d 34 (9th Cir. 1993) (Table).

The **Fifth Circuit** has held that an employee's deliberate, intentional and unexcused misconduct, resulting in an unforeseeable work-related injury, may sever the connection between the original work-related injury and the subsequent consequences he may suffer. Bludworth Shipyard Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983).

However, the **Fifth Circuit** has been highly critical of the **Ninth Circuit's** Cyr approach. See Hartford Accident and Indemnity Co. v. Cardillo, 112 F.2d 11, 17 (5th Cir. 1940) ("It is entirely inconsistent [to] read...into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault.") The **Seventh Circuit**, finding the **Ninth Circuit** approach "problematic" both as a matter of policy and because it is not supported by the language of the statute, adopted the **Fifth Circuit's** standard. Jones v. Director, OWCP, 977 F.2d 1106 (7th Cir. 1992) (the test is whether the causal effect attributable to the employment has been "overpowered and nullified by influences originally entirely outside the employment."). The **Seventh Circuit** further noted that a worker's reckless disregard of his own health and safety would ordinarily not be foreseeable, but that it is generally foreseeable that workers will seek employment for which they are qualified even if there might be some risk of aggravating an injury. Thus, in the **Seventh Circuit**, foreseeable negligence on the part of the employee cannot constitute an intervening cause. It is deliberate misconduct on a claimant's part that amounts to an intervening cause, not merely a hapless lapse of the moment.

In Meissner v. Foss Maritime, 29 BRBS 168 (ALJ) (1995), the judge found that a claimant's own affirmative misconduct effectively overpowered and nullified the causal effect attributable to the employment, thus severing the connection with his employment. The claimant, a shipbuilder, had a history of bronchial problems and a prior incident of almost passing out in April of 1983 while working for another employer. He was originally told by his doctor not to return to shipfitting because of his respiratory condition. Subsequently the claimant was retained for other work. However, when those positions ended, the claimant **despite all of his doctor's orders, applied for work as a shipfitter with the employer, concealing his medical information.**

The judge in Meissner concluded that the claimant's conduct after he was hired, especially in light of the medical information he concealed when hired, constituted no less than a knowing disregard for his own safety. The judge determined that the claimant's conduct was the type that is not foreseeable for the circumstances of the first injury, nor were the injuries sustained in June of 1990 the natural and unavoidable consequences of the first April of 1983 injury.

Intent to Harm Another

Again, the claimant has the benefit of the presumption that there was no intent to harm himself or another. It can be rebutted if willful intent can be shown. The finding of intent can be based upon the claimant's speech and physical activity (gestures and contact) at the time of the incident. Rogers v. Dalton Steamship Corp., 7 BRBS 207 (1977).

In Arrar v. St Louis Shipbuilding Co., 780 F.2d 19 (8th Cir. 1985), the court dealt with what constitutes "substantial evidence" that a claimant intended to injure another. The court held that a claimant, injured when he attempted to break up a fight, was entitled to the presumption that the injury was not occasioned by the willful intention of the injured employee to injure another. The testimony of the party striking the claimant was not substantial evidence that the claimant intended to injure him.

For examples of cases dealing with intent to harm another see for example Kielczewski v. Washington Post Co., 8 BRBS 428 (1978) (harassment of a fellow employee did not constitute the willful intention of the injured employee to injure himself or another); Green v. Atlantic and Gulf Stevedores, 18 BRBS 116 (1986) (an aggressor injured while seeking to harm another will be excluded from coverage); Kirkland v. Air America, Inc., 23 BRBS 348 (1990) (where a claimant participated in the murder of her husband, any causal relationship which may have existed between, the conditions created by his job and his death were effectively severed.

1.11.6 "Employee" exclusions

The 1984 Amendments added several employee exclusions to the LHWCA at Section 2(3). These exclusions apply only if the individuals described are subject to coverage under a state workers' compensation law. Also, they apply only to injuries occurring after September 28, 1984, the date of enactment of the 1984 Amendments.

1.11.7 Clerical/secretarial/security/data processing employees

This exclusion is for land-based workers whose duties are performed in an office. H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. 22 (1984). Cargo checkers and marine clerks continue to be covered. The Board has found coverage for a clerk/checker who performed clerical duties as to cargo removal. Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990); Caldwell v. Universal Maritime Serv. Corp., 22 BRBS 398 (1989). Similarly, in Riggio v. Maher Terminals, ___ BRBS ___, (BRB No. 00-960)(June 28, 2001), the Board held that a claimant's duties as a checker required him to spend part of his time in covered employment and therefore, he was covered. The Board noted that at the time of the injury, the claimant need not have been performing maritime work on the "same day of injury." The common theme of cases cited by the Board is whether the claimant performs maritime duties as a *regular* portion of his overall duties. See also, Schilhab v. Interrcontinental Terminals, Inc., ___ BRBS ___, (BRB No. 00-0999)(June 29, 2001)(railcar supervisor at employer's ships, barge, rail and truck terminal adjoining Houston Ship Channel met status requirement since his duties required him to spend a portion of his time in covered maritime duties, viz., the loading and unloading of railcars for the direct transfer of liquid product either to or from marine vessels.).

Nevertheless, in Bergquist v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 131 (1989), a key machine operator was excluded from coverage. Her employment essentially involved processing invoices and inspection information using a computer terminal, and generating descriptive stickers and tags which were ultimately placed on various pieces of equipment and which were used in the shipyard inventory and routing process. Although the claimant herself did not inspect the parts or affix the inspection stickers, her office was adjacent to the warehouse/inspection office, and she would occasionally have to go into the parts warehouse.

The Board held that her duties were that of an office clerical worker and therefore excluded from coverage. See also Sette v. Maher Terminals, Inc., 27 BRBS 224 (1993) (employee who performs exclusively office clerical work is not covered); Williams v. Newport News Shipbuilding and Dry Dock Co., 28 BRBS 42 (1994), *vac'd* and *rem'd*, 29 BRBS 75 (CRT). The Board distinguished this case from White v. Newport News Shipbuilding & Dry Dock Co., 633 F.2d 1070 (4th Cir. 1980) (immaterial that the skills used by employee are essentially non-maritime in character if the purpose of the work is maritime). In White, a claimant whose duties consisted of sorting and marking pipe to be used in shipbuilding, was found to be covered. See also Jones v. Aluminum Co. Of America, 31 BRBS 130 (1997) (holding that a clerical worker who spent 1% of his time working on a conveyor system was covered as his conveyor work "was a regular, non-discretionary part of [his] job."). See also Ladd v. Tampa Shipyards, Inc., 32 BRBS 228 (1998) (holding that "production clerk" who spent 80 percent of his time working in house trailer and 20 percent of his time making rounds in the shipyard to gather and deliver correspondence, summon people to meetings, etc. but never worked on actual building or repairing of ships or assist in loading or unloading of cargo was excluded under the clerical/secretarial/security/data processing exception).

Non-maritime skills applied to a maritime project are maritime for purposes of the maritime employment test of the LHWCA. Hullinger Industries v. Carrol, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The work of constructing, repairing, and maintaining pipelines on a pier needed to carry fuel, water, and steam to the vessels docked at a naval pier was integrally related to the loading and unloading process; without these pipes the fuel, water, electricity, and steam could not be loaded onto ships. Simonds v. Pittman Mechanical Contractors, 27 BRBS 120 (1993).

The **Fourth Circuit** in White concluded that the claimant's functions regarding the pipes were the first steps physically taken to alter that pipe for its use in ship construction; the claimant's doing so constituted an integral part of the shipbuilding process. In Bergquist, the Board noted that the claimant's duties involved handling paper rather than shipbuilding materials.

In Hall v. Newport News Shipbuilding & Dry Dock Co., 24 BRBS 1 (1990), a claimant whose duties were that of a key punch operator performed purely clerical tasks. Office clerical work equally well-suited to land-based enterprises is not maritime employment. Levins v. Benefits Review Bd., 724 F.2d 4 (1st Cir. 1984). The practical substance of an employee's duties is determinative of coverage.

When a claimant's duties have been found to be peculiarly maritime in nature, coverage has been found. In Powell v. International Transportation Services, 18 BRBS 82 (1986), a "vessel planning and stowage coordinator" was found to be covered under the LHWCA as his duties involved planning the movement of cargo, albeit largely from an office.

Clerical/security employees, who make trips to ships/yards/piers, may continue to be covered. In Jannuzzelli v. Maersk Container Service Co., 25 BRBS 66 (1991), the Board found that a timekeeper who checked in men for payroll purposes, and ensured that work crews were fully manned by going down to the dock regularly, spent at least some of his time performing functions which were maritime and integral to the loading and unloading process. Importantly, the Board noted that these **duties were more than momentary and episodic** and that the claimant was not engaged exclusively in office clerical work. The exclusion did not apply. See also Riggio v. Maher Terminals, Inc., 31 BRBS 58 (1992) (office delivery clerk who occasionally works as a checker and is injured while performing his office delivery checker duties, is not "exclusively" a clerical employee, and the §2(3)(A) exclusion is not applicable); Caldwell v. Universal Maritime Service Corp., 22 BRBS 398 (1989) (office clerk subject to reassignment as a checker is covered under the LHWCA); McGoey v. Chiquita Brands International, 30 BRBS 237 (1997), rev'g, 29 BRBS 637 (ALJ) (a person is "engaged in maritime employment" under Section 2(3) if he spends "at least some of [his] time engaged in maritime work). Cf. Stone v. Ingalls Shipbuilding, Inc., 30 BRBS 209 (1996) (claimant hired as joiner-helper at shipyard with the understanding that she could be called upon to perform joiner duties, lacked status because "most of claimant's work "was performed in an office and that which is not is too sporadic to warrant coverage."). Cf. Sylvester v. Bath Iron Works, 34 BRBS 759 (ALJ, 2000) (shipyard security guard determined to be statutory employee because his duties included patrolling and investigating aboard ships).

Though the majority of a dispatcher's duties were clerical, he was covered under the LHWCA since his duties also required him to sort, pad, and handle cargo destined to be loaded upon vessels. Lennon v. Waterfront Transport, 20 F.3d 658 (5th Cir. 1994).

[ED. NOTE: In Caldwell, the office clerk was *subject to reassignment* as a checker and was covered. In Stone, the claimant was *hired with the understanding that she may be called upon to do joiner work*. How does the Board distinguish these cases? Also, how does the Board reconcile McGoey where a person is engaged in maritime employment if he spends *at least some of his time* engaged in maritime work, with Stone where the claimant spent most of her work in an office, *but not all of it?*]

Similarly, in Spear v. General Dynamics Corp., 25 BRBS 132 (1991), the Board found that where a claimant was not exclusively engaged in security guard work he was not excluded. Here, the claimant helped ensure a safe working environment by performing various fire and safety duties in a regular fashion in addition to his patrolling duties which regularly involved spending several hours onboard submarines as a night watchman. Ensuring a safe working environment is an integral function in the shipbuilding industry. The Board also noted that the title of an employee's job is not determinative of coverage. This policy is in keeping with the opinion of the **United States Supreme Court** in Gizoni.

Similarly the Board held in Dobey v. Johnson Controls, 33 BRBS 63 (1999), that a traffic officer who also did marine patrol duties at a U.S. Navy submarine base was not excluded from coverage. The Board reasoned that claimant's work as a marine patrol officer was not "episodic, momentary or incidental" to non-maritime work and that this type of work was not intended to be excluded from coverage by the 1984 amendments.

In Pugh v. Newport News Shipbuilding & Dry Dock Co., (BRB No. 97-0693)(Jan. 28 1998) (Unpublished), the Board held that a claimant was excluded by Section 2(3)(A) under the clerical exclusion as a matter of law. In Pugh, the claimant normally worked in an office located on the waterfront on employer's premises. On occasion, during the course of her employment, she was required to leave her office to retrieve documents located in other buildings at employer's facility. On one such occasion, she developed a problem with her right hand while operating a printing press as a reproduction clerk. The Board held that an employee performing exclusively clerical work who occasionally leaves the office in performing such work, such as retrieving documents, is excluded under Section 2(3)(A).

1.11.8 Employed by a club, camp, recreational operation, restaurant, museum, or retail outlet

Section 2(3)(B) excludes "recreational employees." This group includes social and fraternal organizations for profit or nonprofit purposes. It also includes those connected with water sports, i.e., scuba diving, snorkeling, rafting, and canoeing.

The **Fifth Circuit** first interpreted the "club/camp" exclusion delineated at Section 2(3)(B) of the LHWCA in Green v. Vermilion Corp., 144 F.3d 332 (5th Cir. 1998). The claimant was injured as he assisted in mooring a vessel which belonged to his employer. The claimant was actually on the vessel at the time of his injury. He worked at a duck camp operated by the Vermilion Corporation pursuant to a contract with a private club. Besides a duck camp, the post was used as a "headquarters" for its operations in the area which included harvesting and selling alligator eggs, trapping and selling alligators, fur trapping, shrimping and rice farming. During duck season, the claimant worked as both cook and watchman at the camp. During the rest of the year he performed general maintenance and usually cooked a lunch meal for corporation employees. He got to the camp by boat and stayed there from Monday morning to noon on Friday [except for duck season when his work hours increased], brought the groceries with him and occasionally assisted in mooring and unloading supply boats that docked at the camp.

There was testimony to the effect that while the corporation used the camp throughout the year, the primary reason it maintained the facility was to fulfill its contractual obligation to the private club to provide a duck camp for hunting season. A corporate officer testified that but for the lease to the club, the corporation would not have conducted any of its operations from this site and would not have had any need for the claimant's services. Finding that the claimant was employed solely to render services to promote and maintain a duck camp, the **Fifth Circuit** held that the claimant was excluded from coverage under §§ 2(3)(B).

Relying on the U.S. House of Representative Document accompanying the 1984 Amendments to the LHWCA which added the "club/camp" exception ("... exclusions from the definition of employee' contained in the amendments . . . are intended to be narrowly construed" and that paragraph (B) excludes employees "because of the nature of the employing enterprise, as opposed to the exclusions in paragraph[(A)], which are based on the nature of the work which the employee is performing." H. R. Doc. No. 98-570, Part I 98th Cong., 2nd Sess.), the claimant argued that he was employed "by" the Vermilion Corporation, not a recreational enterprise and that, therefore, the recreational exception did not apply.

In holding that the claimant was excluded from coverage under the LHWCA by the exception, the **Fifth Circuit** stated that in construing the "club/camp" exception, it is not limited to considering only the nature of the employer's enterprise. The court noted that while the House document to which the claimant referred expressly stated that businesses falling under paragraph (B) may have employees that should remain covered under the LHWCA "because of the nature of the work which they do, or the nature of the hazards to which they are exposed," the opposite is true: clubs and camps may employ individuals who should not be covered under the LHWCA because their job responsibilities do not, or only minutely, involve maritime activities and they are not exposed to hazards associated with traditional maritime activities.

Interestingly, the **Fifth Circuit** went on in this matter to hold that the claimant was injured in the course of his employment while performing the traditional maritime activity of mooring a vessel and could pursue his unseaworthiness claim as well as his general maritime negligence claim against employer.

To the contrary, in Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179 (1999) (per curiam) the Board determined that a claimant employed as a harbor master for a restaurant housed on a permanently moored vessel and floating dock was not an employee of the restaurant, but of the entire enterprise and therefore not subject to the restaurant exclusion. The Board also considered its previous determination in Shano that the central inquiry should be into the claimant's assignable duties at the time of the injury.

On these considerations, the Board affirmed the ALJ's decision that the claimant was engaged in traditional maritime activities. It found that not every restaurant employee is excluded from coverage under the Act. Rather, the focus is on overall job duties and whether they further the operation of the restaurant or further maritime commerce and expose the claimant to maritime hazards. Because the claimant's duties furthered maritime commerce on the Ohio River and were not exclusively for the furtherance of the restaurant's business, the claimant was engaged in covered employment.

Similarly, in Bazor v. Boomtown Belle Casino, ___ BRBS ___ (BRB No. 00-0928B) (July 11, 2001), the Board rejected the employer's contention that the decedent was excluded from coverage as an employee of a recreational operation under Section 2(3)(B) of the LHWCA. The Board reasoned that since the decedent was involved solely in the vessel construction phase, i.e. a ship building operator at all times working on the vessel, there was coverage. Here again, the Board observed that it is the nature of the work which controls coverage, not the fact that the employer is a casino operation.

[ED. NOTE: For Dockside Gambling/Floating Casinos, see Topic 1.4.3.1, supra.]

1.11.9 Marina workers

Section 2(3)(C) includes individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marinas (except for routine maintenance). Though covered prior to the 1984 Amendments, marina workers were actually engaged in the pleasure boat industry.

The Amendments excluded those who do routine marina maintenance such as maintenance work on clubs, restaurants, and bars. Workers who perform construction, replacement, or expansion work on piers, berths, and marina facilities remain covered. One should look to what a worker is actually doing, rather than the job title.

In Keating v. City of Titusville, 31 BRBS 187 (1997), the Board held that employees of the City of Titusville were not covered by the Act pursuant to the provisions of Section 3(b). The claimants argued that coverage was afforded them pursuant to Section 2(3)(C) contending that the marina on which they worked was a "small port" and not merely a recreational marina. The Board concluded otherwise by noting that it was a recreational marina because it "primarily services recreational boats" and it "exists to secure boats, sell gasoline and snacks, and provide electricity and

telephone services.” In addition, it was determined that claimants’ duties at the marina did not involve the “construction, replacement, or expansion of the marina.” Specifically, one claimant inspected the vessels for seaworthiness and the other claimant inspected docks, tied boats to the docks and provided fueling services. Citing Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983), the Board determined that “the fact that claimants may have been injured on actual navigable waters (Keating was in the water on a boat, King on a floating dock) does not compel a finding of coverage ...”

Shano v. Rene Cross Construction, 32 BRBS 221 (1998) held that the claimant lacked status because he was an excluded marina worker. The Board upheld the ALJ decision on the basis that the claimant’s primary function was the launching and storage of boats as well as collecting money, fueling boats, cutting grass, etc. Because the claimant was engaged only in routine marina maintenance and not in construction or expansion of the marina, he could not escape the exclusion.

When a claimant’s duties are temporary in nature, he may be found not to have status. Moon v. Tidewater Const. Co., ___ BRBS ___, (BRB No. 00-1138) (Aug. 22, 2001) (civilian employee of a contractor hired by U.S. Navy to build a warehouse at a naval base had only a temporary connection to the base which would terminate when he completed his portion of construction of the warehouse, which was not uniquely maritime in nature.), see also Tidewater Marine Service, Inc., Tidewater, Inc., and M/V Brazos Moon, in rem, (No. CIV. A 98-0403) (Oct. 9, 1998), 1998 WL 720636; Weyher/Livsey Constructors Inc. v. Prevetire, 27 F.3d 985 (4th Cir. 1994).

1.11.10 Employees of suppliers, transporters, or vendors

Section 2(3)(D) deals with employees who are temporarily on the maritime site. These people are not performing any portion of the maritime employer’s work.

In this regard, Martinez v. Distribution Auto Service, 19 BRBS 12 (1985), held that a truck driver, whose sole responsibility was to pick up and transport a container of sealed cargo from a storage area to his employer’s facility where it was stripped by fellow employees, is excluded from coverage.

In Ripley v. Century Concrete Services, 23 BRBS 336 (1990), the Board found that a concrete form carpenter, employed by a building contractor, engaged in the alteration of a pier/adjacent area used in the repair of ships at the shipyard, was engaged in covered maritime employment. A building contractor working under a contract to complete a construction project is not a “vendor” as that term refers to one who sells goods. The employer, the Board reasoned, provided a service, not a product, to the shipyard.

Vendor Exclusion

In Daul v. Petroleum Communications, 196 F.3d 611 (5th Cir. 1999), aff’g 32 BRBS 47 (1998), the claimant was a salesman of cellular air time for one of two companies licensed to provide

cellular telephone communications to users in the Gulf of Mexico. While descending steps on a barge docked on the Houma navigational canal and carrying a desk phone, the claimant slipped and fell allegedly because of “slippery food material” on the stairs. He brought suit under the Act and the ALJ and Board held that the claimant was barred from recovery as a matter of law due to the vendor exclusion of Section 2(3)(D).

1.11.11 Aquaculture workers

The 1984 Amendments to the LHWCA specifically exclude from coverage anyone who is employed as an “aquaculture worker” as long as that person is “subject to coverage under a State workers’ compensation law.” 33 U.S.C. § 902(3)(E). Aquaculture workers are defined as 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. § 701.301(a)(12)(iii)(E).

The legislative history indicates that

[t]he conferees understand 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.R. Conf. Rep. 98-1027, 98th Cong., 2d 23 (1984).

A fish spotter is not an aquaculture worker. Zapata-Haynie Corp. v. Barnard, 933 F.2d 256 (4th Cir. 1991), aff’d 23 BRBS 267 (1990). This occupation does not involve the controlled cultivation and harvesting of animals. Also, the claimant in that case was not involved in the processing of the caught fish. See also, Ward v. Director, OWCP, 684 F.2d 1114 (5th Cir. 1982), cert. denied sub nom Zapata-Haynie Corp. v. Ward, 459 U.S. 1170 (1983)(Fish spotter pilot is covered under the LHWCA.).

See Hutchinson v. Mavar Shrimp & Oyster Co., 14 BRBS 48 (ALJ) (1982) (laborer in a canning facility who handles and moves roller baskets containing canned pet food to a cooker is clearly involved in the processing and canning operation, and his duties bear no significant relationship to maritime activity.).

See also Loggins v. Newport Shrimp Co., 20 BRBS 814 (ALJ) (1988) (utility worker who was assisting in the unloading of squid from a boat was engaged exclusively in the business of cleaning, processing and canning fish, and is thus an excluded aquaculture worker). See also Green v. C.J. Langenfelder and Son, Inc., 30 BRBS 77 (1996)(on remand the Board instructed the ALJ to consider aquaculture issue if by using the Board’s guidelines, ALJ concluded that “seaman”

exclusion did not apply to employee attempting to fix conveyor belt onboard oyster harvester dredge).

But see Ljubic v. United Food Processors, 30 BRBS 143 (1996) (maintenance supervisor who maintained/repared equipment on the dock of a cannery was not excluded from coverage as a aquaculture worker, because his work constituted “traditional maritime employment” and workers engaged in both maritime and non-maritime employment “cannot walk in and out of coverage”).

[ED. NOTE: Remember: A worker engaged in longshoring activity during at least a portion of his working day is covered under the LHWCA since to exclude him would be to reinstate the same degree of shifting and fortuitous coverage that Congress intended to eliminate. Brady-Hamilton Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978).]

1.11.12 Recreational vessel construction/repair

Section 2(3)(G) limits this exclusion to boat yards involved in the construction, repair, or scrapping of **recreational** vessels under 65 feet in length. If a recreational vessel 65 feet or over is worked on, the employer is not excluded from any claims arising out of that work. A recreational vessel is one operated primarily for pleasure. 20 C.F.R. § 701.301(a)(12)(iii)(F) (1985).

For a case analyzing how a vessel should be measured in order to determine whether or not it is 65 feet, see Powers v. Sea Ray Boats, Inc, 31 BRBS 206 (1998). In Powers, the hull and deck measured 64 feet, 6 inches. The overall length, including a “service platform” and “bow pulpit” would place the vessel at 72 feet, 7 inches. Respondent had argued that Coast Guard regulations (which would not include these additional measurements) should be used to determine the correct length, i.e. less than 65 feet. However, the judge and later the Board, relied on the plain and scientific mandates of the Department of Labor’s regulation for measuring the length of a recreational vessel. 20 C.F.R. §701.301(a)(12)(iii)(F). The judge reasoned that had the Department of Labor wanted a portion of the vessel excluded, it could have so specified and had it wanted the Coast Guard regulations utilized, it could have so stated. Furthermore, the judge noted that exclusions from coverage are narrowly constructed. See 130 Cong. Rec. H9597-8 (Daily Ed. Sept. 14, 1984); 130 Cong. Rec. H9731, H9733-4 (Daily Ed. Sept. 18, 1984); Cong. Rec. S11622-3 (Daily Ed. Sept. 20, 1984). He further noted the judicial policy of resolving all doubtful questions of coverage in the claimant’s favor. Tampa Ship Repair v. Director, OWCP, 535 F.2d 936 (5th Cir. 1976).

1.11.13 Small vessel building/repairing/dismantling

This exclusion is found at Section 3(d). In order for it to be operable, the facility must be certified by the Secretary as not building, repairing, or dismantling any vessel exceeding the required size limits. These limits are **commercial** barges under 900 light-ship displacement tons and **commercial** tugboats, towboats, crew boats, supply boats, fishing boats, or other work vessels under 1,600 tons gross. Note that the exclusion is for commercial vessels only.

“[A] facility, in order to avail itself of the exemption, must in its shipbuilding operations be engaged in working only on small vessels. If such a facility engages in the construction or repair of a vessel larger or of a type other than those defined in the provision, those employees who would be subject to the exemption would be covered under the [LHWCA] during the period of activity on the non-qualified vessel. Once the facility is again engaged in exclusively small vessel operations, the exemption would apply.

S11624 Cong. Rec. (Sept. 20, 1984).

If the facility receives federal maritime subsidies, or the employer’s workers are not covered under a state workers’ compensation system, then the facility is **not** excluded.

Note that the exclusion applies only to employees that are **not** working over navigable waters or on an adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels. Those so working will continue to be covered.