COMMENT

MUDDY WATERS—CLARIFYING MARITIME COVERAGE UNDER THE LONGSHORE AND HARBOR WORKERS’ COMPENSATION ACT

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I. INTRODUCTION

The extent of coverage under the Longshore and Harbor Workers' Compensation Act (Longshore Act or the Act) has been the source of much confusion. The differing circuit opinions and Congress's failure to adequately amend the Longshore Act has resulted in inconsistent, unpredictable coverage or lack of coverage for maritime employees whom Congress intended the Act to cover.

Section II of the Comment addresses the background and jurisprudence that has shaped the Longshore Act into what it is today. This Section discusses how the circuits have interpreted the Act and how these interpretations have led to conflicting results. In response to problems outlined in Section II, Section III proposes amendments to the Longshore Act to create a clear geographical boundary for coverage under the Act. Section III also proposes how the Supreme Court should address the circuit split over the interpretation of the Longshore Act. Section IV provides a brief conclusion.

II. COVERAGE UNDER THE LONGSHORE ACT—BASICS AND THE CURRENT CIRCUIT SPLIT

The development of the Longshore Act began much earlier than its enactment in 1927. The Act evolved from the recognition of general maritime law in United States, the development of state workers' compensation remedies, the passage of the Jones Act, the extent of state and federal authority in maritime law, and the interaction between Congress and the U.S. courts in attempting to extend states' laws to admiralty jurisdiction. The following Section discusses how these factors combined to form a gap between general maritime law and state workers' compensation remedies.

A. HISTORICAL DEVELOPMENT OF THE LONGSHORE ACT

The Supreme Court of the United States adopted general maritime law as uniform law applying to activity on navigable waters.¹ Under general maritime law, seamen² were recognized

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¹ "[T]he provision in the Constitution, by virtue of which the admiralty courts were created, was intended to provide courts for the sole purpose of administering the general maritime law. The maritime law is part of the law of nations, one of the great beauties of which is its universality. Uniformity has been declared to be its
as “wards of the admiralty” with their own legal remedies. As wards of the admiralty, seamen injured in the course of their employment were (and still are) entitled to maintain general maritime law actions for maintenance and cure, actions for continued wages until the voyage’s end or lawful discharge, unseaworthiness actions against the vessel and vessel owner, and negligence actions against their employer. However, these remedies were not (and still are not) available to maritime workers who were injured on navigable water but did not qualify as seamen.

essence. The worst maritime code would be one which should be dictated by the separate interest and influenced by the peculiar manner of only one people.” The Lottawanna, 88 U.S. 558, 565-66 (1874) (emphasis added).

2. See Chandris, Inc. v. Latsis, 515 U.S. 347, 347, 367-68 (1995) (holding that in order to qualify as a “seaman” the employee’s “duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of [such] vessels) that is substantial in both its duration and nature”); see also McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 355 (1991).

3. Harden v. Gordon, 11 F. Cas. 480, 483, 485 (C.C.D. Me. 1823) (“Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment . . . . [Seaman] are emphatically the wards of the admiralty . . . .” (emphasis added)).

4. The Osceola, 189 U.S. 158, 175 (1903) (“[W]e think the law may be considered as settled upon the following propositions: 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.” (emphasis added)), superseded by statute, Jones Act, Pub. L. No. 109-304, §6(c), 120 Stat. 1510 (codified as amended at 46 U.S.C. § 30104 (2006)), as recognized in Atl. Sounding Co., Inc. v. Townsend, 557 U.S. 404, 415 (2009); see also Scarff v. Metcalf, 107 N.Y. 211, 215-16 (1887).

5. The Osceola, 189 U.S. at 175.

6. Id. (citing Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796 (1887)).


8. For purposes of this Comment, “maritime workers” include longshoremen, harbor workers, stevedores etc., all of whom were intended to be covered by the Longshore and Harbor Workers Compensation Act. 33 U.S.C. § 902(3) (2009).

Because these injuries on navigable waters were not covered under the general maritime law, Congress and the states attempted to extend state workers' compensation coverage to these non-seamen maritime workers. In response, the Supreme Court, in a series of cases, ruled that it was unconstitutional to apply states' workers' compensation statutes to maritime workers injured on navigable waters. In *Southern Pacific Co. v. Jensen*, the Court reasoned that allowing the states to cover maritime workers would undermine the uniformity intended by the maritime law. The Court's decision in *Jensen* and the cases that followed resulted in maritime workers being precluded from any coverage if injured over navigable waters, but covered by state compensation acts if injured on land.

In an attempt to extend coverage, the Court began to modify


10. See H.R. REP. NO. 67-639, at 2 (1922) ("[P]ort workmen and seaman are distinct . . . . It is easy to understand the reason why the representatives of the workmen ask for compensation under State Laws. The longshoremen are no more peripatetic workmen than are the repair men. They do not leave the port in which they work; they do not go into different jurisdictions. They are part of the local labor force and are permanently subject to the same conditions as are other local workmen. The work of longshoremen is not all on ship. Much of it is on the wharves. They may be at one moment unloading a dray or a railroad car or moving articles from one point on the dock to another, the next actually engaged in the process of loading or unloading cargo."); see also *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 118 (1962) ("Congress twice attempted to deal with the situation [of lack of legal remedies for maritime workers as a result of *Jensen*] by legislation expressly allowing state compensation statutes to operate.").

11. E.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214-15, 217-18 (1917) (holding that states could not, consistently with Article III, Section 2 of the Constitution, which extends federal power over admiralty and maritime jurisdiction, provide compensation to maritime workers injured on the gangway between a ship and a pier); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (adopting the doctrine that the Constitution took from all the states all power to interfere with admiralty and maritime jurisdiction reserved to the federal government).

12. *Jensen*, 244 U.S. at 217 ("If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded.").

13. See *Calbeck*, 370 U.S. at 118 (explaining that the Supreme Court's decision in *Jensen* "deprived many thousands of employees of the benefits of workmen's compensation").

its decision in *Jensen* by extending state compensation coverage to some maritime injuries that were "maritime but local" in character.\textsuperscript{15} In these cases, the Court reasoned that application of state workers' compensation remedies would not violate general maritime law because the injured employees' activities at the time of injury were not directly related to navigation or commerce, even though the injuries occurred on navigable waters.\textsuperscript{16} However, these decisions failed to establish a predictable definition of the area or activities that would be considered "maritime but local," resulting in the possible exclusion from coverage of many maritime workers.\textsuperscript{17} In response to this issue, Congress enacted the Longshore Act in 1927, which established a federal compensation law that provided uniform coverage for maritime workers.\textsuperscript{18}


\textsuperscript{16} See, e.g., Garcia, 257 U.S. at 241-42; Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 475-76 (1922) (allowing claims under state wrongful death statutes when employee is killed by a maritime tort on that state's navigable waters as long as application of state law "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."); see also Overlapping Remedies for Injured Harborworkers, supra note 15, at 1211 n.22.

\textsuperscript{17} See Calbeck, 370 U.S. at 119-20.

\textsuperscript{18} 33 U.S.C. §§ 901-950 (2013); H.R. REP. NO. 67-639, at 2 (1922) ("Their need for uniformity is one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not." (emphasis added)); S. REP No. 69-973, at 16 (1926) ("Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation . . . . It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute." (emphasis added)).
1. THE 1927 LONGSHORE ACT AND JUDICIAL INTERPRETATION—"WALKING IN AND OUT OF COVERAGE"

The 1927 Longshore Act had only a situs\(^1\) requirement which extended coverage to employees\(^2\) who were injured or killed on "navigable waters of the United States (including any dry dock) and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law."\(^3\) Congress intended to provide uniform compensation for longshoremen injured in maritime jurisdiction—actual navigable waters—and to reserve state compensation for any injuries occurring on land.\(^4\) However, the Supreme Court reasoned that the provision of the Longshore Act permitting recovery only where compensation "may not validly be provided by State law" extended coverage under the Longshore Act to all injuries on navigable water, even if it would have been constitutional to apply state compensation remedies in that scenario.\(^5\) The Court decided that under some circumstances injuries occurring on navigable waters may be covered by both the Longshore Act and state compensation remedies.\(^6\) These cases were considered to be in a "twilight zone."\(^7\)

\(^1\) Situs is defined as "[t]he location or position (of something) for legal purposes . . . ." BLACK'S LAW DICTIONARY (9th ed. 2009).

\(^2\) Under the 1927 Longshore Act, the term "employee" excluded: "(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof." 33 U.S.C. § 903(a)(1)-(2) (Supp. II 1927) (current version at 33 U.S.C. § 903 (1996)). In addition, the Act provides that the employee must be employed by "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." Id. § 902(4).

\(^3\) Id. § 903(a). "The purpose of this bill is to provide . . . for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." S. REP NO. 69-973, at 16 (1926) (emphasis added).


\(^6\) See, e.g., id. at 126-27; Davis v. Dep't of Labor, 317 U.S. 249, 256-58 (1942).

\(^7\) See Davis, 317 U.S. at 256.
The Court interpreted the first element of the situs requirement—location of the injury on "navigable waters of the United States (including any dry dock)"—as an adoption of the "Jensen line." In other words, since injuries sustained by maritime employees shoreside would be covered by state workers' compensation acts, coverage under the Longshore Act should focus on water-based locations. Under this reasoning, there would never be an overlap of state and Longshore Act coverage when the injury occurred shoreside. In *Nacirema Operating Co. v. Johnson*, the Court explained:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

Because the Act protected only those individuals injured in the course of their employment on "navigable waters," workers whose time was divided between ship and shore were eligible for


28. *See id*.


30. Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 311 (1983) ("[T]he consistent interpretation given to the LHWCA before 1972 by the Director, the deputy commissioners, the courts, and the commentators was that... any worker injured upon [actual] navigable waters in the course of employment was 'covered... without any inquiry into what he was doing (or supposed to be doing) at the time of his injury.'" (quoting GRANT GILMORE & CHARLES LUND BLACK, JR., THE LAW OF ADMIRALTY 429-30 (2d ed. 1975)); *Nacirema*, 396 U.S. 212 (declining to extend the Longshore Act coverage landward, so injuries on land fell solely under state compensation statutes).
coverage under the Longshore Act only to the extent they suffered injury over navigable waters. This inconsistency in protection under the Longshore Act was referred to as "walking in and out of coverage," and Congress sought to address that inconsistency with the 1972 Amendments.

2. THE 1972 AMENDMENTS TO THE LONGSHORE ACT—GENESIS OF THE TWO-PRONGED TEST

In the 1972 Amendments to the Longshore Act, Congress broadened the situs requirement in an attempt to provide uniform coverage for maritime workers independent of "the fortuitous circumstance of whether the injury occurred on land or over water." Originally, coverage under the Act only included injuries that occurred on the "navigable waters of the United States (including any dry dock)." The 1972 Amendments extended coverage beyond actual navigable waters of the United States. The Amendment provided the following:

Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable


32. S. Rep. No. 92-1125, at 12-13 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4707 ("The present [1927 Longshore] Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs. To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate . . . " (emphasis added)); see Sisson v. Davis & Sons, Inc., 131 F.3d 555, 557 (5th Cir. 1998) (per curiam) (citing P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 83 (1979) ("We must also keep in mind Congress's purpose in amending the LHWCA in 1972, which was to expand coverage, apply uniform standards, cover on-shore maritime duties and reduce the number of employees walking in and out of coverage.").


34. 33 U.S.C. § 903(a) (1970) (current version at 33 U.S.C. § 903 (1996)) ("Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ").

waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). 36

The 1972 Amendments also limited coverage to “maritime employees.” 37

The term ‘employee’ means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 38

The result was a two-pronged test that included both the location of the injury known as “situs” as well as the nature of the employment known as “status.” 39 The two-pronged test—which was intended to achieve certainty and uniformity of coverage—only generated more confusion. 40

In sum, workers injured upon “navigable waters” 41 within the plain meaning of that term, and as it has been traditionally understood, have only been subject to a situs inquiry to determine eligibility. 42 But, under the Court’s subsequent interpretation, workers injured within the “certain adjoining shoreside areas” are subject to a more complicated two-pronged inquiry into both

36. 33 U.S.C. § 903(a) (emphasis added).
37. Id.
38. Id.
40. Id. (stating that “the First, Second, Third, Fourth, Fifth, and Ninth Circuits each struggled to apply the ambiguous terms of the status requirement”).
41. Navigable waters are defined as those waters that “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 n.21 (1940), superseded by statute Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972), as stated in Rapanos v. United States, 547 U.S. 715 (2006).
situs of injury and employment status before they can be considered eligible for the Act’s coverage. The lack of congressional guidance has led to inconsistent Longshore Act eligibility determinations by the circuit courts, resulting in overcompensation for some employees and under compensation for others. The following two Subsections address the problems the courts have had in applying the status and situs prongs of the Longshore Act.

B. STATUS—DEFINING “MARITIME EMPLOYEE”

Judicial interpretation of the expansion of coverage landward introduced more confusion and ambiguity regarding eligibility. Uncertainty over which occupations were properly included in the Act’s definition of “employee” compounded this confusion. While the 1972 Amendments to the Longshore Act extended coverage to “any person engaged in maritime employment,” the Amendments failed to provide a definition of “maritime employment.” The 1972 Amendments did, however, allude to a meaning of “maritime employment” in its definition of “employee.” Under the Act, an employee was defined as:

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

By 1984, the uncertainty of eligibility as to those workers injured within the “certain adjoining shoreside areas” had

44. See Coverage under the LHWCA Amendments of 1972, supra note 39, at 556-57.
45. Id. at 556-57.
47. Id. § 902(3).
49. 33 U.S.C. § 902(3).
50. Id.
become such a problem that the Committee on Education and Labor urged Congress to act again. The Committee noted despite the new status prerequisite, employers, employees, and insurers remained unsure of which duties performed ashore were covered by the Act’s “certain adjoining shoreside area” language.\(^5\) As a result, benefits were often afforded to individuals whom Congress never intended to protect.\(^5\) Congress responded to these concerns by amending the Act to incorporate an explicit and exhaustive list of vocations deemed ineligible for coverage.\(^5\)

When the courts began to apply a status-based inquiry, the once simple situs-based test for persons injured on “navigable waters” became complicated.\(^5\) The following cases illustrate the courts’ application and the frustration of the status requirement resulting in more confusion.

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\(^{297, 299}\) n.2 (1983).


53. See id. at 81-82, reprinted in 1984 U.S.C.A.N. 2734, 2764-66 (additional views of Honorable Austin J. Murphy) (noting that the high cost of compliance with the Longshore Act was bankrupting small vessel shipyards that were never intended to be, yet inadvertently were, included in the Act).


The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

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

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

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

\(^{55}\) See, e.g., Fusco v. Perini N. River Assocs., 622 F.2d 1111 (2d Cir. 1980); Thibodaux v. Atl. Richfield Co., 580 F.2d 841 (5th Cir. 1978); Weyerhaeuser Co. v. Gilmore 528 F.2d 957 (9th Cir. 1975).
1. PRE-1983: CIRCUIT PRECEDENT

In 1975, in *Weyerhaeuser Co. v. Gilmore*, the United States Court of Appeals for the Ninth Circuit addressed whether a timber industry employee, injured when he fell off a floating walkway into a sawmill pond, was a maritime employee within the meaning of the Act. The court held that maritime employment under the Longshore Act requires that employment "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" The plaintiff in that case was denied coverage because he could not prove sawmill work had the requisite significant relationship to traditional maritime activity.

In 1980, the Second Circuit applied the *Weyerhaeuser* test in *Fusco v. Perini North River Associates* and held that a plaintiff was required to prove that his occupational activities had a "significant relationship to navigation or to commerce on navigable waters." Specifically, the *Fusco* court concluded that workers injured while constructing a sewage disposal plant on navigable waters did not have the requisite "significant relationship" to traditional occupations involving navigation or commerce on navigable waters. The court refused to base eligibility solely on the situs of an employee's work. The *Fusco* court characterized maritime employment as "an occupational rather than a geographic concept."

The Fifth Circuit took a similar approach. In *Thibodaux v. Atlantic Richfield Co.*, the plaintiff oilfield worker was regularly transported to his worksites by boat and labored over the navigable waters. While in transit to an offshore oilfield, the

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56. 528 F.2d 957 (9th Cir. 1975).
57. *Weyerhaeuser Co. v. Gilmore* 528 F.2d 957, 959 (9th Cir. 1975). Ponds are enclosed areas of a bay adjacent to a sawmill, which are enclosed by docks and log booms so the logs can be processed. *Id.* at 958.
58. *Id.* at 961 (citation omitted).
59. *Id.*
60. 622 F.2d 1111 (2d Cir. 1980).
61. *Id.* at 1113.
62. *Id.*
63. See *id.* at 1112-13.
64. *Id.* at 1112 (quoting P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 79 (1979)).
vessel carrying the crew and equipment sank.\textsuperscript{66} In determining eligibility, the court focused on the occupational skills for which the worker was hired and held that because the worker had been hired for oilfield construction and maintenance, he was not engaged in maritime employment even though he was injured on navigable waters.\textsuperscript{67} Like Weyerhaeuser and Fusco, the Thibodaux holding suggested that the status requirement focused on occupational title of the employee rather than the nature of the labor at the time of injury or the maritime hazards encountered on the navigable waters.\textsuperscript{68}

In 1982, the Fifth Circuit, in \textit{Boudreaux v. American Workover, Inc.}, revisited its ruling in Thibodaux.\textsuperscript{69} At this time, the circuit courts were split on whether a worker injured on navigable waters must satisfy the Weyerhaeuser standard and prove that his employment duties “ha[d] a significant relationship to traditional maritime activity.”\textsuperscript{70} In \textit{Boudreaux}, the plaintiff was injured on navigable waters in the course of his employment, which involved specialty mineral-production work on a drilling barge.\textsuperscript{71} The court concluded that an employee injured on navigable waters in the course and scope of his employment satisfied the 1972 Amendments’ “maritime employment” test because employment on the water was, by definition, “maritime employment” within the meaning of the Act.\textsuperscript{72} In refusing to adopt Weyerhaeuser’s “significant relationship” test, the court described that standard as using a “cumbersome methodology” that resulted in “disputable borderline case-by-case application” of the test.\textsuperscript{73} Thus, the Fifth Circuit moved back toward a more traditional approach to compensating all injuries on navigable waters without regard to the nature of the injured worker's

\begin{footnotes}
\item[66] Thibodaux v. Atlantic Richfield Co., 580 F.2d 841, 842 (5th Cir. 1978).
\item[67] \textit{Id.} at 844-45.
\item[68] \textit{Id.} at 845 (noting that the “occupation of the deceased was that of an oilfield construction and maintenance man” and was “not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA”).
\item[69] 680 F.2d 1034 (5th Cir. Unit A 1982).
\item[70] \textit{See id.} at 1036 n.1, 1045 (“Following adoption of the 1972 Amendments . . . [a] substantial minority of the decisions of the lower courts . . . attempted to apply a status test in some formulation to work-related injuries on navigable waters . . . .”).
\item[71] \textit{Id.} at 1036.
\item[72] \textit{Id.} at 1039.
\item[73] \textit{Id.} at 1048.
\end{footnotes}
employment.74

2. POST-1983: SUPREME COURT GUIDANCE AND BEYOND

The Supreme Court attempted to resolve the Weyerhaeuser split in 1983.75 In Director, Office of Workers' Compensation Programs v. Perini North River Associates, the plaintiff was employed to unload caissons76 from a cargo barge.77 While on the barge deck, a cable snapped striking the plaintiff and resulting in injuries.78 The Court ruled that the plaintiff was covered by the Act and as a result, the Court upheld the traditional view that maritime employment status should be presumed when an employee is injured in the course and scope of his duties on navigable waters.79 The Court observed that workers like the plaintiff who were injured on navigable waters were subject only to a situs-based standard, distinct from maritime workers injured on adjoining shoreside areas who had to satisfy a both a situs and status requirement.80 In reaching its conclusion, the Perini Court noted there was no indication from Congress that the 1972 Amendments intended to withdraw coverage from employees injured on navigable waters in the course of their employment.81 Thus, the 1972 Amendments did not incorporate a status inquiry for injuries that occurred on navigable waters by employees who, for the nature of their employment, are required to work upon navigable waters.82

In its next decision considering the status requirement, the Supreme Court deferred to congressional intent.83 In Herb's Welding, Inc. v. Gray,84 a welder was injured while working on a

74. See supra Section II(A)(2).
76. A caisson is a large, hollow circular pipe used for construction in water. See Perini, 459 U.S. at 300.
77. Id. at 300.
78. Id.
79. Id. at 315, 324.
81. Id. at 325.
82. See id. at 324.
fixed platform located in Louisiana state waters.\textsuperscript{85} Initially, the Fifth Circuit held that offshore drilling is maritime commerce, that anyone whose work was a "central part of that process...[is] clearly employed in maritime employment," and as such, was within the Act's coverage.\textsuperscript{86} The Supreme Court, in refusing to extend coverage to all employees on a stationary platform,\textsuperscript{87} rejected the Fifth Circuit's decision.\textsuperscript{88} The Supreme Court returned to an occupational test to define status.\textsuperscript{89} The Court noted that the 1972 Amendments extended coverage from navigable waters to areas adjoining navigable waters as long as the injured employee was engaged in "maritime employment."\textsuperscript{90} The Supreme Court, relying on \textit{P.C. Pfeiffer Co. v. Ford},\textsuperscript{91} concluded that the "maritime employment" requirement was an "occupational test that focuses on loading and unloading."\textsuperscript{92} The Court relied on Congress's warning that the injured employee must satisfy both situs and status requirements and found that classifying the plaintiff's employment on a fixed platform as maritime "because he was on a covered situs or in a 'maritime environment' would blur together requirements Congress intended to be distinct."\textsuperscript{93} The Court refused to further diminish the status requirement, finding that the plaintiff did not qualify for coverage because his employment was not maritime.\textsuperscript{94}

Several years after deciding \textit{Herb's Welding}, the Supreme Court in \textit{Chesapeake & Ohio Railway Co. v. Schwalb} again addressed the status of an employee injured on statutory navigable waters, i.e. an "other adjoining area."\textsuperscript{95}

Although moving away from an occupational test, the

\textsuperscript{87.} The Supreme Court had previously defined stationary platforms as "islands, albeit artificial ones..." Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (1969). The Court also held that these platforms were outside of admiralty jurisdiction. \textit{Herb's Welding}, 470 U.S. at 421-20 (quoting Rodrigue, 395 U.S. at 360).
\textsuperscript{88.} \textit{Herb's Welding}, 470 U.S. at 421-24.
\textsuperscript{89.} See \textit{id.} at 424 n.10.
\textsuperscript{90.} \textit{Id.} at 420.
\textsuperscript{93.} \textit{Id.} at 414, 425-26 (citations omitted).
\textsuperscript{94.} \textit{Id.} at 427.
Supreme Court, in *Chesapeake & Ohio Railway Co. v. Schwalb*, reiterated the idea that an injured worker must be engaged in a task that bears some connection to loading or unloading a vessel in order to qualify for compensation under the Act. In *Chesapeake*, two railroad employees were injured at a terminal where coal was loaded and unloaded on and off trains to ships. The railroad workers cleaned and maintained equipment used to transfer cargo from railway cars into vessels on navigable waters. The Supreme Court, in deciding that the railroad employees were covered by the Longshore Act, noted that maritime employment within the meaning of the Longshore Act was not limited to the specified occupations or employees who physically handled cargo—coverage also included land-based activity occurring within the relevant situs if it was an integral or essential part of loading or unloading a vessel.

For review, the Longshore Act’s status requirement is met when an employee is injured on navigable water in the course of his employment; status is also met when an employee whose job is an integral or essential part of loading or unloading a vessel is injured shoreside. Because the 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. The following Section discusses how the circuit courts have addressed the situs requirement and how varying interpretations of the situs requirement has resulted in a circuit split.

97. *Id.* at 42-43.
98. *Id.* at 43.
99. *Id.* at 47 (“[E]mployees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act . . . . Someone who repairs or maintains . . . [such] equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured. It is irrelevant that an employee’s contribution to the loading process is not continuous or that repair or maintenance is not always needed . . . [or] if they also have duties not integrally connected with the [process].”).
C. SITUS—DEFINING "OTHER ADJOINING AREA" UNDER § 903(A)

When injuries occur on navigable water or one of the enumerated shoreside areas covered by the Longshore Act, the inquiry into situs is generally not an issue. However, a number of cases have arisen involving whether a particular site is covered as an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."\(^{102}\)

The circuit courts are greatly divided in how each determines whether an injury occurring in this grey area is indeed an "adjoining area," thus meeting the situs requirement.\(^{103}\) The Third Circuit has essentially read the situs requirement out of the Longshore Act.\(^{104}\) The First, Second, Ninth, and Eleventh Circuits have held that an "adjoining area" need not be contiguous to navigable waters nor a prescribed distance from the water's edge.\(^{105}\) The Fourth Circuit and most recently the Fifth Circuit have interpreted "other adjoining area" to mean physically adjacent to or contiguous with navigable water.\(^{106}\) A discussion of the differing circuit court approaches to determining situs follows, beginning with the broadest standard and finishing with the most restrictive standards.

1. THE THIRD CIRCUIT'S APPROACH—BYPASSING SITUS

The Third Circuit has the most liberal approach in interpreting the Longshore Act's coverage of an "other adjoining area."\(^{107}\) In *Sea-Land Service, Inc. v. DOWCP*,\(^{108}\) an employee of a


\(^{103}\) See id.

\(^{104}\) See *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 638 (3d Cir. 1976).

\(^{105}\) E.g., *Ramos v. Dir., OWCP*, 486 F. App'x 775 (11th Cir. 2012); *Cunningham v. Dir., Office of Workers' Comp. Programs*, 377 F.3d 98 (1st Cir. 2004) (agreeing with *Herron*, 568 F.2d 137); *Triguero v. Consol. Rail Corp.*, 932 F.2d 95 (2d Cir. 1991); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); see also *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc) (followed by the Fifth Circuit for over thirty years until it was overruled by *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013)).

\(^{106}\) E.g., *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (adopting the *Sidwell* definition of "adjoining areas"); *Sidwell v. Express Container Serv., Inc.*, 71 F.3d 1134 (4th Cir. 1995).

\(^{107}\) See *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629 (3d Cir. 1976).
freight carrying company was using a truck to move cargo between two of the employer’s facilities.\textsuperscript{109} The cargo had been unloaded from a vessel prior to being stored at the employer’s facility.\textsuperscript{110} The employee overturned the truck and was injured on a public street in an area outside the terminal where the employer’s facilities were located.\textsuperscript{111} The court noted that when an injured employee meets the status requirement, there is no need to address situs.\textsuperscript{112} The Third Circuit held that “as long as employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available” regardless of “the situs of [the] maritime employees at the time of the injury.”\textsuperscript{113} It is important to note that no other circuit has adopted the Third Circuit’s interpretation of “adjoining areas” under the Longshore Act.\textsuperscript{114} The other circuits, as discussed below, interpret the Longshore Act as requiring both situs and status when injuries occur on “adjoining areas.”\textsuperscript{115}

2. THE FUNCTIONAL RELATIONSHIP TEST

Following the 1972 Amendments to the Longshore Act, the Ninth and Fifth Circuits adopted functional relationship tests or guidelines to determine if an injury on an “adjoining area” would

\begin{itemize}
\item \textsuperscript{108} Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs, 540 F.2d 629 (3d Cir. 1976).
\item \textsuperscript{109} Id. at 632, 639.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. at 632.
\item \textsuperscript{112} Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs, 540 F.2d 629, 638 (3d Cir. 1976) (“As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress’ intention to eliminate the phenomenon of shifting coverage. It is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters.”).
\item \textsuperscript{113} Id. at 638.
\item \textsuperscript{114} New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (declining to follow the Sea-Land Services, Inc. interpretation); Cunningham v. Dir., Office of Workers’ Comp. Programs, 377 F.3d 98, 104 n.5 (1st Cir. 2004) (suggesting that the Supreme Court has essentially overruled the Second Circuit’s decision in Sea-Land Services, Inc. in several cases where the Court held that both situs and status are required for coverage under the Longshore Act); Sidwell v. Express Container Serv., Inc., 71 F.3d 1134 (4th Cir. 1995) (adhering to the Fourth Circuit’s rejection of Sea-Land Services, Inc.).
\item \textsuperscript{115} See infra Section II(C)(2).
\end{itemize}
be covered under the Act. The functional relationship tests developed by the Ninth and Fifth Circuits are currently used by many of the circuit courts (although no longer used by the Fifth Circuit).116

Until recently,117 the Fifth Circuit relied on its decision in Texports Stevedore Co. v. Winchester to determine situs of "adjoining areas."118 In Winchester, the Fifth Circuit adopted a broad view of situs.119 The court noted that the "perimeter of an 'area' under the 1972 Amendments was defined by the area's function and the overall area must be customarily used in loading, unloading, building or repairing a vessel by any maritime employer—not necessarily the injured employee's employer.120 This was referred to as the function nexus.121 In addition to a function nexus to maritime-related work, the court determined that the area must also be "close to or in the vicinity of navigable waters, or in a neighboring area" in order to be a

116. See, e.g., Ramos v. Dir., Office of Workers' Comp. Programs, 486 F. App'x 775 (11th Cir. 2011) (per curiam) (citing the Winchester test to determine if an adjoining area is covered under the Longshore Act); Ramos v. Container Maint. of Fla., 45 BRBS 61 (2011) (citing both the Herron test and Winchester test to determine if an adjoining area is covered under the Longshore Act), available at http://www.dol.gov/brb/decisions/longshore/published/11-0130.pdf; Prolerized New Eng. Co. v. Benefits Review Bd., 637 F.2d 30 (1st Cir. 1980) (noting that an "expansive construction" should be given to the phrase "adjoining area"); Stockman v. John T. Clark & Son of Bos., Inc., 539 F.2d 264 (1st Cir. 1976) (holding that the situs requirement was met and the claimant was covered under the Act after being injured while stripping a container at the Boston Army Base, a facility two miles by land or 700-800 feet by water from the area where the container was off-loaded from a vessel).

117. In April 2013 the Fifth Circuit in New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) overruled thirty years of case precedent that was based on its decisions in Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc). Although it has been overruled in the Fifth Circuit, it is still necessary to discuss the Winchester decision because it is relied on by other circuits.

118. See Winchester, 632 F.2d 504.

119. See id. at 508.

120. Id. at 515-16.

121. See Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 442 (5th Cir. 2009) (DeMoss, J., dissenting) ("The functional nexus inquiry is fact-intensive. The scope of the covered situs cannot be determined solely through reference to fence lines and employers' designations, which are subject to manipulation. Rather, '[t]he perimeter of an area is defined by function.' An adjoining area must be 'customarily used for significant maritime activity.'" (alteration in original) (citations omitted)).
covered situs in the Longshore Act.122 This prong of the Winchester test became known as the geographical nexus.123 The Ninth Circuit expanded upon the Winchester test in its Brady-Hamilton Stevedore Co. v. Herron decision.124

The Ninth Circuit, in Brady-Hamilton Stevedore Co. v. Herron, enumerated the following four factors to determine if an "adjoining area" is covered under the Longshore Act:

In order to further Congress' goal of uniform coverage, the phrase "adjoining area" should be read to describe a functional relationship that does not in all cases depend upon physical contiguity. Consideration should be given to the following factors, among others, in determining whether or not a site is an "adjoining area" under section 903(a): [(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.125

The tests established by the Ninth and Fifth Circuits provided a middle ground for determining if an adjoining area was covered under the Longshore Act. These tests required an evaluation of the facts and circumstances of each case on a case-by-case basis. The Fourth Circuit, and most recently, the Fifth Circuit (overruling Winchester) have developed a hard line rule for determining situs without having to resort to evaluating the circumstances of every case where an "adjoining area" is in dispute.

3. THE CONTIGUOUS STANDARD

The Fourth Circuit declined to follow the functional

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122. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 514 (5th Cir. 1980) (en banc).
123. Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 442, 443 n.2 (5th Cir. 2009) (DeMoss, J., dissenting) ("The geographical nexus prong of the situs test focuses on the production platform's geographical nexus with navigable waters. In contrast, the fact that the production platform is 'geographically separate' from the loading barge is relevant to the functional nexus inquiry.").
124. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978).
125. Id. at 141.
relationship and totality of the circumstances approaches formerly used by the Fifth Circuit and currently used by the First, Second, Ninth, and Eleventh Circuits to determine if an area was “adjoining navigable water” under the Longshore Act.\(^{126}\) Instead, the Fourth Circuit, in *Sidwell v. Express Container Services, Inc.*,\(^{127}\) looked to the ordinary meaning of the term “adjoin” and held that an area is adjoining navigable water only if it is “contiguous with’ or otherwise ‘touches’ such waters.”\(^{128}\)

Sidwell was injured while working as a container mechanic at his employer’s facility that was located less than one mile from a terminal where vessels were loaded and unloaded.\(^{129}\) Sidwell filed a claim under the Longshore Act.\(^{130}\) Originally, his claim was dismissed; Sidwell appealed the decision to the Fourth Circuit, which examined the three existing tests—(1) the Ninth Circuit’s *Herron* Test, (2) the Fifth Circuit’s *Winchester* Test, and (3) the Third Circuit’s *Sea-Land Service, Inc.* test—for determining situs of other “adjoining areas.”\(^{131}\) Ultimately, the Fourth Circuit opted not to follow any of these decisions.\(^{132}\)

The court examined the plain or ordinary meaning of the word “adjoin” in the Act and found that an area must be contiguous with navigable waters in order to be considered adjoining navigable waters as provided in the Longshore Act.\(^{133}\) Looking at the words “area” and “other,” the court noted that the words should not be viewed in isolation; rather, they should be read with the relevant part of the statute in mind.\(^{134}\) The court concluded that the “other adjoining area” under the Longshore Act “must be like a ‘pier,’ ‘wharf,’ ‘dry dock,’ ‘terminal,’ ‘building way,’ or ‘marine railway.’”\(^{135}\) In other words, the court said an

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126. See *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134 (4th Cir. 1995). The Sixth, Seventh, Eighth, and Tenth Circuits have not addressed the meaning of “adjoining area” in the Longshore Act.

127. *Id.*

128. *Id.* at 1138-39.

129. *Id.* at 1135. The facility was closed to the terminal until the terminal expanded so the facility relocated. *Id.*


132. *Id.* at 1138.

133. *Id.* at 1138-39.

134. *Id.* at 1139.

135. *Id.*
“other area” must be a “discrete [shoreside] structure or facility.”

Applying this definition of “other adjoining area,” the Sidwell panel found that the claimant’s injury had not occurred on a covered situs because it was not an area “adjoining” navigable waters. Two months following this decision in Sidwell, the Fourth Circuit once again addressed the issue of situs regarding an “adjoining area.” The court affirmed the use of the Sidwell test by using it to conclude that a claimant who met the Longshore Act status requirement did not meet the situs requirement because the facility where the injuries were sustained was not contiguous with water. And most recently, the Fifth Circuit has relied on Sidwell to overturn over thirty years of case precedent dealing with adjoining areas as a covered situs under the Longshore Act.

In New Orleans Depot Services, Inc. v. Director, Office of Worker’s Compensation Programs, the Fifth Circuit en banc overruled the Winchester test for determining situs and opted to follow the Fourth Circuit’s approach in Sidwell. In this case, the location in question was the Chef Yard, which was located in an industrial park three hundred yards from the Intracoastal Canal. Employees at the Chef Yard repaired, maintained, and stored shipping containers that could potentially serve as marine containers. A Fifth Circuit panel and the Benefit Review Board affirmed the administrative law judge’s conclusion that the Chef Yard was an “adjoining area” and that the plaintiff-employee was a maritime employee under the Longshore Act. The Fifth Circuit reheard the case en banc.

137. Id. at 1141.
138. See Parker v. Dir., Office of Workers' Comp. Programs, 75 F.3d 929 (4th Cir. 1996).
139. Id. at 932-35.
140. See New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013).
141. Id. at 394.
142. Id. at 386-87.
143. Id.
144. Id. at 387; New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, U.S. Dep't of Labor, 689 F.3d 400 (5th Cir. 2012), reh'g en banc granted by 701 F.3d 782 (5th Cir. 2012), on reh'g en banc, 718 F.3d 384 (5th Cir. 2013).
145. New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs,
The court reviewed its previous en banc decision in *Winchester* as well as the tests used by the other circuit courts.\(^{146}\) The court explained that its decision in *Winchester* was "vague" and "provided little guidance to other courts or future litigants on how to determine from 'the circumstances' whether a claimant satisfies the situs test."\(^{147}\) In rejecting the Ninth Circuit's *Herron* functional relationship test and the Third Circuit's status-only approach in *Sea-Land Services*, the court, citing the Fourth Circuit's reasoning in *Sidwell*, explained that the tests used by Ninth and Third Circuits failed to follow the plain language of the Longshore Act.\(^{148}\)

The court relied on five key areas of the *Sidwell* decision. First, "adjoining" should be given its ordinary meaning.\(^{149}\) It noted that in the context of the Longshore Act, "adjoining" is defined as "'border[ing] on' or 'be[ing] contiguous with' navigable waters."\(^{150}\) Second, limiting coverage to maritime workers injured on navigable waters and "waterfront areas where the loading, unloading, and repair of vessels occurs" ensures coverage for longshoremen walking the gangplank from ship to shore, which was Congress's purpose for enacting and later expanding the Longshore Act.\(^{151}\) Third, "area" should be interpreted narrowly to include only "discrete shoreside structure[s] or facilit[ies]" "use[d] in connection with navigable waters."\(^{152}\) Fourth, the land on which the employer's facility is located—not necessarily the particular part of the land where injury occurred—must be contiguous with navigable water.\(^{153}\) Finally, the court emphasized that—in addition to being contiguous with

\(^{146}\) New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 390-93 (5th Cir. 2013).

\(^{147}\) Id. at 390.

\(^{148}\) Id. at 391.

\(^{149}\) Id.

\(^{150}\) Id. at 393-94.

\(^{151}\) New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 392 (5th Cir. 2013) (emphasis added) (quoting Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1140 (4th Cir. 1995)).

\(^{152}\) Id. (quoting Sidwell, 71 F.3d at 1139).

\(^{153}\) Id. at 392; see also BPU Mgmt., Inc. v. Dir., Office of Workers' Comp. Programs, 732 F.3d 457 (5th Cir. 2013) (holding that a "cross-tunnel conveyer" that did not adjoin navigable waters nonetheless satisfied the geographical component of the Longshore Act's situs requirement because the cross-tunnel conveyer was part of the employer's entire facility which did adjoin navigable waters).
navigable waters—the situs must also meet the functional requirement as provided in the Act.\textsuperscript{154}

The court rejected the argument that a broad reading of “adjoining” better advances Congress’s intention to prevent longshoremen from walking in and out of coverage.\textsuperscript{155} The court explained that Congress only intended to prevent “loss of coverage when a longshoreman crossed the ship’s gangplank.”\textsuperscript{156} In addition, the court reasoned that Congress, by requiring a particular situs, anticipated longshoremen would still walk in and out of coverage.\textsuperscript{157} In rejecting the argument that the Act should be read in favor of coverage, the court explained that the rules of statutory construction required it to read the terms of the statute according its plain language.\textsuperscript{158} By relying on the reasoning explained above, the court held that the industrial park located three hundred yards from the Intracoastal Canal was not a covered situs under the Longshore Act because it was not contiguous with navigable waters.\textsuperscript{159}

The following Section of this Comment proposes that the contiguous standard used by the Fourth and Fifth Circuits is the proper test for determining whether an “adjoining area” is a covered situs under the Longshore Act.

\textsuperscript{154} New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 392-93 (5th Cir. 2013); see also BPU Mgmt., 732 F.3d 457 (holding that an injury in a “cross-tunnel conveyer” that met the geographical prong of the Longshore Act’s situs requirement did not meet the functional component of the situs test because the unloading process ceased prior to the bauxite reaching the cross-tunnel conveyer).

\textsuperscript{155} New Orleans Depot Servs., 718 F.3d at 393.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 394.
III. A PROPOSED CALL FOR LEGISLATIVE AND JUDICIAL CLARIFICATION OF THE LONGSHORE ACT COVERAGE

A. THE NEED FOR CONGRESSIONAL ACTION TO CLARIFY "OTHER ADJOINING AREAS"

There is a compelling need for congressional clarification on the issue of coverage under the Longshore Act. Congress should draft legislation amending the Act to reflect its original intent, which was to provide a uniform remedy for employees excluded from both seaman (general maritime law) and state workers' compensation coverage. When Congress first enacted the Longshore Act, it recognized that a "uniform compensation statute" was the only means to provide longshoremen coverage for injuries occurring in the course of their employment.161 The need for uniformity was reiterated when Congress amended the Longshore Act in 1972 to provide "uniform compensation"162 to cover injuries occurring on "the contiguous dock area related to longshore and ship repair work."163 Future legislation regarding situs under the Longshore Act should be clear and unambiguous so that its interpretation by the courts will result in predictable, consistent, uniform coverage for maritime workers injured on navigable waters or areas contiguous with navigable waters traditionally used for maritime activities.164

160. Editor's Note: During the final editing stages of this Comment, the Tulane Maritime Law Journal published a comment coming to a similar conclusion as that of Ms. Pitre's proposal. Yaakov Adler, Comment, Situs Unraveled: Evaluating Methods for Determining Whether an Injury Site Qualifies as an LHWCA § 903(a) "Other Adjoining Area", 38 Tul. Mar. L.J. 147 (2013). The Loyola Law Review recommends both pieces to its readers, as both include excellent analysis of the underlying issues and jurisprudence regarding coverage under the LHWCA. In addition, this Comment, authored by Claire Pitre, provides some novel points of distinction, including extended treatment of the en banc decision in New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) and a proposed federal statute as the preferred means of implementation, emphasizing the importance of uniformity in admiralty law. Citations to Mr. Adler's comment have been added into some of the footnotes in this Section, noting particular points of overlap.


163. New Orleans Depot Servs., 718 F.3d at 392 (emphasis omitted) (quoting S. Rep No. 92-1125, at 2 (1972)).

164. See supra Section II.
The Longshore Act, as it currently reads, does not adequately define situs. The Act should be modified so that situs is more clearly defined, allowing for more consistent and predictable coverage. The Act currently reads as follows:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any 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).\(^{165}\)

The Act would read more clearly if it read:\(^{166}\)

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area, structure or facility that is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel). For the purpose of this article, adjoining shall mean adjacent to or contiguous to navigable waters of the United States.

The Proposed Statute most resembles the Fourth and Fifth Circuits' contiguous standard discussed in Sidwell and New Orleans Depot Services.\(^{167}\) By eliminating the need for a subjective test to determine when situs is satisfied by an "other adjoining area," the Proposed Statute provides a clear geographic boundary where coverage ends—areas that are contiguous to (i.e. touching) navigable waters.\(^{168}\) Also, according to the statute, the area must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.


\(^{166}\) Hereafter "Proposed Statute."

\(^{167}\) New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013); Sidwell v. Express Container Servs., Inc., 71 F.3d 1134 (4th Cir. 1995); supra Section II(C)(3).

\(^{168}\) See Adler, supra note 160, at 167-69 (noting "predictable coverage" as a reason to adopt the Fourth Circuit's approach).
Opponents to the Proposed Statute may consider the changes a return to the *Jensen* line of cases resulting in some maritime employees “walking in and out of coverage.” However, the boundary in the Proposed Statute serves to encompass as many maritime employees as possible without overextending coverage to employees who genuinely do not qualify. There must be a point or boundary where coverage under the Longshore Act ends and coverage under some other compensation scheme begins. It is unavoidable that some employees will have to cross that point or boundary during the course of their employment. The purpose of the Longshore Act was to address the problem presented in cases like *Jensen* where longshoremen loading and unloading ships walked in and out of Longshore coverage as they walked the gangplank from ship to shore; the Longshore Act was not created to provide coverage for “all those who breath salt air.” The Proposed Statute stays true to Congress’s original purpose for enacting the Longshore Act by providing coverage for longshoremen and harbor workers who work ship to shore.

**B. CLARIFICATION BY THE SUPREME COURT**

In absence of action by Congress, the Supreme Court should address the split among the circuits in determining situs when an injury occurs on an “adjoining area.” The jurisprudence that has evolved over the last forty years since the Ninth and Fifth Circuits developed the “functional relation test” to determine


172. New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs, 718 F.3d 384, 393 (5th Cir. 2013) (“Congress’s primary concern was that longshoremen constantly walked the gangplank between the ship and the dock so that the worker injured on the dock was not covered under the LHWCA and his co-worker injured on the ship was covered. This loss of coverage when a longshoreman crossed the ship’s gangplank was the inequity Congress sought to cure.”)

173. *Id.* at 423.
situs reveals that application of the test does not result in consistent results amongst the circuits. As previously discussed, the Winchester test for determining situs has resulted in numerous decisions with contradictory holdings under virtually identical facts depending on which circuit governed the case. For this reason, the Supreme Court should provide a test that limits broad interpretation and promotes uniformity among the circuits. The factors should mirror more closely the plain language of the statute.

In determining geographical nexus, the Court should limit coverage to injuries occurring on navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." In determining whether an "adjoining area" is covered by the Longshore Act, the court should require the area to be contiguous to the navigable water. The "functional nexus" of an "adjoining area" should not even be addressed until the geographical nexus has been established by showing that the "adjoining area" is actually contiguous to navigable water. In other words, the functional test should not be

174. See supra Section II(C).
175. See Arjona v. Interport Maint. Co., 34 Ben. Rev. Bd. Serv. 15 (2000) (holding claimant was not covered after finding that employer's property was not a covered situs because only the proximity of the site and its economic value to the employer were the only factors in favor of finding the property covered); Bennett v. Matson Terminals, Inc., 14 Ben. Rev. Bd. Serv. 526 (1981), aff'd sub nom. Motoviloff v. Dir., Office of Workers' Comp. Programs, 692 F.2d 87 (9th Cir. 1982) (affirming the Board's decision that the situs requirement was not met because the property's location was chosen for economic and transportation reasons and not for its marine proximity); see also Coastal Prod. Servs., Inc. v. Hudson, 555 F.3d 426 (5th Cir. 2009) (highlighting how the Winchester "functional relationship" test leads to questionable results).
177. This would more closely mirror Congress's intentions when the 1972 Amendment was enacted. See H.R. REP. NO. 92-1441, at 10-11 (1972), reprinted in 1972 U.S.C.C.A.N. 4698, 4708 ("The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water . . . . The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity . . . . The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.").
used to define the adjoining area if the adjoining area is not directly contiguous to navigable water. This will address the issue of using a sliding scale, where the strength of one factor can make up for the weakness of another, to determine what constitutes an "adjoining area." By eliminating the sliding scale, the Court would insure more predictable coverage under the Longshore Act. The courts recognized that a worker's compensation statute—"[m]ore than perhaps any other statutory scheme"—should result in expeditious and predictable outcomes.\(^{179}\)

\section*{C. ILLUSTRATION OF THE PROBLEM}

The problems with allowing a sliding scale to be used to determine "adjoining area" are evident.\(^{180}\) For example, consider a container repairman, injured at a facility one mile from navigable waters, who occasionally services containers that were offloaded from vessels. If the container repairman (claimant) was injured in a state within the First or Ninth Circuits, he may meet the requirements of the situs test under \textit{Herron} as long as the site met a very broad functional test that merely requires some minimal association with maritime activities.\(^{181}\) However, if the case were decided in the Eleventh Circuit also using the \textit{Winchester} test, the facility would not likely meet the geographic nexus requirement, and as a result, the claimant would not be eligible for Longshore benefits.\(^{182}\) The claimant would likely prevail in the Third Circuit because that circuit has essentially done away with the situs requirement when the claimant is able to meet the status requirement.\(^{183}\) The Fourth and Fifth Circuits are the only circuits where the results would be predictable. Because the facility in this hypothetical is not contiguous with

\begin{footnotesize}
\begin{enumerate}
\item[\(^{178}\)] New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 394 (5th Cir. 2013) (referring to worker's compensation statutes and stating "[o]ne could hardly imagine an area where predictability is more important").
\item[\(^{179}\)] \textit{Id.} (citing Texports Stevedore Co. v. Winchester, 632 F.2d 504, 518 (5th Cir. 1980) (en banc) (Tjoflat, J., dissenting)).
\item[\(^{180}\)] \textit{See supra} Section II(C).
\item[\(^{181}\)] \textit{See, e.g.,} Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 139, 140-41 (9th Cir. 1978).
\item[\(^{182}\)] \textit{See, e.g.,} Ramos v. Dir., Office of Workers' Comp. Programs, 486 F. App'x 775, 777 (11th Cir. 2011) (per curiam).
\item[\(^{183}\)] \textit{See, e.g.,} Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs, 540 F.2d 629, 635-36 (3d Cir. 1976).
\end{enumerate}
\end{footnotesize}
navigable water, the claimant would not be covered under the Longshore Act if this case was heard in the Fourth or Fifth Circuits.\textsuperscript{184}

**IV. CONCLUSION**

To be covered under the Longshore Act, an injured worker must have status as a maritime employee, and the injury must occur on a covered maritime situs.\textsuperscript{185} Under the Longshore Act, situs is met if the injury occurred “upon the navigable waters of the United States;” on one of the enumerated sites such as an “adjoining pier, wharf, dry dock, terminal, building way, or marine railway;” or at an “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.”\textsuperscript{186}

Whether a site is an “other adjoining area” as that phrase is used in the Longshore Act depends on in which circuit the injury occurred.\textsuperscript{187} A situs analysis with regard to the meaning of “other adjoining area” involves consideration of a variety of factors, such as proximity to navigable water, nature of surrounding properties, nature of properties between the injury site and the water, site selection considerations, and functional connection with the navigable waterway.\textsuperscript{188} The circuits vary in how they weigh each of these factors, and the result has been inconsistent decisions regarding coverage.\textsuperscript{189}

The purpose of the Longshore Act is to provide adequate coverage for maritime workers. The Act is also intended to prevent employees from falling in and out of coverage as they leave the waters’ edge. The varying results from different circuits have resulted in the exact opposite. Congress needs to address these problems by amending the Act so that courts have a better framework for determining an employee’s status and an injury’s situs. In the absence of congressional action, the Supreme Court should address these issues in order to resolve the circuit split

\textsuperscript{185} See supra Section II.
\textsuperscript{187} See supra Section II(C).
\textsuperscript{188} See supra Section II(C).
\textsuperscript{189} See supra Section II(C).
that currently exist. In either case, a clear geographic boundary akin to the one used by the Fourth and Fifth Circuits should be used to determine whether or not an “adjoining area” meets the situs requirement of the Longshore Act.

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