

2-12-2015

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### Recommended Citation

Adam Hare, *Land Ho! Two Words an Injured Longshore or Harbor Worker Never Wants to Hear*, 64 Cath. U. L. Rev. 161 (2015).

Available at: <https://scholarship.law.edu/lawreview/vol64/iss1/9>

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## Land Ho! Two Words an Injured Longshore or Harbor Worker Never Wants to Hear

### Cover Page Footnote

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2006, The University of Maryland, College Park. The author wishes to thank his wife, Lovely Padua-Hare, for her love and unwavering support in life. He wishes also to thank his family. The author thanks Dr. Michael Boyle and Dr. Beryl Rosenstein of Johns Hopkins Hospital, without whose care the author's life would not be possible. Finally, the author wishes to thank Alexander C. Papandreou and Michael Wray for their expertise and generosity while writing this Comment, and the staff and board members of the Catholic University Law Review for their tremendous efforts.

# LAND HO! TWO WORDS AN INJURED LONGSHORE OR HARBOR WORKER NEVER WANTS TO HEAR

*Adam Hare*<sup>+</sup>

Two longshoremen<sup>1</sup> are working in different maritime shipping yards: one in Newark, New Jersey, the other in Houston, Texas. Both men are injured when his cargo truck overturns several hundred yards from the dock. Under the Longshore and Harbor Workers' Compensation Act (LHWCA), only one of the workers will be compensated for his injuries.<sup>2</sup> This inequitable result is a function of inconsistent interpretations of the LHWCA's situs requirement by several U.S. Courts of Appeals.<sup>3</sup>

To be covered by the LHWCA, a claimant must satisfy two requirements: a status requirement and a situs<sup>4</sup> requirement.<sup>5</sup> The status requirement is met if, at the time of an accident, the person seeking coverage under the LHWCA was an employee engaged in maritime activity.<sup>6</sup> The situs requirement limits

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1. BLACK'S LAW DICTIONARY 1027–28 (9th ed. 2009) (defining longshoreman as “[a] maritime laborer who works on the wharves in a port; esp., a person who loads and unloads ships”).

2. See Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 903(a) (2012) (providing that employees shall be compensated for “injur[ies] occurring upon the navigable waters of the United States”).

3. See *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d 384, 400 (5th Cir. 2013) (Steward, J., dissenting) (recognizing the circuit court split regarding the proper interpretation of the LHWCA's situs requirement).

4. See BLACK'S LAW DICTIONARY *supra* note 1, at 1513 (defining situs as “[t]he location or position (of something) for legal purposes . . . the law of the place where the thing in issue is situated”).

5. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415–16 (1985) (citing 33 U.S.C. § 903(a)) (interpreting the LHWCA to include both a status and a situs requirement); see also 33 U.S.C. § 903(a) (“[C]ompensation shall be payable under this chapter in respect of disability or death of an *employee*, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . .” (emphasis added)).

6. 33 U.S.C. § 902(3) (providing examples of what is and is not considered “engag[ing] in maritime employment” for the purposes of defining “employee” under the LHWCA); see also *Dir., Office of Workers' Comp. Programs v. Perini North River Assocs.*, 459 U.S. 297, 323–24 (1983) (relying on the LHWCA's maritime employment language as a basis for determining the meaning of the Act's status requirement). For a thorough reading of the status requirement of the LHWCA,

coverage to employees involved in accidents occurring on or around “navigable waters.”<sup>7</sup> Consistent interpretation of these requirements, which the situs requirement currently lacks, is crucial because it is a question of law, and a judge, not a jury, will be the ultimate arbiter on the issue.<sup>8</sup>

Congress passed the LHWCA in 1927<sup>9</sup> and comprehensively amended it in 1972.<sup>10</sup> The exact boundaries of the Act’s situs requirement developed through case law.<sup>11</sup> Neither Congress nor the Supreme Court of the United States has offered guidance regarding the precise and proper interpretation of the Act’s situs requirement.<sup>12</sup>

In the 1983 case *Director, Office of Workers’ Compensation Programs v. Perini North River Associates*,<sup>13</sup> the Supreme Court offered guidance to the circuit courts on how the LHWCA’s status requirement should be interpreted.<sup>14</sup> The Supreme Court has not provided similar guidance on the situs requirement,<sup>15</sup> even though the requirement was drafted in the hope that a

particularly how the Supreme Court interpreted the 1972 Amendments to include land-based injuries, *see generally* Lawrence M. Merlin, Comment, *On the Waterfront: The Supreme Court Defines the ‘Status’ Requirement of ‘Maritime Employment’*, 8 MAR. LAW. 147 (1983) (discussing the evolution of the jurisprudence regarding the LHWCA’s status requirement).

7. *See* *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 263–64 (1977) (stating that the 1972 Amendments to the LHWCA “broadened the definition of ‘navigable waters’ to include ‘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’” (quoting 33 U.S.C. § 903(a))).

8. *See* *Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs*, 540 F.2d 629, 635 (3d Cir. 1976) (finding that workers’ compensation claims under the LHWCA are a matter of law because the LHWCA “concern[s] subject matter within Congress’ legislative jurisdiction in admiralty, [and] it is well-settled that no right to jury trial exists”).

9. Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA), ch. 509, 44 Stat. 1424 (1927) (codified as amended 33 U.S.C. §§ 901–950).

10. *See* *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73–75 (1979) (stating that Congress responded to gaps in coverage with the 1972 Amendments to the LHWCA by providing coverage for on-shore employees).

11. In numerous cases, courts cite frequently to the LHWCA, yet these cases hardly refer to, let alone cite, other federal laws pertaining to modern regulation of maritime workers’ compensation claims. *See, e.g.*, *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 508–16 (5th Cir. 1980) (en banc), *overruled by* *New Orleans Depot Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 718 F.3d, 394 (5th Cir. 2013); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140–41 (9th Cir. 1978); *Sea-Land Serv.*, 540 F.2d at 638–39.

12. Thomas C. Fitzhugh III, *Adjoining Navigable Waters: Circuit Conflicts on LHWCA Situs* (Oct. 18, 2013) (explaining that “[d]etermining the extent to which Congress moved jurisdiction landward has been the source of continuous litigation since 1972,” and pointing out that “the Supreme Court has shown little interest in resolving circuit conflicts” that have led to differing outcomes over interpretation of the situs requirement).

13. 459 U.S. 297 (1983).

14. *Id.* at 317–18 (noting that the legislative intention of the status requirement was to limit the coverage of the LHWCA to those workers engaged in maritime activity).

15. Claire R. Pitre, Comment, *Muddying Waters—Clarifying Maritime Coverage Under the Longshore and Harbor Workers’ Compensation Act*, 59 LOY. L. REV. 981, 996 (“Because the

compendium of case law would develop and define the term.<sup>16</sup> Consequently, the Supreme Court should adopt a bright line rule to clarify the divergent circuit court interpretations of the situs requirement of the LHWCA.

Since the LHWCA's adoption, the U.S. Courts of Appeals for the Third, Fifth, Fourth, and Ninth Circuits have adopted different interpretations of the situs requirement.<sup>17</sup> In *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*,<sup>18</sup> the Third Circuit held broadly that, if the status requirement of the LHWCA is met, then the situs requirement of the Act is also met.<sup>19</sup> Additionally, in *Texports Stevedore Co. v. Winchester*, the Fifth Circuit

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Supreme Court has addressed and clarified the status requirements under the Longshore Act, interpretation of the status requirement by the lower courts has not resulted in as much inconsistency and unpredictability as judicial interpretation and application of the Longshore Act's situs requirement.”).

16. See *Sea-Land Serv.*, 540 F.2d at 635–36 (discussing how Congress seemingly wanted adjudicative bodies to determine LHWCA requirements because of the constitutional limitations in admiralty law). Not only does the situs requirement ask a federal judge to determine what constitutes “navigable waters,” but it also asks a judge to interpret the word “around.” *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1131 (5th Cir. 1991). Courts also must construe a non-exhaustive list of geographical areas included as “adjoining” areas under the LHWCA. See 33 U.S.C. § 903(a) (listing the following areas that Congress has decided will meet the situs requirement in the LHWCA: “any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel”).

The cases that construe the situs requirement of the LHWCA broadly seem to mirror the desire of the Supreme Court that, as stated in *Voris v. Eikel*, claimants be given the benefit of a liberal construction of the original LHWCA to “avoid[] harsh and incongruous results.” *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (citing *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932)). But see *Fitzhugh, supra* note 12 (stating that the *Voris* presumption was abrogated by *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), which looked to the “plain language” of the LHWCA (internal quotation marks omitted)).

17. See *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1137 (5th Cir. 1995) (rejecting the differing Third, Fifth, and Ninth Circuit situs tests, and relying on its own precedent, the plain language of the LHWCA, and the intent of Congress to find against the claimant). Other circuits have struggled to interpret this requirement, but the circuit decisions this Comment analyzes set forth the clearest and earliest tests for the situs requirement. See, e.g., *Cunningham v. Dir., Office of Workers' Comp. Programs*, 377 F.3d 98, 104 (1st Cir. 2004) (“This court has not yet articulated a standard methodology for approaching the questions of ‘adjoining area.’ . . . [H]owever, other circuits have adopted varied approaches.”); *Scott v. Trump Indiana, Inc.*, 337 F.3d 939, 946 (7th Cir. 2003) (using Supreme Court cases, not other Seventh Circuit precedent, to find against a claimant); *Stowers v. Consol. Rail Corp.*, 985 F.2d 292, 296 (6th Cir. 1993) (agreeing primarily with the Third Circuit’s interpretation of maritime employment in its decision).

18. 540 F.2d 629 (3d Cir. 1976).

19. See *id.* at 638.

Congress was cautious in its language [in the LHWCA], but the fact remains that [Congress] intended to expand the scope of the LHWCA to provide a federal workmen’s compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty. As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available.

*Id.*

recognized that its “broad interpretation of the maritime situs requirement” would not create a bright line rule, but would, instead, allow decisions to be made on a case-by-case basis.<sup>20</sup> Meanwhile, in *Brady-Hamilton Stevedore Co. v. Herron*, the Ninth Circuit enumerated the “functional relationship” test, which employed four factors to determine if a claim satisfied the situs requirement.<sup>21</sup> The Fifth Circuit did not adopt a uniform test appropriate for application across all cases.<sup>22</sup>

In one of the more recent cases out of the Fifth Circuit, *New Orleans Depot Services, Inc. v. Director, Office of Worker’s Compensation Programs*,<sup>23</sup> the court overturned its own precedent and interpreted narrowly the LHWCA’s situs requirement.<sup>24</sup> Similar to the Fifth Circuit’s interpretation in *New Orleans Depot Services*, the Fourth Circuit also interpreted narrowly the LHWCA’s situs requirement in *Sidwell v. Express Container Services, Inc.*<sup>25</sup> Great inequity results from these divergent interpretations.<sup>26</sup>

The conflicting judicial analyses of the situs requirement and the inequity they cause are the primary reasons the interpretations of the LHWCA’s status and situs requirements must be harmonized. For the sake of equity and predictability, the Supreme Court should resolve the circuit split over the

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20. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 516 (5th Cir. 1980) (en banc), *overruled by* *New Orleans Depot Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 718 F.3d 394 (5th Cir. 2013).

21. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (providing a non-exhaustive list of the factors a court should consider in deciding whether an area is an “adjoining area” including: “the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances”).

22. *Winchester*, 632 F.2d at 518–19 (Tjoflat, J., dissenting); *see also* *Humphries v. Dir., Office of Workers Comp. Programs*, 834 F.2d 372, 374 (4th Cir. 1987) (criticizing the *Winchester* decision as proffering “little more than a litany of factors” and, ultimately, being inconclusive in determining the situs requirement).

23. 718 F.3d 384 (5th Cir. 2013).

24. *Id.* at 394–95 (concluding, “[w]e, therefore, overrule the contrary definition and analysis of [the situs requirement in] *Winchester* and its progeny inconsistent with this opinion . . . [W]e are also influenced by the fact that the vague definition of “adjoining” we adopted thirty years ago in *Winchester* provides litigants and courts . . . with little guidance in determining whether coverage is provided by the Act.”).

25. 71 F.3d 1134, 1138 (5th Cir. 1995). In *Sidwell*, the Fourth Circuit rejected the “expansive” and “broad[]” approaches of the courts in *Winchester* and *Sea-Land*. *See id.* at 1137–38. The court, instead, ruled that the “covered situs actually ‘adjoin’ navigable waters.” *Id.* at 1138. Additionally, the court noted that, in interpreting statutes, circuit courts will defer to the intent of Congress when that intent is clear, and, in the terms of the LHWCA, that Supreme Court Justice Kennedy has stated that Congress provided clear intent in drafting the LHWCA. *Id.* (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 484 (1992)).

26. *See* Fitzhugh, *supra* note 12 (“There is now a very serious split among the circuits on what ‘adjoining’ means and just how far landward coverage extends and what boundaries limit it. . . . [S]ubstantially different outcomes will result depending on the state in which the injury occurred.”).

interpretation of the LHWCA's situs requirement. This Comment suggests that the Supreme Court should create a bright line rule extending the LHWCA's situs requirement to an area enclosed within a seaport terminal or extending outward one thousand feet from any boundary between navigable water and land, whichever distance is greater.<sup>27</sup>

This Comment begins by analyzing the *Jensen* Doctrine and its interpretation of the judicial landscape of workers' compensation coverage prior to the 1927 enactment of the LHWCA. This Comment then examines the original language of the LHWCA and the deficiencies of the original Act. Next, this Comment discusses how Congress sought to ameliorate the deficiencies of the original Act with an amended LHWCA in 1972. Thereafter, this Comment identifies Congress' intent regarding the scope of compensation coverage provided by the amended Act and analyzes the initial jurisprudence of the amended Act. This Comment reviews five opinions from the United States Courts of Appeals, which illustrate the fractured nature of the circuit courts' interpretations of the situs requirement of the 1972 LHWCA. This Comment concludes that the interpretation of the LHWCA's situs requirement is ripe for adjudication by the Supreme Court because the narrow interpretation of the situs requirement—which is the trending interpretation among circuit courts—is inequitable and deprives a large number of maritime workers compensation coverage.

#### I. THE IMPETUS FOR THE 1927 LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND ITS UNINTENDED CONSEQUENCES

##### A. *The Jensen Doctrine Prohibits State Compensation Laws from Protecting Maritime Workers, but No Federal Law Offers the Necessary Protection*

In the 1917 case *Southern Pacific Co. v. Jensen*,<sup>28</sup> the Supreme Court ruled that, because the U.S. Constitution grants jurisdiction over admiralty and maritime law to the U.S. Congress, states are prohibited from granting maritime workers compensation coverage under state compensation laws if death or injury to the worker occurred on the waterside boundary between the state's land and the sea.<sup>29</sup> As a result of *Jensen*, a state workers' compensation law could cover a worker injured on a dock, but not a worker similarly injured on a ship moments after it left the dock.<sup>30</sup>

In 1927, Congress drafted the original LHWCA in response to *Jensen*, seeking to correct the inequity of the *Jensen* Doctrine and to assuage the fears of maritime workers affected by the inequity.<sup>31</sup> Specifically, Congress intended

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27. For an example of the dangers of an imprecise test for the situs requirement, *see id.* at 4.

28. 244 U.S. 205 (1917).

29. *Id.* at 214–18. *See also* Merlin, *supra* note 6 at 148.

30. *See* Merlin, *supra* note 6, at 148 (discussing the effects of the *Jensen* decision on state workers' compensation laws).

31. *Id.* at 148. Prior to the enactment of the LHWCA in 1927, Congress attempted to grant states the power to compensate maritime workers, but the Supreme Court struck down each attempt

the LHWCA to provide compensation for injury to or death of maritime workers.<sup>32</sup> Initially, coverage of the 1927 LHWCA applied to “injur[ies] occurring upon the navigable waters of the United States” and to workers employed on dry docks.<sup>33</sup> Coverage under the original LHWCA was tailored specifically to include claims that the *Jensen* Doctrine excluded from a state’s jurisdiction.<sup>34</sup> The 1927 LHWCA, however, was not the all-encompassing legislation the maritime industry required; it explicitly denied coverage to a select group of maritime workers.<sup>35</sup>

*B. The 1927 LHWCA Created An Unintentional No Man’s Land for Maritime Workers*

Through the original LHWCA, Congress abrogated the *Jensen* Doctrine and provided compensation coverage to maritime workers injured or killed on the seaward side of a state’s navigable water boundary.<sup>36</sup> A troubling void, however, developed in the years following enactment of the LHWCA.<sup>37</sup> Although Congress intended to extend coverage of state workers’ compensation laws to maritime workers injured “upon the navigable waters of the United States,”<sup>38</sup> rigid judicial interpretation of the original LHWCA led to the denial of coverage for a class of workers under both federal and state compensation acts.<sup>39</sup> Specifically, workers who sustained injury or died on the gangway between a vessel and the dock were not covered under the original LHWCA.<sup>40</sup>

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as unconstitutional. *See id.* at 148 n.9 (citing *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Steward*, 253 U.S. 149 (1920)).

32. *See* Longshoremen’s and Harbor Workers’ Compensation Act (LHWCA), ch. 509, § 3(a), 44 Stat. 1424, 1426 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (2012)) (describing the coverage of the LHWCA).

33. *Id.*

34. *Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs*, 540 F.2d 629, 632–33 (3d Cir. 1976); *see also* *Merlin*, *supra* note 6, at 148–49.

35. § 3(a)(1)–(2), 44 Stat. at 1426 (denying compensation to any captain, any crew, or any other person engaged in stevedoring operations for any vessel weighing less than eighteen net tons, any employee or agent of the United States’ government, and any person whose injury was a result of his own drunkenness or intentional injury).

36. *See supra* notes 31–35 and accompanying text.

37. *Merlin*, *supra* note 6, at 150 (clarifying the implications of the courts’ interpretation of the original language of the LHWCA).

38. § 3(a), 44 Stat. at 1426 (stating, in the coverage section of the statute, that an “injury occurring upon the navigable waters of the United States” is a compensable act); *see also* *Merlin*, *supra* note 6, at 148.

39. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 72–73, 73 n.2 (1979) (noting that the language of the original LHWCA, coupled with the Court’s decision in *Jensen*, led to a “situs test [that] was understood to draw a sharp line between injuries sustained over water and those suffered on land,” and the impact this line of interpretation had on compensation coverage decisions in the lower courts).

40. *See Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs*, 540 F.2d 629, 632–33 (3d Cir. 1976) (according to the court, under the original language of the LHWCA, there was a



*C. The 1972 Amendments to the LHWCA Sought to Provide More Complete Coverage to Maritime Workers*

Realizing the gulf remaining between the intentions of the original LHWCA and the judicial interpretations of the Act, Justice Douglas wrote a dissenting opinion in the 1969 case *Nacirema Operating Co. v. Johnson*<sup>41</sup> that suggested Congress move the demarcating line created by the original LHWCA closer to land.<sup>42</sup>

In 1972, Congress amended the LHWCA.<sup>43</sup> Congress only intended the 1972 Amendments to be “modest in scope.”<sup>44</sup> Congress did not want any notice provisions to be a barrier for employee coverage under the LHWCA, so Congress attempted to maintain an uneasy balance between preventing barriers to compensation coverage and not increasing the scope of the Act.<sup>45</sup> Consequently, Congress included an additional prong—the situs prong—to the coverage requirement of the LHWCA.<sup>46</sup> Courts still use the two-prong approach to determine a longshoreman’s or harbor worker’s coverage under the

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“continuing anomaly that the schedule of benefits [under the LHWCA] to be applied in any case depended on whether the injury occurred on the land or water side of the gangplank”).

41. 396 U.S. 212 (1969) (reversing a Fourth Circuit en banc ruling and holding that an injury occurring on a pier, which is attached permanently to land and extends seaward, is not covered under the original LHWCA).

42. *See id.* at 224–25 (Douglas, J., dissenting) (agreeing with the lower court’s statement that only Congress could alter the LHWCA’s coverage).

43. Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251.

44. S. SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE LONGSHOREMEN’S AND HARBOR WORKERS’ COMPENSATION ACT AMENDMENTS OF 1972, 157 (Comm. Print 1972).

45. *See id.*

46. *See* § 2(3), 86 Stat. at 1251. Later, Congress refined the status requirement to cover more accurately workers who Congress first envisioned fell under the purview of the LHWCA. *See* 33 U.S.C. § 902(3)(A)–(H) (2012) (adding a provision allowing coverage of stevedoring employees as long as they are not covered by a state compensation statute, and listing specifically those types of employees who are not covered under the amended LHWCA, including: “(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; (B) individuals employed by a club, camp, recreational operation . . . ; (C) individuals employed by a marina [in a capacity other than maritime construction] . . . ; (D) individuals who . . . are temporarily doing business on the premises of an employer [as defined in the statute] . . . ; (E) aquaculture workers; (F) individuals employed to build any recreational vessel under sixty-five feet in length . . . ; (G) a master or member of a crew of any vessel; or (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net . . .”).

LHWCA.<sup>47</sup> Unfortunately, confounded by Congress' intent in the LHWCA, many courts struggle to interpret the two-pronged approach.<sup>48</sup>

## II. THE COURTS OF APPEALS EXPAND THE SCOPE OF THE SITUS REQUIREMENT BETWEEN 1976 AND 1994

### A. *The Third Circuit Erased the Situs Requirement of the LHWCA in Sea-Land Service*

In the 1976 case *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*,<sup>49</sup> the Third Circuit held that the LHWCA covered a worker who was injured when his truck overturned on a public street inside a shipping terminal complex.<sup>50</sup> Wallace Johns was employed by Sea-Land Service, Inc. to transport maritime cargo through a shipping terminal located in Port Elizabeth, New Jersey.<sup>51</sup> While transporting his cargo on a public road inside the terminal zone of the port, Johns' truck overturned, injuring him.<sup>52</sup> Fencing enclosed the shipping terminal, and the nearest navigable water was more than one-half mile from the site of the accident.<sup>53</sup>

Initially, Johns filed a claim against his employer under the state compensation laws.<sup>54</sup> For almost three months, Sea-Land paid the claim at the state compensation level.<sup>55</sup> Johns filed a new claim under the LHWCA in July 1973 to take advantage of more generous federal benefits.<sup>56</sup> Sea-Land opposed paying the larger claims amount provided for by the federal law.<sup>57</sup> The administrative law judge (ALJ) denied the larger federal benefits, holding that Johns was not injured within the purview of the situs requirement of the

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47. See *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d 384, 387–89, 393 (5th Cir. 2013) (showing how several courts have wrestled with the application of the status and situs requirements of the LHWCA).

48. See *id.*; see also *Hayes v. CSX Transp., Inc.*, 985 F.2d 137, 139–42 (4th Cir. 1993) (discussing the courts' struggles to interpret uniformly the LHWCA's situs and status requirements).

49. 540 F.2d 629 (3d Cir. 1976).

50. *Id.* at 639.

51. *Id.* at 631–32 (stating that Johns was not a regular, full-time employee of Sea-Land Services, but was more like a part-time worker, “a ‘shape-up’ employee,” employed through a commission that hired people on a fill-in basis).

52. *Id.* at 632.

53. *Id.*

54. *Id.* (noting that there were several workers' compensation statutes that Johns may have utilized—the LHWCA, the New Jersey Workmen's Compensation Act, and the Federal Employers' Liability Act—but that each statute required an initial adjudication of the status of the injured worker).

55. *Id.*

56. *Id.*

57. *Id.* Sea-Land insisted it did not need to pay Johns' larger claim because “at the time of the injury, the claimant was covered by the New Jersey statute, not the federal statute.” *Id.*

LHWCA.<sup>58</sup> On appeal, the Benefits Review Board (BRB) reversed the ALJ, finding that Johns was engaged in activity within the LHWCA's situs requirement.<sup>59</sup> Sea-Land appealed the BRB's decision to the Third Circuit.<sup>60</sup>

The Third Circuit determined that Johns was an "employee" and that Sea-Land Service was an "employer" as defined in the LHWCA.<sup>61</sup> Turning to the coverage requirements of the LHWCA, the court found that the injured employee clearly satisfied the status requirement and remanded the case to the BRB to determine if the claim met the situs requirement.<sup>62</sup> The Third Circuit offered the BRB guidance on interpreting the requirement because the court did not believe that the BRB understood the proper scope of the amended LHWCA.<sup>63</sup> Noting that the Supreme Court held previously that no state compensation laws could infringe on the constitutionally-protected power of Congress to regulate exclusively the navigable waters of the United States, the Third Circuit concluded that the power of Congress to regulate compensation laws could extend only as far as Congress' admiralty jurisdiction allowed.<sup>64</sup> The Third Circuit also stated that Congress intended the 1972 Amendments to the LHWCA to provide a constant cloak of compensation protection to maritime workers.<sup>65</sup> Congress sought to avoid maritime workers inadvertently "walk[ing]

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58. *Id.* at 631.

59. *Id.*

60. *Id.*

61. *See id.* at 634 ("[T]he 'coverage' provision and the 'employer' definition [in the LHWCA] manifest an unmistakable congressional intention to afford federal coverage for injuries occurring in areas inland of the navigable waters of the United States where, prior to 1972, Congress had deferred to state law.").

62. *Id.* at 640.

63. *See id.* at 634 (noting that determining the scope of the situs requirement was "of no little difficulty as several diverging opinions demonstrate"). The court specifically questioned the BRB's interpretation of the 1972 amendments' scope. *Id.* at 634. The Third Circuit also noted that critical factual determinations were not addressed sufficiently in the lower courts. *See id.* at 632. The ALJ and BRB both failed to produce findings of "the contents of the crate that Johns was hauling at the time of the accident, its origins, or its destination," and to "make any finding as to whether a vessel was berthed at or expected" where Johns was working. *Id.* These facts, the Third Circuit expressed, may have been essential to adjudicating the claim. *Id.* Therefore, the court held that "[b]ecause of the inadequacy of the record compiled in the administrative proceedings, we are not in position to either approve or disapprove the Board's decision and must remand for additional fact-finding." *Id.* at 634.

64. *Id.* at 635 (citing *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 210 (1971)) ("[T]he Constitution forbids state compensation laws to intrude on the navigable waters of the United States. On those waters the federal lawmaking power is exclusive, but the scope of congressional power to enact federal compensation legislation pursuant to its admiralty jurisdiction is, of course, defined by the test of navigability.").

65. *Id.* at 636-37 (writing that the chief reason for Congress amending the LHWCA in 1972 was to broaden the coverage of the Act to those areas that used to be under the purview of the state compensation laws).

into federal coverage and out of state coverage, and vice versa” while performing daily maritime activities.<sup>66</sup>

*B. The Ninth Circuit Employs a Four-Factor Test to Determine the Satisfaction of the Situs Requirement in Brady-Hamilton*

In *Brady-Hamilton Stevedore Co. v. Herron*,<sup>67</sup> the Ninth Circuit interpreted the LHWCA’s situs requirement broadly.<sup>68</sup> Brady-Hamilton hired James Herron as a gear lockman to repair, maintain, and inspect equipment that the company used around the pier.<sup>69</sup> Herron often transported equipment from the company’s storage facility to the pier, which was located approximately one-half mile away.<sup>70</sup> Herron was injured while moving steel plates from his truck to a storage facility.<sup>71</sup> Subsequently, Herron filed a compensation claim under the amended LHWCA.<sup>72</sup> His employer disputed the claim on the ground that Herron’s injury was not covered by the Act.<sup>73</sup>

Brady-Hamilton argued that Herron’s injuries did not satisfy the status requirement of the Act because the steel plates he unloaded from the truck were not intended for maritime use. The ALJ did not agree.<sup>74</sup> It determined that the steel plates were intended for maritime use.<sup>75</sup> The ALJ, therefore, ruled that Herron met both the status and situs requirements of the LHWCA.<sup>76</sup> The company appealed the decision to the BRB, and the BRB affirmed the ALJ’s ruling.<sup>77</sup> Brady-Hamilton appealed the BRB ruling to the Ninth Circuit.<sup>78</sup>

The Ninth Circuit approached the case in the same manner the Third Circuit approached *Sea-Land Service*. First, the Ninth Circuit inspected the language of 33 U.S.C. §§ 902(3) and 903(a), finding both a status and a situs requirement inherent in the LHWCA, but the court declined to overturn the ALJ’s findings.<sup>79</sup> The Ninth Circuit held that Herron met the status requirement because he was an employee as defined under section 902(3) of the LHWCA.<sup>80</sup> Turning to the Act’s situs requirement, the Ninth Circuit rested its reasoning on the Supreme

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66. *Id.* at 637.

67. 568 F.2d 137 (9th Cir. 1978).

68. *Id.* 140–41.

69. *Id.* at 139.

70. *Id.*

71. *Id.* (“The administrative law judge found that these [steel] plates were to be installed on a vessel in such a way that logs loaded on the vessel could be securely fastened to the plates.”).

72. *Id.*

73. *Id.*

74. *Id.* at 140.

75. *Id.* at 139–40.

76. *See id.* at 139 (“The [ALJ] held that the [LHWCA] . . . cover[ed] Herron’s injury and awarded compensation.”).

77. *Id.*

78. *Id.*

79. *Id.* at 139–40.

80. *Id.* at 140.

Court's decision in *Northeast Marine Terminal Co. v. Caputo*,<sup>81</sup> finding that Herron's injury was covered under the situs requirement of the LHWCA.<sup>82</sup> In making this determination, the Ninth Circuit created the "functional relationship" test, which it used to determine if the situs of a maritime accident adjoined the navigable waters by analyzing:

[1] the particular suitability of the site for the maritime uses referred to in the statute; [2] whether adjoining properties are devoted primarily to uses in maritime commerce; [3] the proximity of the site to the waterway; and [4] whether the site is as close to the waterway as is feasible given all of the circumstances in the case."<sup>83</sup>

This four-factor functional relationship test continued the broad interpretation of the situs requirement also evidenced in *Sea-Land Service*.

### C. The Fifth Circuit Incorporates the Views of Brady-Hamilton and Sea-Land Service

The Fifth Circuit interpreted the LHWCA's situs requirement broadly in *Texports Stevedore Co. v. Winchester*.<sup>84</sup> Specifically, the *Winchester* court concluded that the situs requirement of the LHWCA covered an injury occurring in a gear building several blocks from the gate of the maritime terminal.<sup>85</sup>

Murl Winchester was a gear repairman assigned to work in three storage equipment buildings inside the Houston Shipping Channel Docks for Texports Stevedore Co.<sup>86</sup> Winchester fell into a forklift in one of the buildings located five blocks away from the nearest shipping terminal access gate.<sup>87</sup>

Following his injury, Winchester filed a compensation claim under the LHWCA.<sup>88</sup> Although the ALJ denied the disfigurement claim, the judge held

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81. 432 U.S. 249 (1977) (holding that Congress, in amending the LHWCA, sought to provide more protection to maritime workers whose work had gradually been moving inland, though was still heavily maritime in nature).

82. *Brady-Hamilton*, 568 F.2d at 140–41. "While [*Caputo*] is not dispositive of the situs question, the approach of the Court in interpreting the [LHWCA] is instructive." *Id.* at 140. Specifically, in *Caputo*, "[t]he Court found that the 1972 Amendments were motivated by two congressional purposes: (1) to recognize that modern cargo handling techniques have moved much of a longshoreman's work onto land, and (2) to provide continuous coverage to workers who would otherwise be covered for only part of their activities." *Id.* at 140–41 (citing *Caputo*, 432 U.S. at 249).

83. *Id.* at 141 (intending, by inclusion of the phrase "among others," that the four factors put forth by the Court were not to be an all-encompassing list upon which future courts should rely strictly).

84. 632 F.2d 504 (5th Cir. 1980) (en banc), *overruled by* *New Orleans Depot Servs., Inc. v. Dir. Office of Workers' Comp. Programs*, 718 F.3d 384, 394 (5th Cir. 2013).

85. *Id.* at 513–15.

86. *Id.* at 506–07 (stating that the third gear room, where the longshoreman was injured, was not at the docks, but was "as close as Texports could get to the docks").

87. *Id.* at 507 (noting that Winchester suffered "serious facial disfigurement" when he fell into the forklift).

88. *Id.*

Texports Stevedore liable for Winchester's injuries.<sup>89</sup> The company appealed this ruling to the BRB.<sup>90</sup> The BRB affirmed the holding of the ALJ.<sup>91</sup> Like the broad Third Circuit ruling in *Sea-Land Service*, the BRB's interpretation of the situs requirement focused on the utility of the general location as a maritime area, rather than on the geographic location of the accident.<sup>92</sup> Texperts appealed the BRB decision to the Fifth Circuit.<sup>93</sup> On appeal, a Fifth Circuit panel upheld the ALJ decision, citing the policies of broad construction of statutory language, a presumption that the LHWCA was meant to cover maritime employees, and the limited scope of judicial review by the panel over findings of fact by the ALJ.<sup>94</sup> Subsequently, the Fifth Circuit granted a petition for rehearing en banc.<sup>95</sup>

The en banc court analyzed both the policy behind the amended LHWCA and the Fifth Circuit's own broad interpretation of the situs requirement.<sup>96</sup> The court eschewed a narrow reading of the LHWCA coverage requirements, reasoning that an "adjoining area" under the situs requirement of the amended Act was subject to a totality of the circumstances assessment.<sup>97</sup>

### III. TWO COURTS OF APPEALS CHANGE COURSE AND BEGIN INTERPRETING THE LHWCA'S SITUS REQUIREMENT NARROWLY

#### A. *The Fourth Circuit Disfavors the Aforementioned Broad Tests of the Situs Requirement*

In 1995, the Fourth Circuit, in *Sidwell v. Express Container Services, Inc.*,<sup>98</sup> held that the situs requirement of the LHWCA did not cover a worker who was injured more than one-half mile from a port terminal.<sup>99</sup> The Fourth Circuit focused primarily on the breadth of the situs requirement encompassing maritime workers.<sup>100</sup>

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89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* at 507–08 (discussing the BRB's fact and legal findings).

93. *Id.* at 508.

94. *Id.* (refusing to adopt Texperts Stevedore's position, and holding that "[a]lthough we recognize the merit of some of petitioners' positions, we decline their invitation to constrict the broadened coverage of the LHWCA by corseting the areas eligible as maritime situs").

95. *Id.*

96. *Id.* at 508–13.

97. *Id.* at 513–14 ("The best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances. The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. . . . Growing ports are not hemmed in by fence lines; [the LHWCA's] coverage should not be either. All circumstances must be examined.").

98. 71 F.3d 1134 (5th Cir. 1995).

99. *Id.* at 1135, 1142.

100. *Id.* at 1135.

Express Container's operations took place in a building eight-tenths of one mile from the Portsmouth Maritime Terminal.<sup>101</sup> Most of the company's business was unrelated to maritime activity.<sup>102</sup> There were instances, however, when employees of Express Container Services would work on maritime projects either in the company facility or on a pier.<sup>103</sup> At the time of the accident, Christopher Sidwell was working at the container facility near the terminal gates.<sup>104</sup>

Relying on the "functional relationship" test established by the Ninth Circuit in *Brady-Hamilton*, the ALJ denied Sidwell's compensation claim under the LHWCA, and the BRB affirmed the ALJ's decision.<sup>105</sup> Ultimately, the Fourth Circuit upheld the denial of the initial claim, and, while doing so, systematically refuted each of the three broad tests from *Sea-Land Service*, *Brady-Hamilton*, and *Winchester*.<sup>106</sup>

Prior to *Sidwell*, the Fourth Circuit twice discussed the situs requirement of the LHWCA.<sup>107</sup> In *Newport News Shipbuilding & Dry Dock Co. v. Graham*,<sup>108</sup> the Fourth Circuit held that the locations in question, which were "integral parts of the shipyard," were covered under the situs requirement.<sup>109</sup> Additionally, in *Humphries v. Director, Office of Workers Compensation Programs*,<sup>110</sup> the Fourth Circuit held that the situs requirement of the LHWCA was not met when a maritime worker was hit by a car one and one-half miles from the port.<sup>111</sup> *Sidwell* was, therefore, positioned to determine the Fourth Circuit's interpretation of the situs requirement.<sup>112</sup>

First, the *Sidwell* court accepted the Fourth Circuit's previous rejection of the Third Circuit's reasoning in *Sea-Land Service*, stating that the Third Circuit's interpretation essentially gutted the LHWCA of its situs requirement.<sup>113</sup> The

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101. *Id.* at 1135.

102. *Id.*

103. *Id.*

104. *Id.* (finding that the petitioner had not worked at the terminal for one year prior to working at the new container facility).

105. *Id.*

106. *See id.* at 1135–37 (discussing the various tests previously employed by the Fourth Circuit's sister circuits).

107. *Id.* at 1137.

108. 573 F.2d 167 (4th Cir. 1978).

109. *Id.* at 169.

110. 834 F.2d 372 (4th Cir. 1987).

111. *Id.* at 373–74.

112. *Sidwell*, 71 F.3d at 1137 (stating that the court was deciding *Sidwell* with the guidance of the Fourth Circuit's previous LHWCA decisions).

113. *Id.* at 1137 (stating that, in *Humphries*, the Fourth Circuit "rejected *Sea-Land* as 'unacceptable' because it 'effectively read[] the explicit situs requirement out of the [LHWCA]'" (quoting *Humphries*, 834 F.2d at 374)). Additionally, the *Sidwell* court noted that the Supreme Court "explained . . . the requirements of 'status' and 'situs' are distinct, and that neither should be read to render the other superfluous." *Id.* at 1136 (citing *Herb's Welding, Inc. v. Gray*, 470 U.S.

Fourth Circuit also noted its prior ruling that, while the four-factor test from *Brady-Hamilton* was a valid attempt at “a more practical approach” than the test proffered in *Sea-Land Service*, the Ninth Circuit’s test still failed in its interpretation of Congress’ true intent in amending the LHWCA.<sup>114</sup> Lastly, the *Sidwell* court stated that the Fifth Circuit’s *Winchester* case elucidated little more than a string of factors that were inconclusive in their totality.<sup>115</sup>

*B. The Fifth Circuit Reverses Its Holding in Winchester, Relying Heavily on the Divergent Sidwell Decision*

In one of the most recent cases interpreting the LHWCA’s situs requirement, the Fifth Circuit reversed its broad interpretation of the situs requirement from *Winchester*.<sup>116</sup> In the 2013 case, *New Orleans Depot Services, Inc. v. Director, Office of Worker’s Compensation Programs*,<sup>117</sup> the Fifth Circuit held that the LHWCA did not cover a maritime worker who suffered hearing loss at a maritime facility.<sup>118</sup>

Juan Zepeda worked in a “small industrial park” about 300 yards from the nearest navigable waters.<sup>119</sup> He repaired and maintained marine containers used for transporting seafaring cargo.<sup>120</sup> Following an injury, Zepeda filed an LHWCA claim against two prior employers.<sup>121</sup> Both employers sought clarification from the ALJ as to which employer was accountable for paying Zepeda’s workers’ compensation benefits.<sup>122</sup> The ALJ determined that, if Zepeda was entitled to coverage under the LHWCA, New Orleans Depot

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414, 426 (1985); *Dir., Office of Workers’ Comp. Programs v. Perini North River Assocs.*, 459 U.S. 297, 324 n.32 (1983)).

114. *Id.* at 1136–37 (quoting *Humphries*, 834 F.2d at 374) (internal quotation marks omitted) (discussing the Fourth Circuit’s prior treatment of its sister circuits’ analyses of the LHWCA’s situs requirement).

115. *Id.* at 1137.

116. *New Orleans Depot Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 718 F.3d 384, 393–94 (5th Cir. 2013) (choosing to adopt a narrow interpretation of the situs requirement of the LHWCA, instead of the precedent in *Winchester*).

117. 718 F.3d 384 (5th Cir. 2013).

118. *See id.* at 386 (vacating the BRB’s decision awarding benefits to the maritime worker).

119. *Id.* at 386–87 (listing the types of businesses around the “small industrial park,” to note that the New Orleans Depot employees did not have access to the Intracoastal Canal, which was 300 yards away).

120. *Id.* at 387. The type of work in which Zepeda was engaged satisfied the LHWCA’s status requirement. *Id.*

121. *Id.* at 386. In resolving the issue of which employer, if either, was responsible for the workers’ compensation claim of Zepeda, the Fifth Circuit relied upon a secondary source that stated: “[w]hen the disability arises from an ‘occupational injury’ incurred while working for different employers, the last employer who exposes the claimant to the injury-causing condition may be responsible for all of the benefits.” *Id.* at 386 n.2 (quoting FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL 291 (6th ed. 2010)) (internal quotation marks omitted).

122. *Id.*



Services was the correct company to pay the benefits.<sup>123</sup> The ALJ determined that Zepeda met both the status and situs requirements of the LHWCA.<sup>124</sup> On appeal, the BRB affirmed the lower court's ruling.<sup>125</sup> New Orleans Depot appealed the BRB decision to the Fifth Circuit, which affirmed the initial decision, before voting to hear the case en banc.<sup>126</sup>

Sitting en banc, the Fifth Circuit discussed its prior decision in *Winchester*.<sup>127</sup> The court noted that its precedent eschewed a bright line rule in favor of a totality of the circumstances approach.<sup>128</sup> The court, however, lamented that *Winchester* failed to discuss exactly which circumstances should be considered in this approach.<sup>129</sup>

Following the Fourth Circuit's reasoning in *Sidwell*, the Fifth Circuit reviewed its sister circuits' interpretations of the situs requirement of the LHWCA.<sup>130</sup> Consequently, the Fifth Circuit chose not to follow the Third and Ninth Circuits' decisions in *Sea-Land Service* and *Brady-Hamilton*, respectively.<sup>131</sup> Instead, believing that *Sidwell* was more faithful to the text of the amended LHWCA, the Fifth Circuit adopted the narrow "*Sidwell* definition of 'adjoining' navigable

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123. *Id.* at 387.

124. *Id.* "Also, the ALJ found that the repair work and maintenance Mr. Zepeda performed on these containers was related closely to loading or unloading vessels and constituted 'maritime employment,' which satisfied the status test under the Act." *Id.* "In addition, the ALJ concluded that the location of the [New Orleans Depot] Chef Yard, located some 300 yards from the Intracoastal Canal[,] satisfied the situs requirement that the injury occur in an area 'adjoining navigable waters.'" *Id.*

125. *Id.*

126. *Id.* at 386–87 (explaining that a Fifth Circuit panel originally "affirmed the BRB['s]" decision that found Zepeda was covered by the LHWCA, but the Fifth Circuit decided to reexamine the case en banc to discuss specifically the breadth of the LHWCA's situs test).

127. *Id.* at 389–90 (stating that *Winchester*, decided in 1980, was the Fifth Circuit's first opportunity to define the situs requirement).

128. *Id.* at 390 (quoting *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 513 (5th Cir. 1980) (en banc), *overruled by* *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d, 394 (5th Cir. 2013)).

129. *Id.* The court noted:

Other than these vague instructions [that all circumstances should be considered in determining if the situs requirement was met], the [*Winchester*] court provided little guidance to other courts or future litigants on how to determine from "the circumstances" whether a claimant satisfies the situs test. This is apparent from the court's statement: "[O]uter 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."

*Id.* (quoting *Winchester*, 632 F.2d at 514).

130. *See id.* at 390–91 (analyzing some of the other circuits' jurisprudence regarding the LHWCA).

131. *Id.* (reasoning that the Fourth Circuit's interpretation "adhere[d] more faithfully to the plain language of the statute" than the other circuits).

water[s],” overturning its prior broad interpretation of the LHWCA’s situs requirement.<sup>132</sup>

#### IV. ANALYZING THE INTERPRETATIONS OF EACH CIRCUIT REGARDING THE 1972 AMENDMENTS TO THE LHWCA

##### A. *Taking a Broad Tack: Analyzing How Courts Expanded the Situs Requirement*

In *Sea-Land Service*, the Third Circuit believed Congress intended the 1972 Amendments to cover maritime workers even when the workers walked inside and outside of areas covered by the original LHWCA.<sup>133</sup> With this congressional purpose firmly in mind, the Third Circuit interpreted the coverage of the amended LHWCA in a sweeping manner.<sup>134</sup> The court held that as long as the status requirement of the LHWCA was met, the Act should cover the maritime worker.<sup>135</sup> The Third Circuit’s holding effectively removed the situs requirement from the LHWCA.<sup>136</sup> According to the court, Congress intended the LHWCA to be a federal compensation act for every maritime worker.<sup>137</sup> Consequently, the court construed the situs requirement as being applicable to the location of vessels engaged in maritime commerce, rather than the situs of the worker’s injury or death.<sup>138</sup>

The Ninth Circuit likewise interpreted the 1972 Amendments to the LHWCA broadly. In *Brady-Hamilton*, the Ninth Circuit stated that the “adjoining area” language in the act included even those areas not physically congruent to navigable waters.<sup>139</sup> Applying its “functional relationship” test,<sup>140</sup> the Ninth Circuit found that the equipment serviced by the injured employee was exclusive to maritime activity, and the building that housed the equipment was “integral”

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132. *Id.* at 393–94 (defining “adjoining” as “border[ing] on” or “be[ing] contiguous with,” thus requiring direct, physical connection between the area of injury and navigable water).

133. *Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs*, 540 F.2d 629, 637 (3d Cir. 1976).

134. *See id.* at 638; *see also* *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1136 (4th Cir. 1995) (stating that the Supreme Court described the Third Circuit’s ruling as “appearing to ‘essentially discard[] the situs test’” (alteration in the original) (quoting *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 277 n.40 (1977))).

135. *Sea-Land Serv.*, 540 F.2d at 638.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (relying on the overall intent of the 1972 Amendments to the LHWCA and holding that a rigid reading of the phrase “adjoining area” was inconsistent with this intent).

140. *See supra* note 83 and accompanying text.

to the company's maritime activity, and, therefore, the ALJ was correct in determining that the building was as close to the pier as feasible.<sup>141</sup>

In *Winchester*, the Fifth Circuit noted that the inequitable *Jensen* Doctrine led Congress to pass the original LHWCA in 1927.<sup>142</sup> The court also discussed the rigid interpretation of the original LHWCA by the Supreme Court in *Nacirema*, as well as the 1972 Amendments to the LHWCA.<sup>143</sup> The *Winchester* court urged a broader reading of the LHWCA coverage requirements, partially because technological advances had moved a significant amount of maritime work inward from the edges of the navigable waters.<sup>144</sup> Unlike the court in *Sea-Land Service*, which collapsed the LHWCA's status and situs requirements into one status-focused requirement,<sup>145</sup> the *Winchester* court sided with the Ninth Circuit's analysis in *Brady-Hamilton* and read the Act as providing for application of two separate requirements.<sup>146</sup>

The *Winchester* court noted that it should interpret the situs requirement broadly because the Supreme Court, in *Caputo*, indicated that the 1972 Amendments were meant to be "expansive."<sup>147</sup> The *Winchester* court also relied on its own precedent in *Alabama Dry Dock & Shipbuilding Co. v. Kininess*,<sup>148</sup> where the court eschewed rigid compliance with the LHWCA's language in favor of compliance with the broad policies of the amended Act.<sup>149</sup> Notably, in *Winchester*, the Fifth Circuit stated that because the "[g]rowing ports are not

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141. *Brady-Hamilton*, 568 F.2d at 141 (echoing the concerns of the BRB, which said that there was only so much land that abuts the navigable water on which maritime facilities can be built, and that, as the shipping industry expands its terrestrial footprint, the coverage of the LHWCA should likewise expand).

142. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 508–09 (5th Cir. 1980) (en banc), *overruled by* *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d 394 (5th Cir. 2013) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214–18 (1917)).

143. *Id.* at 509–10 (citing *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223–24 (1969)).

144. *See id.* at 510 (citing *Ne. Marine Terminal, Co. v. Caputo*, 432 U.S. 249, 268 (1977)). The Court, in *Caputo*, stated that "[o]ne of the primary motivations for Congress' decision to extend the coverage shoreward was the recognition that 'the advent of modern cargo-handling techniques' had moved much of the longshoremen's work off the vessel and onto land." *Caputo*, 432 U.S. at 269–70 (citing S. REP. NO. 92–1125, at 13 (1972); H.R. REP. NO. 92-1441, at 10 (1972)).

145. *See Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 638–39 (3d Cir. 1976) (finding that "coverage under the [LHWCA] is not foreclosed by the fact that the accident occurred on a public street in the marine terminal not under the employer's control").

146. *Winchester*, 632 F.2d at 510 (reading the status and situs prongs of the LHWCA as expanding the coverage of the LHWCA, the court recognized that some semblance of maritime activity still had to occur for the LHWCA to apply); *see also Brady-Hamilton*, 568 F.2d at 139–40 ("Situs and status must coincide before coverage will attach. Each test acts as a control upon the other so as to diminish the potential for undue expansion of coverage.").

147. *Winchester*, 632 F.2d at 510 (quoting *Caputo*, 432 U.S. at 268) (internal quotation marks omitted).

148. 554 F.2d 176 (5th Cir. 1977).

149. *Winchester*, 632 F.2d at 512 ("In any event, the physical distance is not decisive . . . . The test is whether the situs is within a contiguous shipbuilding area which adjoins the water." (quoting *Ala. Dry Dock*, 554 F.2d at 178) (internal quotation marks omitted)).

hemmed in by fence lines; the [LHWCA's] coverage should not be either."<sup>150</sup> As such, the Fifth Circuit declined to create a bright line rule that would encompass all activities that could fall within the LHWCA's coverage requirements.<sup>151</sup> Realizing such an unencumbered view of the situs requirement may be scrutinized, the Fifth Circuit made sure to iterate that its current view of the situs requirement would "not be extended to extremes," and must have some discernable relationship to the waterways.<sup>152</sup>

Finally, the *Winchester* court stated that, absent clear policy decisions and court precedent, it was compelled to define the LHWCA's situs requirement broadly.<sup>153</sup> The Fifth Circuit reasoned that the word "adjoining," in the LHWCA, had many broad synonyms and, even if strict congruity with the words was required, the word "area" in the phrase "adjoining area" demanded the situs requirement be interpreted broadly.<sup>154</sup> In holding that Texports Stevedore was liable for the injuries Winchester sustained working in a gear building away from the maritime terminal,<sup>155</sup> the Fifth Circuit laid the framework for cases broadly interpreting the situs requirement of the LHWCA, until that same court revisited and overturned *Winchester* in 2013.<sup>156</sup>

*B. Abandoning the Intent of Congress and Focusing on the Lexicon of the  
1972 Amendments to the LHWCA*

Rejecting each of the tests from *Winchester*, *Brady-Hamilton*, and *Sea-Land Service*, the Fourth Circuit, in 1995, created its own test: a rigid, textual interpretation of the amended LHWCA.<sup>157</sup> The Fourth Circuit read the word

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150. *Id.* at 514.

151. *Id.* (indicating that the totality of circumstances must be examined to determine the situs prong).

152. *Id.* at 514–15.

153. *See id.* at 514–16.

154. *See id.* at 514–15 (internal quotation marks omitted).

A broad interpretation of the maritime situs requirement reduces the number of workers walking in and out of coverage and promotes uniformity. It also is in line with the congressional desire to extend coverage to those maritime chores that technology has moved ashore. In addition, this interpretation is in keeping with the Supreme Court's expansive approach to interpreting the amendments' "employee" status test in *Caputo* and *Pfeiffer*. Furthermore, a broad view of the situs test has been adopted in other circuits.

*Id.* at 516 (footnote omitted).

155. *See id.* at 516.

156. *See* *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs*, 718 F.3d 384, 394 (5th Cir. 2013) (overturning the *Winchester* line of cases); *but see* *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981) (noting presciently the "shifting sands" of the presumption in favor of the claimant for the situs requirement).

157. *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1137–39 (4th Cir. 1995) ("[W]e will interpret the [LHWCA] as it is written, and as we have been instructed by the Supreme Court

“adjoin” literally and determined that the situs of the accident had to fit within “the ordinary meaning of ‘adjoin’[:] ‘to lie next to,’ to ‘be in contact with,’ to ‘abut upon,’ or to be ‘touching or bounding at some point.’”<sup>158</sup> Applying this new, narrow interpretation, the court held that the injured employee did not meet the situs requirement because—although the company’s facility where the injury occurred was an “area” as defined in the LHWCA—the facility was not an “adjoining area.”<sup>159</sup>

Citing the *Sidwell* court’s analysis of the legislative history of the 1972 Amendments, the *New Orleans Depot* court believed a narrow interpretation of the situs requirement fulfilled the purpose of the 1972 Amendments, which was to cure the defect of longshore workers “walk[ing] in and out of LHWCA coverage as they walked the gangplank from ship to shore.”<sup>160</sup> Applying this interpretation of the situs requirement to the facts of *New Orleans Depot*, the Fifth Circuit held that the injured employee did not suffer his injury in an area covered by the situs requirement while engaged in maritime activity.<sup>161</sup>

*C. Workers in Today’s Maritime Industry Face Great Uncertainty Regarding Whether They Are Covered By Federal Workers’ Compensation Legislation*

As demonstrated by *Jensen*, longshore and harbor workers entered the twentieth century unsure of the compensation scheme for injuries sustained during maritime employment.<sup>162</sup> Workers were caught in the void between state compensation laws, which stopped at the state’s terrestrial boundary, and an assumption that federal legislation governed injuries sustained while upon territorial waters.<sup>163</sup> Congress took steps in 1972 to amend the LHWCA by instituting a second requirement in the Act. Congress hoped this new situs requirement would cover injuries that occurred in areas around “the navigable waters of the United States.”<sup>164</sup> Subsequent court decisions interpreted Congress’ intent broadly and held routinely that the new situs requirement

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to do with respect to [the LHWCA].” (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 484 (1992)).

158. *Id.* at 1138 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 27 (1993)).

159. *Id.* at 1141 (internal quotation marks omitted). In its decision, the Fourth Circuit stated that the crux of the competing interpretations of the situs requirement of the LHWCA is that, “[t]he Supreme Court has not articulated a test for determining what is an ‘other adjoining area’ under the LHWCA.” *Id.* at 1136.

160. *New Orleans Depot Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 718 F.3d 384, 391–92 (5th Cir. 2013) (quoting *Sidwell*, 71 F.3d at 1140) (internal quotation marks omitted).

161. *Id.* at 383–94.

162. *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

163. *Id.* (holding that state compensation laws may not supersede congressional authority, because “[e]qually well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits”).

164. *See Longshore and Harbor Workers’ Compensation Act (LHWCA)*, 33 U.S.C. § 903(a) (2012).

covered injuries sustained by maritime workers.<sup>165</sup> Beginning in 1995, however, judicial decisions turned away from a broad interpretation of the situs requirement and steamed, instead, toward a narrower reading of congressional intent.<sup>166</sup>

#### V. A PROPOSAL TO END THE INCONSISTENCY

Following the most recent major amendment to the LHWCA, courts were split on how to conduct a situs investigation;<sup>167</sup> however, they were split only regarding how best to interpret the LHWCA's text broadly.<sup>168</sup> It was evident that the inclusion of the situs requirement was not meant to destroy maritime workers' claims.<sup>169</sup>

An unjust situation did not transpire until narrow interpretations supplanted the broad interpretations of the Act.<sup>170</sup> Ultimately, geography became the demarcation line between maritime workers being compensated under anemic state compensation laws or not receiving compensation at all.<sup>171</sup> Between the federal government, the state government, the maritime industry, the insurance industry, and the maritime worker, the maritime worker is likely the least able to shoulder the cost of an uncompensated injury. It is, therefore, essential that the Supreme Court provide guidance to bring predictability to the adjudication of maritime workers' compensation claims. The Supreme Court guided the circuits through interpretations of the status requirement of the LHWCA. It must do the same with the situs requirement.

The most effective interpretation for the Supreme Court to follow is a broad reading of the situs requirement. This interpretation of the requirement remains true to the intentions of Congress, because Congress sought to provide coverage for maritime workers injured on the job.<sup>172</sup> Therefore, a mathematical bright line rule based on the ports and how far the ports extend from navigable waters could fully realize Congress' intent. While admittedly arbitrary, a bright line rule would bring to the industry and its members something they desperately lack—predictability. The industry and its workers would be on notice regarding

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165. See *supra* Part IV.A (discussing the courts' broad interpretations of the LHWCA's situs requirement).

166. See *supra* Part IV.B (expounding upon the courts' decisions to interpret narrowly the LHWCA).

167. See *supra* notes 17–26 and accompanying text.

168. See *supra* notes 17–26 and accompanying text.

169. See Merlin, *supra* note 6, at 152 (citing S. REP. NO. 92-1125, at 13 (1972)) (“The legislative history of the 1972 Amendments indicates that the purpose of the ‘maritime employment’ test was to limit coverage for work-related injuries in the newly enlarged shoreside areas, not to condition coverage for work-related injuries on actual navigable water.”).

170. See Fitzhugh, *supra* note 12 (discussing the advent and impact of the circuit courts' narrow interpretations of the LHWCA's situs requirements).

171. See Pitre, *supra* note 15, at 1009–10 (providing an illustration of how a maritime worker could be compensated differently across the circuits).

172. See *supra* notes 44–46 and accompanying text.

workers who were covered by the Act and workers who were not covered by the Act. Companies operating current facilities would know whether their workers were covered by the LHWCA, and companies seeking to build new facilities would be able to choose whether they wanted their employees covered or not covered by the LHWCA. Similarly, employees seeking work would be able to know which buildings were subject to LHWCA coverage and which buildings were not covered by the Act.

Regardless of the outcome, the Supreme Court must speak clearly so a vital piece of workers' compensation legislation is understood universally and applied consistently. The ports of this country and the areas encompassed by its maritime terminals or their functional equivalents should be covered by the situs requirement of the Longshore and Harbor Workers' Compensation Act. Where no maritime port or functional equivalent is present, the situs requirement of the Act should cover an area extending one thousand feet from the banks of navigable waters.<sup>173</sup> Any doubts thereafter should be resolved in favor of covering the longshore worker, so as to be consistent with Congress' initial purpose in passing the LHWCA.<sup>174</sup>

#### VI. CONCLUSION

The maritime industry, its companies, and its workers are laboring in an inequitable, unjust, and unpredictable environment. What was once non-existent federal workers' compensation coverage became imperfect coverage with the enactment of the original LHWCA. The amended LHWCA filled the voids created unintentionally by the original Act. Court opinions interpreted the amended LHWCA broadly in the decades following its enactment. Recently, courts have been interpreting the LHWCA coverage requirements narrowly and have failed to distill a clear and uniform interpretation of the situs requirement.

The Supreme Court should resolve this issue. The Court must harmonize the divergent interpretations of the situs requirement. The Court did this with the LHWCA's status requirement. It should be done with the situs requirement. A bright line interpretation of the LHWCA will allow the maritime industry, its companies, and its workers to predict more accurately the application of the Longshore and Harbor Workers' Compensation Act.

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173. One may argue 1000 feet from navigable waters is too far a distance, but the status requirement of the amended LHWCA will still act to exclude those people that Congress did not intend to be covered under the LHWCA. The LHWCA was written and has been interpreted in such a way as to require both prongs of the coverage test be satisfied. *See supra* note 5 and accompanying text; *see also* S. REP. NO. 92-1125, at 16 (noting both the inclusionary and exclusionary aspects of the two prongs of the coverage requirements in the LHWCA). Extending the situs 1000 feet from navigable water would simply be in keeping with the intentions of Congress. *See* S. REP. NO. 92-1125, at 1 (discussing the purpose of the 1972 Amendments).

174. *See supra* notes 44-46 and accompanying text.

