

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEW ORLEANS DEPOT SERVICES, INCORPORATED

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;
NEW ORLEANS MARINE CONTRACTORS; and SIGNAL
MUTUAL INDEMNITY ASSOCIATION, LIMITED

Respondents

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

FEDERAL RESPONDENT'S RESPONSE
TO PETITION FOR REHEARING EN BANC

M. PATRICIA SMITH
Solicitor of Labor
RAE ELLEN FRANK JAMES
Associate Solicitor
MARK A. REINHALTER
Counsel for Longshore
GARY K. STEARMAN
Counsel for Appellate Litigation
MATTHEW W. BOYLE
Attorney
U. S. Department of Labor
Office of the Solicitor
Suite N2119, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5658

Attorneys for the Director, Office of
Workers' Compensation Programs

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INTRODUCTION

New Orleans Depot Services, Inc. (NODSI) seeks rehearing en banc of the decision in this case arising under the Longshore and Harbor Workers' Compensation Act (the LWCHA), 33 U.S.C. §§ 901-50. A divided panel of the Court affirmed decisions of an administrative law judge and the Benefits Review Board awarding benefits to Juan Zepeda. *New Orleans Depot Servs., Inc. v. Director, OWCP*, 689 F.3d 400 (5th Cir. 2012). The panel held that Zepeda's work as a container repair mechanic at NODSI's facility, where seagoing shipping containers were stored and repaired, met the requirements for both "situs" (that the injury occurred on the navigable waters of the United States, "including any . . . adjoining area customarily used by an employer in loading [or] unloading . . . a vessel"), 33 U.S.C. § 903(a), and "status" (that the employee engaged in maritime employment), 33 U.S.C. § 902(3), and thus found him covered by the Longshore Act. Because NODSI's petition does not meet the standard for rehearing *en banc* and the panel decision is correct in any event, the Court should deny its petition.

COUNTER STATEMENT OF FACTS

NODSI's statement of the facts (which it claims are undisputed) conspicuously omits the two ALJ factual determinations that this case turns on: first, that some of the containers stored and repaired at NODSI's Chef Yard facility came from or were going to ships at the Port of New Orleans, ALJ D & O (Record Excerpts Tab

5) at 20; slip op. at 8; and second, that NODSI's customary repair of those marine containers "was a significant maritime activity necessary for the process of loading and unloading cargo." *Id.* at 22; *see* slip op. at 8 n. 4 ("Chef Yard is 'associated with items used *as part* of the loading process. . .").

THE STANDARD FOR REHEARING EN BANC

"An en banc hearing or rehearing is not favored, and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the Court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a)(1), (2).

To establish that en banc consideration is necessary to maintain uniformity, the petitioner must show that the panel decision conflicts with a decision of either this Court or the Supreme Court. FED. R. APP. P. 35(b)(1)(A). The petitioner may establish the "exceptional importance" requirement by showing that the proceeding "involves an issue on which the panel decision conflicts with other United States Courts of Appeals that have addressed the issue." FED. R. APP. P. 35(b)(1)(B). Under this Court's Internal Operating Procedures, "alleged errors . . . in the application of the correct precedent to the facts of the case" generally do not warrant en banc review. Rule 35 Internal Operating Procedure (Rule 35 I.O.P.).

ARGUMENT

I. The panel's application of the substantial evidence standard of review does not conflict with decisions of the Supreme Court, or decisions of this Court or of other circuits.

NODSI's primary argument is that the panel did not correctly apply the standard of review used by the full Court in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 515 (5th Cir. 1980) (en banc), and, as a result, created a conflict not only among the decisions of this Court, but also with those of the Supreme Court and other courts of appeals. This contention is not one that the dissent asserted, *cf.* slip op. at 18 n.3, and it is incorrect in the first instance. The panel applied the same standard of review in exactly the same way the full Court did in *Winchester*: it set forth the governing legal standard for an "adjoining area," determined that the ALJ's relevant fact findings were supported by substantial evidence, and then concluded that these fact findings fit within the Court's legal framework for establishing a maritime situs. Review of the panel opinion leaves no doubt that its approach is consistent with *Winchester*.¹

¹ Significantly, NODSI does not argue that the full Court in *Winchester* applied an incorrect standard of review. There, the full Court explained that "[t]he situs requirement compels a *factual* determination that cannot be hedged by the labels placed on an area," and concluded that "[i]n LHW[C]A case[s], this determination of [situs] is handled by the ALJ and reviewed by the Board. . . . If the situs determination is supported by substantial evidence on the record as a whole, it will not be set aside by this court." 632 F.2d at 513, 515 (emphasis added; citations omitted). This standard of review derives from the nature of the situs inquiry. Situs is an intensely fact-bound determination, in which the fact-finder must carefully evaluate all the facts and circumstances of a particular case, and draw appropriate inferences in determining whether a

The panel first outlined the basic components of the situs determination:

liability may be imposed on NODSI only if its facility constitutes an ‘other adjoining area,’ 33 U.S.C. § 903. In this circuit, when deciding whether a location satisfies the situs component of L[ongshore Act] coverage, courts consider both the geographic proximity to the water’s edge and the functional relationship of the location to maritime activity.

Slip op. at 7.²

It then discussed the legal standard, set forth in *Winchester* and reiterated in *Coastal Prod. Servs., Inc. v. Hudson*, 555 F.3d 426 (5th Cir. 2009), under which an “adjoining area” can be considered to have a functional relationship with maritime activity. *Id.* Specifically, it restated this Court’s standard that an area can be a covered situs even if a vessel cannot dock there, and even if it is not “directly involved in loading or unloading or physically connected to the point of loading or unloading,” so long as the area is “associated with items used as part of the loading process.” *Id.* (quoting *Hudson*, 555 F.3d at 434).

Thus, only after setting forth the appropriate legal standard did the panel address the facts on which the ALJ based his determination that the Chef Yard was a maritime situs:

particular location is covered under section 903(a).

By contrast, NODSI repeatedly criticizes *Coastal Prod. Servs., Inc. v. Hudson*, 555 F.3d 426 (5th Cir. 2009), Pet. for Rhrgr at vi n.7, 4-5, 8 n.38; but *Hudson* is not now under review, and this Court declined to hear the *Hudson* employer’s petition for en banc review, which raised the same standard of review argument made here. 567 F.3d 752 (5th Cir. 2009).

² NODSI conceded the Chef Yard’s geographic proximity to navigable waters. *Id.*

The ALJ found that . . . some of the Evergreen containers repaired by NODSI were *used for marine transportation and were offloaded at the Port of New Orleans*. NODSI initially serviced only Evergreen containers, and was required, pursuant to Evergreen’s labor contract, to hire unionized maritime workers, including Zepeda. Accordingly, the ALJ determined that the functional nexus requirement was satisfied because Evergreen’s marine containers, *which were used for marine transportation or had previously been used for marine transportation*, were stored and repaired at the Chef Yard.

Id. at 8 (emphasis added).³ And only after reciting the ALJ’s relevant fact findings did the panel conclude that, “[a]pplying the deferential standard of review required by *Winchester*, it is clear that the ALJ’s situs determination is supported by substantial evidence in the record as a whole.” *Id.* As the panel explained, the facts found by the ALJ met the legal test for situs: “For all the reasons enumerated above, it is clear that there is sufficient evidence establishing that the Chef Yard is ‘*associated with items used as part of the loading process.*’” *Id.* at n.4 (underlining added, italics in original) (quoting *Hudson*, 555 F.3d at 434).⁴

The panel’s approach, therefore, fully comports with *Winchester*. In both cases, the Court delineated the governing legal standard and then deferred to the

³ Contrary to NODSI’s argument, Pet. for Rhrq at 15 n.56, the ALJ and panel did not find union membership determinative of status, but considered it further proof that some of the containers sent to the Chef Yard either came off ships for repair or were returned to ships after repair. See Slip op. at 4, 8.

⁴ The panel majority correctly chided the dissent, which rendered its own factual conclusions, for “ignor[ing] our fundamental *deferential review* of the ALJ’s *factual determinations*. The question before us is not whether we would have reached the same *factual conclusion* in the first instance; rather, we must determine whether there is more than a scintilla of evidence in the record to support the ALJ’s *factual finding*.” Slip op. at 8 n.4 (emphases added).

ALJ's reasonable factual determinations and conclusions. Moreover, the fact finding in *Winchester* -- that the gear room "was in an area customarily used by employers for loading," 632 F.2d at 515 -- is of precisely the same character as the fact finding here, namely that the seagoing containers, customarily stored and repaired at the Chef Yard, were items used as part of the loading process. Both are factual conclusions (satisfying the underlying legal test) that this Court properly reviewed under the substantial evidence standard.

The panel's approach also poses no conflict with the standard of review used in the other Fifth Circuit cases cited by NODSI. In both *Equitable Equip. Co. v. Dir.*, *OWCP*, 191 F.3d 630, 631 (5th Cir. 1999), and *Temp. Emp't Serv. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 458 (5th Cir. 2001), the Court employed de novo review because the sole question presented in each case involved the ALJ's subject matter jurisdiction, which arose under a different statutory provision, 33 U.S.C. § 919(a). Put simply, the panel's decision here -- which addressed only the standard of review for situs and status determinations -- cannot conflict with cases in which that standard is not at issue.

The Court's cursory statement on the standard of review in *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002), also presents no intracircuit conflict. Although the Court did say, as NODSI points out, that it "review[s] determinations of LHWCA coverage by either an ALJ or the BRB as a question of

law,” 313 F.3d at 302 (citation omitted), it also said that “[t]his Court upholds BRB decisions that are supported by substantial evidence and in accordance with law.”

Id. Moreover, the text of the decision sheds no light on the standard of review actually used because the Court held (under the status prong) that the employee was employed by a “recreational operation” and so was specifically excluded from coverage under the plain text of the Act. 313 F.3d at 304 *citing* 33 U.S.C. § 902(3)(B).⁵

NOSDI also claims that the panel’s application of the standard of review conflicts with *Chandris v. Latsis*, 515 U.S. 347 (1995). *Chandris*, however, arose under the Jones Act, not the Longshore Act.⁶ Moreover, NOSDI quotes only one sentence from the Court’s statement on its standard of review with regard to seaman status: “Because statutory terms are at issue, their interpretation is a question of law and it is the court’s duty to define the appropriate standard.” Pet. for Rhrq at iv n.1 (quoting *Chandris*, 515 U.S. at 369). NOSDI ignores the very

⁵ Even if *Bazor* employed a *de novo* standard, it is clear that the en banc decision in *Winchester* would control. Moreover, *Bazor*’s situs analysis is dicta, given its earlier finding that the decedent did not meet the status prong. 313 F.3d at 304. And the ALJ’s situs finding was contrary to the law of this Circuit under any standard of review because the area in question was not and had never been used for a maritime purpose before the employee’s injury. 313 F.3d at 304; *see also Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180 (5th Cir. 2004).

⁶ Unlike the Longshore Act, the Jones Act has no situs requirement and covers workers with “seaman” status, rather than “employee” status. The Jones Act, however, does not define “seaman,” so courts use the Longshore Act’s exclusion from coverage of any “master or member of a crew of any vessel,” 33 U.S.C. § 902(3)(G), to determine whether a worker is a “seaman.” *Chandris*, 515 U.S. at 356.

next sentence in which the Court states: “On the other hand, ‘[i]f 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.’” *Chandris*, 515 U.S. at 369 (quoting *McDermott Int’l v. Wilander*, 498 U.S. 337, 356 (1991)). *Chandris* thus directs the court not only to define the proper legal standard but also to defer to the fact finder when reasonable persons applying that standard could differ.

And that is what the panel did here. After delineating the appropriate legal standard for an “adjoining area,” the panel reviewed the ALJ’s fact findings for substantial evidence, and determined that a reasonable person, applying that legal standard, could reasonably have found that the Chef Yard was a maritime situs. Slip op. at 7-8; *see id.* at 4 (recognizing that “[s]ubstantial evidence is that relevant evidence . . . that would cause a *reasonable person* to accept the fact finding.”) (emphasis added).

NODSI’s last argument on the standard of review is that the panel’s decision conflicts with decisions from other circuits. At most, however, NODSI has shown that other courts have *stated* a different standard of review, not that these courts would have actually *applied* a different standard under the circumstances of this case. Indeed, the panel specifically noted its belief that the standard it was

applying here was the same as that used by the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978). Slip op. at 9 and n.5.

Moreover, NODSI has found only two out-of-circuit cases that even state the standard differently, with both reviewing the situs determination as a purely legal question. But both did so because the situs determination in no way depended on the ALJ's resolution of disputed facts. *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 270 (1st Cir. 1976) (recognizing obligation to accept factual findings supported by substantial evidence, but noting that "the material facts are not in dispute"); *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 221 (4th Cir. 1998) ("Because the facts relating to the resolution of the situs issue are not substantially in dispute, coverage becomes a question of law which we determine *de novo*.").

Here by contrast, the ALJ was required to draw inferences from all of the facts and circumstances surrounding Zepeda's employment and resolve two critical factual questions. First, whether the containers that came to the Chef Yard for storage and repair had come off ships, or would return to ships after repair; and second, whether their repair and storage at the Chef Yard were necessary to the process of loading (or as the panel put it, whether the Chef Yard was therefore "associated with items used as part of the loading process."). *Winchester* mandates substantial evidence review of the ALJ's decision on these dispositive questions of

fact, and the panel majority did exactly that. Because there were no similarly critical facts at issue in *Stockman* or *Brickhouse*, they do not represent a circuit split on the standard of review.⁷

II. NOSDI’s assertion that the panel’s situs and status holdings were incorrect is premised on nonexistent facts and is not a basis for en banc review. In any event, the panel’s decision is correct.

NOSDI argues that the panel, by finding Zepeda covered, impermissibly expanded Longshore Act coverage beyond that recognized by any other court. Pet for Rhrq at vi. To make its arguments, however, NOSDI assumes that the storage and repair of seagoing containers at the Chef Yard were not “integral to the loading and unloading process.” Pet. Rhrq at 10, 13. But this unfounded assumption is directly contrary to the ALJ findings that the panel determined were supported by substantial evidence. Slip op. at 8; ALJ D & O (RE Tab 5) at 20. Thus, *all* of NOSDI’s coverage arguments can be rejected out-of-hand as based on an imagined factual foundation.

Besides making up facts to suit its purposes, NOSDI does not argue that the panel relied on the wrong precedent. Rather, it simply alleges error “in *the application of the correct precedent to the facts of the case*,” which is not a matter for rehearing en banc. Rule 35 I.O.P. For that reason as well, NOSDI’s petition

⁷ Indeed, *Brickhouse* premised the stated standard of review on cases addressing the absence of deference owed to the *Board’s* legal interpretations of Longshore Act, not to the *ALJ’s* factual findings. *Brickhouse*, 142 F.3d at 221.

should be denied.

Finally, the petition should be denied for the simple reason that the panel correctly applied the teachings of this Court and the Supreme Court to the facts of this case. First, regarding situs, the panel faithfully applied *Winchester* and *Hudson* to hold the Chef Yard was an “adjoining area” under 33 U.S.C. § 903(a).

In *Winchester*, the Court held that a gear room -- located five blocks from the dock gate and where no loading or unloading could, or did, take place -- met the functional nexus requirement for situs because it was used to store and repair equipment used in loading and unloading.⁸ The Court noted that the result it reached was consistent with the broad interpretation of situs that Congress intended when it included “adjoining areas” in the statute, and “in line with the congressional desire to extend coverage to those maritime chores that technology has moved ashore.” *Id.* at 516.

In *Hudson*, the Court found that *Winchester* “teaches that simply because a vessel cannot dock for loading and unloading at a particular area does not mean that the area is not a covered situs.” *Hudson*, 555 F.3d at 434. Thus, *Hudson*

⁸ In the initial *Winchester* decision, the panel held that the “gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes.” *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 247 (5th Cir. 1977). In the en banc decision, the full Court agreed, concluding that “not only does that [overall] area adjoin the navigable waterway, but the gear room itself has a sufficient nexus to the waterfront” 632 F.2d at 515, and finding that “both the gear room and the overall area were ‘customarily used’ for loading.” *Id.* at 516.

reasoned that if an area is “associated with items used as part of the loading process,” it “need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading.” *Id.*

Thus, NODSI’s argument that the Chef Yard cannot be a covered situs because no loading or unloading takes place there is simply inconsistent with the relevant precedent. As *Winchester* and *Hudson* reveal, it is enough that items necessary to the loading process are repaired or maintained there. *Accord Consol. Coal Co. v. Ben. Rev. Bd.*, 629 F.3d 322, 329, 332 (3d Cir. 2010) (holding that garage, although not used in loading, had the required functional nexus because it was used to service heavy equipment, some of which was used in loading). And the ALJ specifically found that NODSI’s repair of containers “was a significant maritime activity *necessary for the process of loading and unloading cargo.*” RE Tab 5 at 22. Given that Evergreen is a “fully containerized” shipper, *see slip op.* at 3, it would be difficult to conclude otherwise.⁹ The panel’s decision is consistent with controlling precedent and does not amount to an expansion of situs coverage.

⁹ Notably, the dissent substitutes this ALJ factual determination with its own “critical” (and untenable) finding that because they are themselves loaded, the *containers* into which seagoing cargo is packed are not equipment necessary to the loading or unloading process. *Slip op.* at 13, 15. The panel majority correctly rejected the dissent’s finding, stating “this narrow distinction finds no support in the language of the LHWCA, is contrary to the broad construction of the statute required by our applicable precedents, and ignores our fundamental deferential review of the ALJ’s factual determinations.” *Slip op.* at 8 n.4.

Regarding status, the panel's holding that container repair is covered employment also does not represent an expansion of status coverage for three reasons. First, the Board has consistently held, for over thirty years, that container repair – when performed by contractors like NODSI or a shipping company – is covered. *Cabezas v. Oceanic Container Svc., Inc.*, 11 BRBS 279, 281 (1979); *DeRobertis v. Oceanic Container Serv., Inc.*, 14 BRBS 284, 286-287 (1981); *Arjona v. Interport Maint. Co., Inc.*, 31 BRBS 86, 89 (1997 WL 441651 at *1, 3-4) (1997); *Insinna v. Sea-Land Serv., Inc.*, 12 BRBS 772 (1980).

Second, coverage of container repair is consistent with the Supreme Court's pronouncement in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 494 U.S. 40 (1989), that “employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that § 902(3) requires.” *Id.* at 47. Although the Court was addressing different types of employees – two janitorial employees who cleaned up coal beneath a conveyor system, and a pier mechanic who repaired the conveyor – it specifically cited the Board's decisions in *Cabezas* and *DeRobertis*, both container-repair cases, in support of its conclusion that “repair and maintenance employees are engaged in maritime employment.” *Schwalb*, 494 U.S. at 47-48.

Third, the Eleventh Circuit – the only circuit to have addressed the issue – has held that container repair is covered employment. *Atl. Container Svc, Inc. v. Coleman*, 904 F.2d 611, 617 (11th Cir. 1990).¹⁰ As the panel noted, therefore, a contrary holding here would create an intercircuit split, which the court tries to avoid. Slip op at 11 n.6.¹¹ Regardless, it is difficult to fathom how the panel’s decision can be considered an expansion of the status element of coverage when it is consistent with over thirty years of Board precedent, the Eleventh Circuit’s twenty-two year old decision in *Coleman*, and the teachings of the Supreme Court in *Schwalb*.

¹⁰ Although NODSI cites to *Motoviloff v. Dir., OWCP*, 692 F.2d 87 (9th Cir. 1982), the Ninth Circuit did not address the Board’s finding of status, and denied coverage based on a situs factor – the particular suitability of the site for maritime purposes – that this Court has declined to adopt as determinative. See Slip op. at 9 (*Winchester* “rejected the application of a formulaic factor test” for situs). Moreover, *Motoviloff* was decided before *Schwalb* held that repair of items necessary to the loading process is covered employment.

¹¹ NODSI tries to distinguish *Coleman* by focusing only on the employee’s work repairing chassis leaving the port. Pet. for Rhrq at viii-ix n.19. But, as the panel correctly observed, the Eleventh Circuit specifically found that the *containers* he repaired were “essential to the loading and unloading process” and that *all* of his employment activities were “essentially maritime.” 904 F.2d at 618, and n.4.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be denied.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

RAE ELLEN JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

GARY K. STEARMAN
Counsel for Appellate Litigation

s/ Matthew W. Boyle
MATTHEW W. BOYLE
Office of the Solicitor
200 Constitution Avenue, N.W.,
Suite N-2117
Washington, D.C. 20210
(202) 693-5660

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, the foregoing brief was electronically filed and served through the Court's CM/ECF system on:

Anne Derbes Wittmann
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
201 St. Charles Avenue, Suite 3600
New Orleans, LA 70170-0000
Email: awittmann@bakerdonelson.com

Douglas P. Matthews, Esq.
Andrew J. Quackenbos, Esq.
King, Krebs & Jurgens, P.L.L.C.
201 Saint Charles Avenue, 45th Floor
New Orleans, LA 70170-0000
Email: dmatthews@kingkrebs.com
aquackenbos@kingkrebs.com

s/ Matthew W. Boyle
MATTHEW W. BOYLE
United States Department of Labor

COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. Proc. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman);
2. Pursuant to Fifth Circuit Rule 25.2.1, the text of the electronic filing made with the Court is identical to the text in the paper copies; and
3. The brief was scanned for viruses through McAfee VirusScan Enterprise 8.0, and no virus was detected; and
4. Pursuant to Fifth Circuit Rule 25.2.13, the brief does not include the relevant personal data identifiers.

s/ Matthew W. Boyle
MATTHEW W. BOYLE

APPENDIX