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NOTE

COVERAGE UNDER THE LHWCA AMENDMENTS OF 1972: DEVELOPING A PRACTICAL, UNIFORMLY APPLICABLE INTERPRETATION OF THE STATUS REQUIREMENT

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act of 1927¹ (LHWCA) in an attempt to insure uniform recovery by injured longshoremen independent of "the fortuitous circumstance of whether the injury occurred on land or over water."² The original version of the Act limited the jurisdiction of courts administering the LHWCA³ to those injuries occurring "upon the navigable waters of the United States",⁴ meaning that coverage terminated at the water's edge.⁵ The 1972 amendments broadened the territorial scope of the coverage provision of the Act, often referred to as the situs requirement, by including within the territorial coverage of the LHWCA "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."⁶ Thus, for the first time, the jurisdiction of the LHWCA crossed the water's edge and went ashore.

Included within the expanded shoreside jurisdiction were classes of employees previously not entitled to benefits. In addition to ex-

1. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (amending 33 U.S.C. §§ 901-50 (1970)).

2. S. REP. No. 1125, 92d Cong., 2d Sess. 13 (1972).

3. Under the original LHWCA, jurisdiction for review or enforcement of compensation was in the federal district courts. See 33 U.S.C. § 921 (1970) (amended 1972). Under the amended Act, enforcement of any compensation order remained within the jurisdiction of the district courts, but power to review orders was given to a three member Benefits Review Board. The decision of the Board could then be appealed directly to the United States court of appeals for the circuit in which the injury occurred. See 33 U.S.C. § 921 (Supp. II, 1972).

4. 33 U.S.C. § 903 (1970) (amended 1972) reads in pertinent part:

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)

5. See notes 10-14 *infra* & accompanying text.

6. 33 U.S.C. § 903 (a) (Supp. II, 1972) reads in pertinent part:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if disability or death results from an injury occurring upon 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 employee in loading, unloading, repairing, or building a vessel).

panding the situs requirement, however, Congress added an entirely new status requirement, presumably intending to limit the classes of employees entitled to the extended shoreside coverage. The status requirement predicated coverage within the territorial jurisdiction of the Act on the injured worker being a "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"⁷

Unfortunately, in attempting to establish uniform recoveries for maritime employees, Congress enacted provisions courts subsequently found difficult to interpret and apply. The difficulty in determining coverage under the LHWCA arose from the ambiguity of the 1972 amendments insofar as they describe, or fail to describe precisely, the employees Congress intended to cover. The situs requirement, although more liberal and complex than the requirement under the original Act, involved an objective determination of whether the injury occurred within territorial limits. Therefore, courts experienced little difficulty in applying the situs requirement.⁸ Similarly, no serious problems arose in applying the status requirement in cases involving a ship repairman, shipbuilder, or shipbreaker, apparently because these terms are narrowly defined and commonly understood in traditional usage.⁹ In contrast, the Courts of Appeals for the First, Second, Third, Fourth, Fifth, and Ninth Circuits each struggled to apply the ambiguous terms of the status requirement, "engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations," which are not adequately defined either in common usage or in the statute.

7. 33 U.S.C. § 902(3) (Supp. II, 1972) reads:

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.

8. See, e.g., *Stockman v. John T. Clark & Son*, 539 F.2d 264, 271-72 (1976); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 51 & n. 19, cert. granted sub nom. *Northeast Marine Terminals Inc. v. Caputo*, 97 S. Ct. 522 (1976); *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d 1080, 1083-84 (1975); *White v. Norfolk & W. Ry. Co.*, No. 751407 (Va. March 4, 1977). For a discussion of the limits of the situs requirement, see *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 541 (1976).

9. See text accompanying note 164 *infra*.

The ambiguity of these terms within the status requirement has resulted in non-uniform coverage under the LHWCA. Nonetheless, it is possible to reconcile discrepancies in the opinions and to distill consistent guidelines for interpreting this portion of the requirement in the amended LHWCA. Given the guidelines suggested by the circuit courts, this Note endorses the Fifth Circuit Court of Appeals' practical, uniformly applicable interpretation of the requirement.

HISTORY OF WORKMEN'S COMPENSATION FOR MARITIME EMPLOYEES

Pre-LHWCA cases defining the extent of federal admiralty jurisdiction significantly influenced the development of the original Act. Moreover, judicial interpretations and limitations of the 1927 Act were largely responsible for the 1972 amendments of LHWCA. Examination of these precedents facilitates analyzing the amended LHWCA coverage provisions in proper historical perspective.

Compensation Prior to 1927

The Jensen case

In 1917 the United States Supreme Court in *Southern Pacific Co. v. Jensen*¹⁰ held that a state workmen's compensation law could not constitutionally apply to a death occurring on the gang plank of a vessel on navigable waters.¹¹ The Court reasoned that: "[t]he work of a stevedore in which the deceased was engaging [was] maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities . . . were matters clearly within the admiralty jurisdiction."¹² The Court also noted that a need existed for national uniformity in admiralty and that a state compensation law lacked jurisdiction beyond the water's edge.¹³ The water's edge, established in *Jensen* as the boundary between federal admiralty jurisdiction¹⁴ and state

10. 244 U.S. 205 (1917).

11. *Id.* at 217. Jensen, a longshoreman, was killed while driving a small freight truck onto the gangway of a ship anchored in New York harbor. His widow's action was one in admiralty and litigable in the state courts under the "savings to suitors" clause of the Judiciary Act of 1789. See note 20 *infra* & accompanying text. Because the court determined that Jensen's employment was maritime, his survivors were denied recovery under the New York Compensation Law.

12. *Id.*

13. *Id.*

14. The Constitution establishes federal jurisdiction over cases in admiralty. U.S. CONST. art. III, § 2. Under the Judiciary Act of 1789, Congress assigned original jurisdiction in

jurisdiction, became known as the *Jensen* line.

Adhering to the *Jensen* line, the courts strictly limited state courts' jurisdiction to award compensation to maritime employees injured seaward of the water's edge.¹⁵ State courts were nevertheless free to award compensation for similar injuries occurring on land. Denied a remedy in state courts, employees injured within admiralty jurisdiction sought recovery in the federal courts. Because no system of federal workmen's compensation existed for maritime employees, the injured party was forced to rely on common law tort remedies;¹⁶ generally, the result was no recovery.¹⁷

A limited exception to the strict rule of *Jensen* allowed application of state law to admittedly maritime accidents occurring in areas of local concern. Under this "maritime but local" doctrine, injured parties sometimes obtained state compensation for injuries sustained seaward of the *Jensen* line.¹⁸ Situations in which the "maritime but local" exception could be applied were limited, and therefore the exception was basically ineffective in providing uniform relief for injured maritime employees.¹⁹

Legislative Attempts To Provide Compensation

Included in the Judiciary Act of 1789 granting original admiralty jurisdiction to the federal district courts was a "savings to suitors" clause under which parties to an admiralty suit retained the right to a common law remedy if they would have been entitled to such a remedy in a non-admiralty forum.²⁰ Congress then sought twice to allow the admiralty courts to apply state workmen's compensation laws by amending the clause to read "saving to suitors . . . rights

admiralty cases to the district courts. See note 21 *infra*.

15. See *Davis v. Department of Labor*, 317 U. S. 249, 255-56 (1942); *Parker v. Motor Boat Sales*, 314 U. S. 244, 250 (1941).

16. The remedies available to injured employees consisted of negligence actions and actions based on the shipowner's warranty of seaworthiness. See note 51 *infra*.

17. See note 24 *infra*.

18. See, e.g., *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922); *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

19. The *Rohde* case suggested that some significant state connection was required, that the injury must not be directly related to commerce and navigation, and that application of state law should not affect the admiralty law. 257 U. S. at 477.

20. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76 (current version at 28 U. S. C. § 1333 (1970)) provided in pertinent part: "That the district courts shall have . . . exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it"

and remedies under the workmen's compensation law of any State."²¹ Both attempts to effect this change,²² however, were stricken as unconstitutional delegations of the federally reserved admiralty jurisdiction.²³

The LHWCA of 1927

In 1927, however, Congress enacted the LHWCA, which was drafted to provide a no-fault federal workmen's compensation remedy²⁴ for those maritime workers who could not be compensated by the state acts.²⁵ The tacit understanding appeared to be that the Act adopted the *Jensen* line as the division between state and federal jurisdiction.²⁶ The relevant coverage provision read:

Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and *if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.*²⁷

21. Act of Oct. 6, 1917, ch. 97, § 1, 40 Stat. 395.

22. The second attempt to amend the clause was made in 1922. The amendment was almost identical to its predecessor. Act of June 10, 1922, ch. 216, § b, 42 Stat. 634.

23. See *Washington v. Dawson & Co.*, 264 U.S. 219 (1924) (declaring 1922 amendment unconstitutional on grounds of constituting unlawful delegation of legislative power); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (declaring 1917 amendment unconstitutional on grounds of unlawfully delegating legislative power of Congress and frustrating constitutional goal to provide uniformity in maritime law).

24. 33 U.S.C. § 904 (b) (1970) provides: "Compensation shall be payable irrespective of fault as a cause for the injury." The text of the section as originally enacted was more descriptive of the importance of the Act's provision:

In such action [under the LHWCA] the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Longshoremen's and Harbor Worker's Compensation Act of 1927, ch. 509, § 5, 44 Stat. 1426. As a result of this provision, the employee covered by the Act, was not subject to the "unholy trinity" of defenses used to prevent employee recoveries in common law actions. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 80 AT 525-30 (4th ed. 1971).

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

26. See *Davis v. Department of Labor*, 317 U.S. 249, 255-56 (1942); *Parker v. Motor Boat Sales*, 314 U.S. 244, 250-51 (1941).

27. 33 U.S.C. § 903(a) (1970) (amended 1972) (emphasis supplied). The restriction that federal compensation was not obtainable if recovery could be validly provided by state law essentially incorporated the "maritime but local" doctrine originating in pre-1927 Supreme Court decisions into the 1927 Act. Judicial interpretation of the doctrine's effect on the restriction caused considerable uncertainty and litigation until 1962 when the court, in *Calbeck v. Traveler's Ins. Co.*, 370 U.S. 114 (1962), held that the doctrine did not affect

Unfortunately, the "maritime but local" concept led to uncertainties and inequities in the application of both the federal and state schemes. It was unclear, for example, whether the pre-1927 cases establishing the "maritime but local" exception validly provided compensation under state law within the meaning of the LHWCA, and thereby precluded the federal law's application in "maritime but local" areas.²⁸ This uncertainty created a zone in which state jurisdiction could not be established easily nor could federal law clearly apply.²⁹ To alleviate the effects of this uncertainty, the Supreme Court developed the "twilight zone" theory in *Davis v. Department of Labor & Industries*.³⁰ Recognizing concurrent federal and state jurisdiction over certain areas of navigable waters, the court concluded that the determination whether the employee was subject to a state statute or to the LHWCA was a question of fact.³¹ Therefore, the twilight zone clearly did not promote consistency or uniformity. Moreover, during the two decades following *Davis*, although amounts of compensation provided under the LHWCA increased substantially, those under state programs did not.³² As the

federal courts' jurisdiction to award compensation under the Act. See notes 28-34 *infra* & accompanying text.

28. See, e.g., *Hohn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (jurisdiction depends on facts); *Davis v. Department of Labor*, 317 U.S. 249 (1942) (jurisdiction depends on facts); *Baizley Iron Works v. Span*, 281 U.S. 222 (1930) (federal law given exclusive jurisdiction); *Miller's Underwriters v. Braud*, 270 U.S. 59 (1925) (state law given exclusive jurisdiction). For a discussion of the problem, see Morrison, *Workmen's Compensation and the Maritime Law*, 38 YALE L.J. 472. (1929).

29. The Supreme Court illustrated the consequence of the dilemma: "[To] conclude that federal coverage extends to the limits of navigable waters, except in those cases where a state compensation remedy may constitutionally be provided, would mean that, contrary to congressional purpose, some injuries to employees on navigable waters might not be compensable under any statute." *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 125 (1962).

30. 317 U.S. 249 (1942) (employee using barge as platform while engaged in repair of bridge).

31. *Id.* at 256.

32. Even so, prior to the 1972 amendments, the compensation allowed under the LHWCA was fairly low. At the inception of the Act, the compensation permitted was two-thirds of the injured employee's average weekly wage with a maximum recovery of twenty-five dollars per week. Act of Mar. 4, 1927, ch. 509, § 6, 44 Stat. 1424. In 1948, the maximum recovery was raised to thirty-five dollars per week. Act of June 24, 1948, ch. 623, § 1, 62 Stat. 602. In 1956, the maximum allowed was increased to fifty-four dollars per week. Act of June 26, 1956, ch. 735, § 1, 70 Stat. 654. In 1961, the maximum rose to seventy dollars per week and remained at that level until 1972. Act of July 14, 1961, Pub. L. No. 87-87, § 1, 75 Stat. 203. Under the 1972 amendments, maximum compensation remained at two-thirds of the employee's average weekly wage, but the maximum recovery changed from a dollar figure to a percentage of the national average weekly wage. Since October 1, 1975, the maximum recovery has been 200 percent of the national average. See 33 U.S.C. § 906 (Supp. II, 1972).

disparity widened, increased attempts by claimants to recover under the LHWCA emphasized the need for a definitive delineation of the extent of jurisdiction. Finally, in *Calbeck v. Travelers Insurance Company*,³³ the Supreme Court concluded that Congress intended to cover all injuries received on navigable waters whether or not the injury also could be remedied constitutionally by state workmen's compensation.³⁴ *Calbeck* returned the jurisdictional limits of the LHWCA to the *Jensen* line, but retained a "twilight zone" in which the employee could seek relief either under a state act or under the LHWCA.³⁵

The need for legislative intervention in the controversy was manifest in the Supreme Court decisions *Nacirema Operating Co. v. Johnson*³⁶ and *Victory Carriers Inc. v. Law*.³⁷ In *Nacirema*, a federal court denied recovery under the Act for injury or death occurring on piers while loading cargo from railroad cars onto ship's cranes.³⁸ Affirming that decision, the Supreme Court held that the language restricting recovery to injuries "upon navigable waters" prevented recovery on a pier affixed to land.³⁹ In rejecting the contention that the Extension of Admiralty Act⁴⁰ amended the LHWCA to allow longshoremen on piers to recover,⁴¹ the Court restated the "extension of land" doctrine, under which structures such as piers and wharves that are permanently affixed to land are considered extensions of land, thus precluding recovery in admiralty.⁴² The decision emphasized the inequity of having an arbitrary line mark a significant difference in recoveries for similar injuries. Reacting to this inequity, Justice Douglas, joined by Justices Black and Bren-

33. 370 U.S. 114 (1962).

34. *Id.* at 115-31.

35. *Id.* at 131-32.

36. 396 U.S. 212 (1969).

37. 404 U.S. 202 (1971).

38. 396 U.S. at 213-14.

39. *Id.* at 215-21.

40. 46 U.S.C. § 740 (1970). The Act provided in pertinent part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

41. The Court reasoned that "the Extension Act was passed to remedy the completely different problem that arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all. There is no evidence that Congress thereby intended to amend or affect the coverage of the Longshoremen's Act." 396 U.S. at 222.

42. See *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *State Indus. Comm'n v. Nardenholt Corp.*, 259 U.S. 263 (1922).

nan, dissented, and adopted the reasoning of Judge Sobeloff in *Marine Stevedoring Corp. v. Oosting*,⁴³ that is, that the LHWCA was "status oriented, reaching all injuries sustained by longshoremen in the course of their employment."⁴⁴

Similarly, in *Victory Carriers*, the Court held that a longshoreman could not recover for injuries sustained while using his employer's forklift on the dock to load a ship.⁴⁵ Refusing to move the LHWCA jurisdiction onto the pier, the Court expressed fears that state remedies would be pre-empted or displaced⁴⁶ and stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution."⁴⁷

THE 1972 AMENDMENTS

Even though *Calbeck* delineated the extent of jurisdiction under the LHWCA, adherence to the *Jensen* line in situations similar to those in *Nacirema* and *Victory* did not achieve equitable compensation. Justices Douglas, Black and Brennan attempted to cure the inequity by judicially extending the coverage of the Act inland.⁴⁸ Although conceding that the inequity might be "intolerable," the majority of the Court refused to engage in the judicial legislation necessary for extending jurisdiction.⁴⁹

In amending the LHWCA, Congress accepted the Supreme Court's invitation to extend the jurisdiction of the Act shoreward.⁵⁰ The amendments, however, represented a trade-off. In return for increased territorial jurisdiction under the Act, longshoremen for-

43. 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom. Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

44. 398 F.2d at 904. Justice Douglas adopted this argument in his dissent. 396 U.S. at 224.

45. 404 U.S. at 203.

46. *Id.* at 212.

47. *Id.* at 216.

48. See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224-25 (1969). (Douglas, Brennan & Black, JJ., dissenting).

49. 404 U.S. at 216. See text accompanying note 47 *supra*.

50. *Id.* at 216. In *Nacirema* as well, the Court rejected the notion that they could judicially interpret coverage under the LHWCA to coincide with the limits of admiralty jurisdiction:

While we have no doubt that Congress had the power [to make the coverage of LHWCA coincide with the limits of admiralty jurisdiction], 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, and not to this Court.

396 U.S. at 223-24.

feited most of their non-LHWCA remedies against vessels and employers.⁵¹ The shoreward expansion of territorial jurisdiction of the LHWCA was substantial. Coverage under the original LHWCA had been based on "an injury occurring upon the navigable waters of the United States"⁵² Although the amended Act retained this general language, the amendment parenthetically defined "navigable waters of the United States" as "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel",⁵³ thus expanding significantly the territory covered by the LHWCA.

This expansion of territorial jurisdiction, however, was not an absolute expansion of coverage; in addition to the territorial situs requirement, the amended LHWCA contained a status requirement restricting coverage to maritime employees. As defined by Congress, a covered employee encompassed "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations"⁵⁴ In adopting a status approach to determining coverage as suggested by Judge Sobeloff in *Marine Stevedoring* and as endorsed by Justice Douglas in *Nacirema*,⁵⁵ Congress, however, failed to define precisely the terms of the requirement.

The amended LHWCA therefore abandoned the well-defined water's edge as an inequitable, artificial line and adopted, in its

51. From the stevedore's point of view, the object of the trade-off was to eliminate the effect of the seaworthiness doctrine under which the vessel's owner was strictly liable for injuries sustained because of any fault of the vessel. Although originally only seamen were allowed to recover under the doctrine, it was extended to longshoremen injured on board a vessel by *Sea Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Under theories of express or implied warranty, the vessels' owner generally succeeded in recovering damages from the stevedore when the owners were held liable to injured longshoremen. Liability therefore was transferred to the stevedore, the actual employer of the longshoremen, thus increasing the costs and legal fees. The amendments eliminated suits under the seaworthiness doctrine, indemnification actions, and warranty or indemnity agreements. It did not eliminate suits against vessels or third parties for negligence. See 33 U.S.C. § 905(b) (Supp. II, 1972). See generally Comment, *The Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. MIAMI L. REV. 94 (1972).

52. See note 4 *supra*. The single parenthetical inclusion of "any drydock" reflected the judicial precedents including drydocked ships in the admiralty jurisdiction. See, e.g., *The Jefferson*, 215 U.S. 130 (1909).

53. See note 6 *supra*.

54. See note 7 *supra*.

55. See notes 43 & 44 *supra* & accompanying text.

place, a relatively complex, two-part test for measuring the extent of the Act's coverage. Despite the comparative complexity of the revised situs requirement, courts experienced little difficulty in determining territorial jurisdiction.⁵⁶ Deciding which workers were entitled to coverage proved more difficult, however. The principal problem was construing the term "engaged in maritime employment." Individually, the Courts of Appeals for the First, Second, Third, Fourth, Fifth and Ninth Circuits addressed the issue and reached divergent results.⁵⁷ This disparity among the courts has frustrated the goals of uniformity and equity in LHWCA compensation. To achieve these goals, these judicial interpretations of the new status requirement of the LHWCA must be reconciled, and a practical, uniform approach to determining coverage under the LHWCA adopted.

JUDICIAL INTERPRETATION OF THE 1972 AMENDMENTS

Fourth Circuit

The Court of Appeals for the Fourth Circuit addressed the question of the extent of coverage under the 1972 amendments in *I.T.O. Corp. v. Benefits Review Board*.⁵⁸ In *I.T.O.*, the court attempted to specify those shoreside workers entitled to coverage under the Act. With the situs requirement sufficiently broadened to include practically all waterfront workers,⁵⁹ the difficulty was determining what qualified as maritime employment. The court's interpretation of "maritime employment" turned on a concept of "point of rest," the first storage or holding area during unloading.

Three claims were consolidated for appeal in *I.T.O.* The Administrative Law Judge who heard the claims and the Benefits Review

56. See note 8 *supra*.

57. The circuit courts each deemed the interpretation of the status requirement to be the central issue. *Stockham v. John T. Clark & Son*, 539 F.2d 264, 271-72 (1st Cir. 1976); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 51 (2d Cir.), *cert. granted sub nom.* *Northeast Marine Terminals Inc. v. Caputo*, 97 S. Ct. 522 (1976); *Sea-Land Serv., Inc. v. Dir. Office of Workers' Comp. Programs*, 540 F.2d 629 (3d Cir. 1976); *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976); *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d 1080, 1084 (4th Cir. 1975); *Jacksonville Shipyards Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976); *Weyerhaeuser v. Gilmore*, 528 F.2d 957, 959 (9th Cir. 1975). The Virginia Supreme Court has also addressed the issue in *White v. Norfolk & Western Ry. Co.*, No. 751407 (Va. March 4, 1977).

58. 542 F.2d 903 (4th Cir. 1976), *modifying on rehearing* 529 F.2d 1080 (4th Cir. 1975).

59. All of the claimants in *I.T.O.* satisfied the situs test. "As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel." 529 F.2d at 1084.

Board that approved the awards⁶⁰ found that claimants Adkins, Brown, and Harris were engaged in maritime employment.⁶¹ The employers and their insurance carriers appealed from the awards granted to the claimants and presented the question of maritime employment to the Court of Appeals. Adkins had been injured while moving the contents of a container from a storage area onto a waiting delivery truck.⁶² Brown had been injured while "stuffing"⁶³ a shipping container for delivery to a waiting vessel.⁶⁴ Harris worked as a "hustler"⁶⁵ and had received his injury while moving a container, stuffed with goods stored after inland delivery, from the stuffing area to the marshalling area.⁶⁶ In construing the meaning of "maritime employment," the court believed it necessary to consider the legislative history of the amendments,⁶⁷ initially examining language in committee reports indicating an intent to extend coverage only to those "who would otherwise be covered by this Act

60. The 1972 amendments to the LHWCA created the Benefits Review Board as a quasi-judicial intermediate step between the administrative judge and the courts of appeals. The amendments gave the three member Board independent authority to hear and determine questions of law or fact. See 33 U.S.C. § 921(b) (Supp. II, 1972).

61. 529 F.2d at 1081.

62. Adkins was a forklift operator who sustained his injuries while he was moving a load of brass tubing from its storage place in a warehouse to a waiting delivery truck which would transport it to its ultimate destination. He thus performed a function in the overall unloading of the ship and in the discharge of its cargo from the terminal. The tubing, packed in a container, had arrived at the terminal seven days earlier aboard a ship. Upon arrival, the container had been removed from the vessel to a marshalling area. Three days later, the container was moved to a transit shed where it was "stripped" or unloaded and the tubing stored to await transportation to its destination. The delivery truck did not arrive until four days later. Shortly thereafter Adkins was injured loading the tubing with his forklift. 529 F.2d at 1082.

63. "Stuffing" is the term used to describe the process of loading a container with cargo. Containers are rectangular metal structures used to transport cargo. After unloading these containers off the vessel by crane, they are equipped with a chassis and wheels and converted into large box trailers capable of being hauled on the highways by tractors.

64. Brown suffered carbon monoxide poisoning while employed as a forklift operator at Marine Terminals. His job was to move loads of cargo, arriving at the terminal by rail or truck, to an empty container to be stuffed. 529 F.2d at 1082.

65. A "hustler" moves fully loaded containers from the stuffing area to the marshalling area.

66. Harris was injured when, due to brake failure, the vehicle he was driving collided with a shipping container. Harris moved containers from the long-term container storage area to the container marshalling area and was on the return trip to the long-term storage area to pick up another container when the injury occurred. 529 F.2d at 1082.

67. *Id.* at 1084-85. In a strong dissent, Judge Craven discerned no need to consult legislative history, *id.* at 1090-91, in that he found no ambiguity in the literal terms of the statute and contended that the legislative history was vague, contradictory, and misleading. *Id.* at 1094-95.

[before amendment] for part of their activity."⁶⁸ Read in this context, this phrase would extend coverage to those workers who crossed the water's edge as a part of their particular job function but were injured in an adjoining land area. Significantly, however, the court declined to adhere precisely to the letter of the committees' statement that the statute would apply only to persons who would have been covered by the Act before amendment, concluding that even employees "engaged in moving cargo between ship and point of rest who never cross the water's edge . . . [would] be eligible for benefits"⁶⁹ because they were within the point of rest and performed traditional longshoring functions. Therefore, the court departed from a literal interpretation of the legislative history.

The court in *I.T.O.* favored a strict construction of the statute and adopted a construction based on an illustrative example found in the committee report submitted by the Senate Committee on Labor and Public Welfare:

To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. 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. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered⁷⁰

Focusing on the concept of "stored cargo" as the definitive point in the overall process of loading and unloading, the court apparently assumed that the first storage or holding area to which goods were taken during unloading and the point at which persons "pick up stored cargo for further trans-shipment" were intended, by the committee, to denote the same geographical point.⁷¹

68. S. REP. NO. 92-1125, 92d Cong., 2d Sess. 13 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

69. 529 F.2d at 1088.

70. S. REP. NO. 92-1125, 92d Cong., 2d Sess. 13 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

71. 529 F.2d at 1086-87.

In rejecting the contention of the Benefits Review Board that benefits under the Act extended to all persons handling cargo or performing related functions in the terminal area, the court advanced a "point of rest" theory, adopting the first storage or holding area during unloading and the last storage or holding area during loading as the definitive point of rest.⁷² The Fourth Circuit opinion concluded that the point of rest was the limiting geographical point for establishing coverage or non-coverage.⁷³ Thus, maritime employment was deemed to encompass only the immediate process of loading and unloading between the vessel and the point of rest. Under this restricted view of maritime employment, longshoremen injured landward of the first point of rest were deemed outside the coverage of the Act regardless of their particular job function.⁷⁴

The claims in *I.T.O.* subsequently were reheard en banc by the Court of Appeals for the Fourth Circuit.⁷⁵ On rehearing, the point of rest test was accepted by three judges. Judge Widener, however, deemed dispositive whether the "otherwise eligible employee [was] injured while engaged in loading or unloading a ship."⁷⁶ Yet, stating that an employee was covered if he was loading or unloading a vessel merely reiterated the statute. Moreover, Judge Widener applied the new test as though he were applying the point of rest theory rephrased in non-geographic terms. Implicit in his understanding of the loading or unloading process was the view that prior to the arrival of cargo at a point of rest, the loading process had not begun.⁷⁷ Thus the new majority retained the essentially territorial view of the point of rest theory.

The majority en banc held that as Adkins was injured while handling cargo for transshipment he was not participating in the unloading process and thus was not entitled to coverage under the Act.⁷⁸ In Brown's and Harris' cases, three judges believed that the claim-

72. *Id.* In applying the point of rest theory to the cases at bar, the majority concluded that the marshall area adjacent to the pier was the point of rest. Because Adkins was injured landward of the first point of rest and Brown and Harris were injured landward of the last point of rest, the court allowed no coverage. *Id.* at 1087-88. See notes 62-66 *supra*.

73. *Id.* at 1087.

74. *Id.* at 1088.

75. 542 F.2d 903 (1976).

76. *Id.* at 905. Judge Widener did not submit a separate opinion; rather, his views were described by Judge Winter in the majority opinion.

77. *Id.* The point of rest to which Judge Widener made implicit reference was not the same as the point of rest referred to by the other judges.

78. *Id.*

ants were involved in the loading process although landward of the point of rest. In a divided decision, the court upheld Brown's and Harris' claims as entitled to coverage.⁷⁹

After the *I.T.O.* rehearing, the Fourth Circuit's construction of maritime employment in the context of longshoring operations remained unresolved. Three judges supported the point of rest theory; two judges adamantly opposed it. Apparently satisfied to resolve the issue ad hoc, the sixth judge merely espoused an ambiguous theory of "loading and unloading."⁸⁰

Second Circuit

The Court of Appeals for the Second Circuit addressed the extent of shoreside coverage of the LHWCA in *Pittston Stevedoring Corp. v. Dellaventura*.⁸¹ The case consolidated four petitions to review orders of the Benefits Review Board affirming compensation awards made to four workers. Two of the claims involved the loading and unloading of containers; the other two claims resulted from loading cargo into consignee's trucks on a pier.⁸² Two petitions subsequently were dismissed because of untimeliness and lack of a justiciable controversy;⁸³ the claims of claimant Blundo who was injured while employed as a "checker"⁸⁴ and claimant Caputo who was employed as a terminal laborer⁸⁵ remained.

Although recognizing that the 1972 amendments extended the coverage of the Act, the petitioners in *Pittston* nevertheless argued that the extension was limited to facts comparable to those in

79. *Id.*

80. Judge Winter, Judge Russell, and Chief Judge Haynsworth supported the point of rest theory. Judge Craven and Judge Butzner opposed the theory as a judicial gloss on the 1972 Amendments to LHWCA.

81. 544 F.2d 35 (2d Cir. 1976) *cert. granted*, 97 S.Ct. 522 (1976).

82. *Id.* at 41-42.

83. *Id.* at 42-46.

84. A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records. Blundo, who was employed as a "checker", slipped on ice and injured himself while checking cargo being removed from a container on the pier within 40 feet of the water. The container he was checking had been unloaded a few days before at another pier and taken by truck over city streets to the "stripping" pier. *Id.* at 41.

85. Caputo usually was employed at terminal labor. If there was no work available there he took a "shape up" job as a longshoreman whenever it was available. On the day of the accident, he was working at a terminal adjoining the water and was injured while inside a truck helping a cargo consignee's truck driver load boxes of cheese that had been discharged from a vessel at least five days earlier. *Id.* at 42.

Nacirema,⁸⁶ in which the employees were injured on the pier.

In contrast, the injured claimants, the International Longshoremen's Association, and the Solicitor of Labor contended that the extension of coverage was greater than that suggested by the narrow reading urged by the petitioners; they maintained that "the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in maritime employment."⁸⁷ The court perfunctorily rejected petitioners' restrictive reading of the coverage provisions yet declined to decide whether it fully endorsed the scope of coverage espoused by the respondents.⁸⁸

Writing for the majority, Judge Friendly began analysis of the 1972 amendments by endorsing the principle that remedial legislation should be construed liberally.⁸⁹ Without specifically attempting to construe the statute liberally, the court immediately proceeded to examine the Act's legislative history to determine the scope of the phrase "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations"⁹⁰ On the basis of the legislative history, the court read this to mean "*any longshoremen or other person engaged in longshoring activity or engaged in other maritime employment*".⁹¹ The court viewed the language of the Senate Committee Report on Labor and Public Welfare as corroborating such a blanket inclusion of longshoremen as a covered class of workers. The Report stated:

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the act to provide coverage of longshoremen, harbor workers . . . and other employees engaged in maritime employment . . . if the injury

86. See notes 36, 38-44 *supra* & accompanying text. *Nacirema* reversed the en banc decision of the Court of Appeals for the Fourth Circuit in *Marine Stevedoring*.

87. 544 F.2d at 46-47.

88. *Id.*

89. *Id.* at 51. "This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Id.*, quoting *Voris v. Eikel*, 346 U. S. 328, 333 (1953) (commenting on the original version of the LHWCA).

90. 33 U.S.C. § 902(3) (Supp. II, 1972).

91. 544 F.2d at 52.

occurred either upon the navigable waters of the United States [or designated adjoining area].⁹²

Even more significant to the court was that the Act specifically mentions in its definition of employee, "any longshoreman" as well as any other "person engaged in longshoring operations."⁹³ The court deemed this specific inclusion to mean that such a worker at times would be covered even when he was not performing traditional longshoring activities,⁹⁴ that is, "irrespective of the employee's position vis-a-vis a 'point of rest'".⁹⁵ As the court argued persuasively, inasmuch as even the petitioner conceded that persons moving unloaded cargo to its first point of rest, or moving cargo to be loaded from its last point of rest, are "engaged in longshoring operations", if only they were entitled to coverage, there would have been no reason to provide as well for *any* longshoreman.⁹⁶ Therefore, this blanket inclusion of all longshoremen means simply that the Act covers workers injured while performing longshoring activities anywhere within the situs requirement, and not that the Act affords coverage to any longshoreman injured on a pier no matter what he actually is doing when injured.⁹⁷ For, as the court emphasized upon concluding its analysis of these statutory provisions, its interpretation does not encompass all employment-related injuries occurring within the situs specified by the Act.⁹⁸

In determining what Congress meant by the term "longshoreman," the court stated correctly that neither the title of the worker's job, nor that of his union, should be dispositive.⁹⁹ Upon examining the legislative history,¹⁰⁰ the court noted that the Senate

92. S. REP. NO. 92-1125, 92d Cong., 2d Sess. 13-14 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

93. 544 F.2d at 52.

94. *Id.*

95. *Id.* at 53.

96. *Id.* at 52.

97. *Id.* at 47.

98. *Id.* at 56.

99. *Id.* at 52.

100. The court once again referred to the committee reports, seemingly extracting a satisfactory answer from the following language:

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. Thus, employees whose responsibility is only to pick up stored cargo for further trans-

and House Committee reports had expressly excluded the following workers from coverage: those whose only responsibility was to pick up stored cargo for further transshipment,¹⁰¹ and those purely clerical workers whose jobs did not require them to participate in the loading and unloading of cargo.¹⁰² Furthermore, the court perceived that Congress had been concerned with the advent of modern cargo-handling techniques such as containerization.¹⁰³ Asserting that stripping a container of goods destined for different consignees is the functional equivalent of sorting cargo discharged from a ship onto the dock and that stuffing a container is a part of loading the vessel even if performed on land and not in a cargo hold, the court concluded that Congress intended to cover persons performing these activities if they met the situs test of the Act.¹⁰⁴ Thus, persons involved in the loading and unloading processes, necessitated by modern cargo-handling techniques, were afforded coverage. For, the court discerned that Congress intended to provide uniform coverage for persons engaged in loading or unloading functions on land¹⁰⁵ so as to minimize the occasions on which longshoremen and other harbor workers would forfeit the liberal benefits of the LHWCA for

shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

544 F.2d at 52, quoting S. REP. NO. 92-1125, 92d Cong., 2d Sess. 14-15 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708. See also text accompanying note 70 *supra* for additional language from the committee reports upon which the court relied.

101. In discussing this description of excluded persons, the court asserted that cargo would not be considered "stored" merely because the consignee wanted five days to pick it up. 544 F.2d at 54. Implicit in this comment is the view that time is an integral element in determining whether cargo is "stored." As the facts of the case did not require it, the court declined to decide whether cargo should ever be considered "stored" as long as it remained on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. The Court observed, however, that a delay of 133 days, as had occurred in another case, might have necessitated such a decision.

102. 544 F.2d at 53.

103. *Id.*

104. *Id.* at 53-54.

105. *Id.* at 54. The court quoted with approval from the committee report: "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." See note 100 *supra*.

the much lower state benefits by simply moving or walking across an imaginary line in the normal course of their employment.¹⁰⁶

The court affirmed an award to Caputo although he had been injured inside a consignee's truck. Emphasizing the realities of what it deemed "life on the waterfront", the court noted that dock workers often aid the consignee's driver so as to expedite the loading process and to minimize dock congestion. As the court concluded correctly, it would have been "wholly artificial" to uphold an award to Caputo for an injury occurring while he was moving the cargo down the dock to the consignee's truck and yet to deny the award merely because the injury occurred inside the truck.¹⁰⁷ Consistent with the liberal interpretation mandated by this remedial statute, the court held that the Act at least covers

all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel.¹⁰⁸

Apparently the additional requirement that cargo handlers must have spent a significant part of their time in typical longshoring activity, that is, crossing the water's edge to load or unload a vessel, was added in light of the following language in the committee reports: "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act [before amendment] for part of their activity."¹⁰⁹ Because both claimants had spent substantial time in typical longshoring activity, however, the court declined to decide whether this additional requirement was essential.¹¹⁰ It appears, nevertheless, that such a requirement might prove difficult to apply, given the imprecision of the term "substantial time."

Nonetheless, in interpreting the LHWCA as extending coverage to any longshoreman, including strippers and stuffers, and to per-

106. *Id.*

107. *Id.* (emphasis supplied).

108. *Id.* at 56.

109. See note 100 *supra*.

110. 544 F.2d at 56.

sons such as cargo handlers who are engaged for a significant time in typical longshoring operations, and in suggesting these categories were properly delimited by the scope of the loading and unloading processes in the context of modern-cargo handling techniques, the Second Circuit correctly focused on functional criteria as determinative of coverage and enumerated some of the covered functions. Moreover, although the court conceded that its more liberal construction in part "rea[d] the status requirement out of the Act,"¹¹¹ it stressed that its construction did not do so completely. For, as noted previously, the court expressly rejected the contention in one commentary¹¹² that the amendments could properly be read to encompass all employment-related injuries occurring within the Act's territorial limits. Such a rejection further corroborates that the Second Circuit required a nexus between the employee's injury and his participation in the overall process of loading and unloading.

First Circuit

Shortly after *Pittston*, the Court of Appeals for the First Circuit, confronting similar facts, addressed the issue of coverage in *Stockman v. John T. Clark & Son, Inc.*,¹¹³ and rejected, as did the Second Circuit, any approach that would completely abrogate the status requirement by providing federal coverage for all injuries occurring within the Act's territorial limits.¹¹⁴ Furthermore, the court in *Stockman* concurred in the Second Circuit's view that a claimant's status need not depend on the job being performed at the very moment of injury.¹¹⁵ Rather, the court deemed that determining a worker's status required looking at the nature of his regularly assigned duties as a whole.¹¹⁶ For example, the court suggested that Congress intended to include a regularly employed longshoreman whose duties periodically required him to board a vessel, but who at the time of his injury was engaged in moving cargo shoreward of the point of rest.¹¹⁷ *Stockman* was employed on the Boston waterfront and was injured while moving the contents of a container that previously had been off-loaded from a vessel. The employer oper-

111. *Id.*

112. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6.51 at 430 (1975).

113. 539 F.2d 264 (1st Cir. 1976).

114. *Id.* at 274.

115. *Id.*

116. *Id.* at 275.

117. *Id.*

ated as a stevedore and as a terminal operator.¹¹⁸ In this dual capacity, the employer, using commercial truckers, hauled containers to a stripping and stuffing area approximately two miles by land or eight hundred feet across open water from the port where the containers had been off-loaded.¹¹⁹ The complainant's injury occurred within this stripping and stuffing area, in other words, shoreward of the point of rest. Nonetheless, because the work area was part of a terminal and was an "adjoining area used for loading and unloading a vessel", the court concluded that Stockman satisfied the situs requirement,¹²⁰ thus expressly rejecting the Fourth Circuit's point of rest analysis as perpetuating the evil of "bifurcated coverage for essentially the same employment."¹²¹

The court, however, concurred with the views of the Second and Fourth Circuits that the terms "longshoremen", "maritime employment", and "longshoring operations" do not have such well established meanings that the case could be decided without resorting to legislative history.¹²² Given both the narrow interpretation in *I.T.O.*, limiting coverage to those performing the immediate loading and unloading of ships, and the more expansive reading in *Pittston*, extending coverage to those participating in the overall process of loading and unloading a vessel, the court in *Stockman* believed that *Pittston* better effectuated congressional intent.¹²³

118. *Id.* at 266.

119. *Id.*

120. *Id.* at 272. The court dismissed the great distance the cargo travelled between off-loading and stripping as inconsequential for purposes of the situs requirement, stating: "we do not think Congress meant necessarily to limit 'adjoining' to only those areas directly adjoining the berth of the specific vessel being unloaded." The terminal in which the injury occurred was in a location customarily used in loading or unloading vessels and therefore met the situs requirement, although the cargo being stripped when the injury occurred had been off-loaded elsewhere. *Id.*

121. *Id.* at 275.

122. *Id.* at 272.

123. According to the court, the legislative history evinced the following legislative intent:

- 1) The amendments are to be construed to achieve a "uniform compensation system" which does not depend on the "fortuitous circumstance of whether the injury occurred on land or over water."
- 2) The amendments are to afford coverage to employees, or possibly classes of employees, who would otherwise have been covered for part of their activity by the earlier Act.
- 3) One of the reasons for affording coverage on land is that "with the advent of modern cargo-handling techniques, such as containerization and use of LASH-type vehicles, more of the longshoreman's work is performed on land than heretofore."

Id. at 274-75.

Stressing the realities of maritime employment, the court noted, as did the Second Circuit, that modern cargo handling techniques, requiring that longshoremen to work more on land, had necessitated this shoreside extension of coverage.¹²⁴ Therefore, although the court deduced from the legislative history that coverage was intended for those who formerly would have been covered for part of their activity, that is, those whose duties involve shipboard activity, it recognized that even traditional longshoring activities at times were organized so that some workers always remained on the pier in participating in the overall loading and unloading process, and observed that such men are just as much longshoremen as are their colleagues on the ship.¹²⁵ By thus focusing on functional criteria, the court interpreted the legislative history and the Act as simply mandating "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier act—not necessarily a demonstration by each claimant that he individually would have been covered."¹²⁶ Therefore, it deemed, as did the Second Circuit, that a person within the situs requirement, who strips containers holding unsorted cargo, destined for several consignees, was a longshoreman under the Act regardless of whether his individual duties required him to go aboard ship.¹²⁷ Hence, the First Circuit applied functional criteria in expressly extending coverage to those employees engaged in stripping containers but did not attempt to enumerate all classes or functions of employees to which coverage might extend.

Ninth Circuit

The coverage provisions of the amended Act also were interpreted by the Court of Appeals for the Ninth Circuit in *Weyerhaeuser Co. v. Gilmore*¹²⁸ on decidedly different facts involving no longshoremen. In *Weyerhaeuser*, the court concluded correctly that although the 1972 amendments expanded and liberalized the situs requirement for coverage, they restricted the status requirement by requiring the

124. *Id.* at 275-76.

125. *Id.* at 277.

126. *Id.* The court, however, did reserve decision on whether workers who are not clearly longshoremen, or otherwise specifically included in some recognized category of maritime employment, might have to demonstrate their entitlement to coverage by showing that their duties encompassed shipboard activity.

127. *Id.*

128. 528 F.2d 957 (9th Cir. 1975).

worker to be engaged in "maritime employment." As a test of maritime employment, the court held that an employee's own work, as distinguished from his employer's diversified operations, must have "a realistically significant relationship to traditional maritime activity involving navigation and commerce on the navigable waters"¹²⁹ *Weyerhaeuser* concerned a "pondman"¹³⁰ injured while working at his duties sorting logs floating on a saltwater bay of the Pacific Ocean. The unique facet of the case was that the complainant clearly would have been covered under LHWCA prior to the 1972 amendments.¹³¹ Nonetheless, reasoning that a pondman's duties in an inland lake or river certainly could not be considered "maritime employment", the court concluded that although the complainant was injured on a navigable waterway, he did not qualify for coverage under the amended LHWCA.¹³²

Third Circuit

In *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*,¹³³ the Court of Appeals for the Third Circuit also examined the scope of the amended LHWCA coverage provisions, concluding that "[t]he line delimiting the outer reaches of the Act's extended coverage is . . . functional and not spatial."¹³⁴ Although the court considered Judge Friendly's approach valid, it chose to view the problem from a different perspective.¹³⁵ According to the court, an employment nexus with maritime activity is requisite, that is, the jurisdictional basis of the claim is the relation of the function being performed by the injured employee to the waterborne, rather than land-based, transportation.¹³⁶ Finding Judge Craven's dissent in *I.T.O.* persuasive, the Third Circuit expressly rejected the Fourth Circuit's point of rest theory.¹³⁷ Although it used

129. *Id.* at 961. In adopting this test of maritime employment, the court relied heavily on the test for admiralty tort jurisdiction suggested in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

130. A "pondman" sorts logs and feeds them into the sawmill for processing. In performing these duties, he walks about on the logs and moves them with pike poles.

131. See *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953).

132. 528 F.2d at 961-62.

133. 540 F.2d 629 (3d Cir. 1976).

134. *Id.* at 636. In *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), Judge Van Dusen applied the *Sea-Land* rationale to a land-based worker in the shipbuilding industry.

135. 540 F.2d at 629.

136. *Id.* at 638.

137. *Id.* at 639.

somewhat different terminology, the court concluded, as had Judge Craven, that the congressional intent was to extend coverage to all those employees engaged in handling cargo at the interface between waterborne modes of transportation and land or airborne modes of transportation.¹³⁸

In *Sea-Land*, the worker had been injured when the truck he was driving, which was loaded with a large crate, overturned on a public street in the marine terminal. Upon concluding that the Act could cover accidents occurring in an area of the terminal that was not under the employer's control,¹³⁹ the court turned to what it deemed the "crucial issue": whether the injury had occurred when the employee was engaged in an activity related to stevedoring rather than to land-based (trucking or warehousing) operations.¹⁴⁰

Consistent with its assertion that the line delineating coverage was to be drawn between maritime and land commerce, in other words, where cargo is delivered to a separate place for delivery to the next mode of transportation,¹⁴¹ the court stated that it is irrelevant whether one employer is engaged in both types of commerce. Rather, in determining entitlement to coverage, the relevant function is that performed at the time of the injury. Inasmuch as the record was equivocal concerning this crucial fact, the court set aside the order of the Benefits Review Board and remanded the case.¹⁴² Moreover, the court suggested that findings as to the contents, source, and destination of the crate (for example whether it was full and destined for a ship) were necessary in establishing whether the worker was engaged in maritime employment at the time of the injury.¹⁴³

138. *Id.* at 638. As the court stated:

[T]he overall intention appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up.

Id. According to the Third Circuit, Judge Craven, in his *I.T.O.* dissent, similarly had espoused the view that longshoring "was a continuous process involving different employees, which continued at all times while the cargo was in maritime commerce as distinguished from land commerce." *Id.* at 639.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 640.

143. *Id.* at 639.

Fifth Circuit

The Fifth Circuit addressed the issue of coverage in *Jacksonville Shipyards, Inc. v. Perdue*¹⁴⁴ and reached results consistent with the First and Second Circuits. The opinion by Judge Tjoflat paralleled Judge Friendly's analysis in *Pittston* but supplied additional definition in areas left undefined by the other circuit courts. Rather than enumerating employee classes and functions entitled to coverage, the Fifth Circuit, as did the Third Circuit, attempted to interpret the status requirement in the abstract and apply the resulting guidelines to the various facts of the cases.¹⁴⁵

In interpreting the coverage provisions, the Fifth Circuit referred to the House Report's "typical example" upon which the Fourth Circuit had based its point of rest theory¹⁴⁶ and concluded that the passage in the report established:

no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation.¹⁴⁷

Finding the amorphous guidelines provided by this language inadequate, the court relied on language in the committee reports indicating that employees directly involved in the loading or unloading of a vessel are to be covered under the Act.¹⁴⁸ In the absence of explicit language establishing a point of rest dividing line for shoreside cargo handlers, the court rejected this arbitrary standard for determining coverage, adopting instead the more expansive test of whether, at the time of injury, the claimant actually was performing or directly involved in loading and unloading functions.¹⁴⁹ Thus, the Fifth Circuit endorsed a broad interpretation of "maritime employment" based on job function, but refused, as had the Second¹⁵⁰ and Third

144. 539 F.2d 533 (5th Cir. 1976).

145. *Id.* at 538-44.

146. See note 70 *supra* & accompanying text. The House Report is identical to the Senate Labor and Welfare Committee report.

147. 539 F.2d at 540.

148. See note 100 *supra*.

149. 539 F.2d at 540.

150. 544 F.2d at 52-53, 56.

Circuits,¹⁵¹ to accept general job descriptions or union classifications as determinative of this function.¹⁵²

Such a job function test essentially conforms to the interpretation advanced in *Pittston* and followed in *Stockman* in that it also focused on the overall process of loading or unloading.¹⁵³ Similarly, the extent of the overall process as defined and applied in *Perdue* is consistent with the First, Second, and Third Circuits' views. According to the Fifth Circuit, the unloading process continued until the last step in transferring cargo from land to sea transportation was completed, that is, until the cargo departed by land transportation.¹⁵⁴ Conversely, the overall loading process commenced when cargo was received for removal from land transportation.

Although consistent with the First and Second Circuits as to the basic interpretation of the status requirement, the Fifth Circuit decision is distinguishable from *Pittston* and *Stockman*. Petitioners in *Perdue* advocated a limitation on covered employees based on the committee reports' announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act [before amendment] for part of their activity."¹⁵⁵ Precisely this language motivated Judge Friendly, in the Second Circuit, to restrict coverage for cargo handlers to those who participated for a considerable amount of time in traditional longshoring activities, that is, boarding a ship to directly load and unload it.¹⁵⁶ Similarly, in light of this language, the First Circuit declined to decide expressly whether persons in a class of employees whose job did not require crossing the water's edge, were entitled to coverage without demonstrating individually that their duties encompassed some shipboard work.¹⁵⁷

151. 540 F.2d at 639-40.

152. The court stated: "We therefore reject respondents' contention that an employee's general job classification (such as 'longshoreman' or 'ship repairman') will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured." 539 F.2d at 539.

153. See notes 94, 97, 104-05, 126 *supra* & accompanying text.

154. See 539 F.2d at 540, 543-44. In defining the limits of the loading and unloading processes, the court specifically rejected any constructions of the term "maritime employment" based on pre-1972 decisions. See, e.g., *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nako Chem. Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969). Because pre-1972 constructions of the term were necessarily limited by the "water's edge" approach, the court concluded that "these older cases simply do not speak to the issue of what landbased employment is sufficiently maritime to be covered by the new Act." 539 F.2d at 539.

155. See note 68 *supra* & accompanying text.

156. See note 109 *supra* & accompanying text.

157. See note 126 *supra*.

In rejecting this implied limitation Judge Tjoflat, in the Fifth Circuit, concluded that:

the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions."¹⁵⁸

The Fifth Circuit, as did the Third Circuit, espoused a purely functional interpretation of the status requirement, without regard to the location of the injury within the covered situs and without reference to any artificial line such as the water's edge or the point of rest. Referring to legislative history indicating that an injured employee would be covered if "engaged in loading, unloading, repairing, or building a vessel," but would not be covered merely because the injury occurred within the covered situs,¹⁵⁹ the court in *Perdue* concluded, consistent with the Third Circuit's holding that the worker's activity at the time of injury must be related functionally to maritime employment, that to be entitled to coverage, the employee actually must be performing or directly involved in a covered job function at the time of injury.¹⁶⁰ In establishing their functional tests, therefore, both courts emphasized that the nature of the employee's work at the time of injury was the controlling factor under the status requirement.¹⁶¹ Although in propounding functional tests, the Second and First Circuits did not deem determinative the job a worker was performing at the time of injury, it appears this stance is not in conflict with that of the Third and Fifth Circuits, but means merely that whether an employee was injured

158. 539 F.2d at 540-41 n.21, quoting H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 11 (1972) reprinted in [1972] U.S. CODE CONG. & AD. NEWS, 4698, 4708.

159. See note 70 *supra* & accompanying text.

160. 539 F.2d at 539.

161. *Id.*

while handling cargo shoreward of the point of rest was not dispositive. Yet, that the Fifth Circuit cited approvingly¹⁶² the Ninth Circuit's language in *Weyerhaeuser* stating that the injured employee's work must bear "a realistically significant relationship" to maritime employment,¹⁶³ demonstrates that the "at the time of the injury" portion of the test would not extend coverage to a worker such as a truck driver, who merely offered his assistance in loading cargo and was then injured.

Two of the five cases consolidated for appeal in *Perdue* construed the terms "ship repairman, shipbuilder or ship breaker" as classes of "maritime employment". Because these terms are well defined in common usage and precise in their accepted meanings, they are not as difficult to apply as are the ambiguous "longshoremen" or "longshoring operations." To illustrate, in *Perdue* claimant Nulty, a carpenter, was injured while fabricating a part for a ship within an area customarily used for shipbuilding and repair.¹⁶⁴ The court summarily concluded that Nulty was a shipbuilder directly involved in the process of shipbuilding and was therefore entitled to coverage.¹⁶⁵ Another employee, Charles Skipper, normally employed as a ship repairman, sustained an injury while dismantling a building in an abandoned terminal area.¹⁶⁶ Disregarding Skipper's normal job classification, the court examined his duties at the time of injury. Concluding that these duties were clearly not encompassed by the term "ship repairman," the court denied compensation.¹⁶⁷ The court also denied Skipper coverage because he did not satisfy the situs requirement.

The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal," for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading or one of the other functions specified in the act It will not suffice if

162. *Id.*

163. 528 F.2d at 961.

164. 539 F.2d at 543.

165. *Id.* at 544. "In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation." *Id.*

166. *Id.* at 542. The purpose of dismantling the structure was to salvage steel for use in constructing a new plant that would manufacture sandblasting equipment.

167. *Id.*

the area was so used only in the past, or if such uses are merely contemplated for the future.¹⁶⁸

Pursuant to this function-oriented situs requirement another claimant, Perdue, was denied coverage.

Employed as a shipfitter, Purdue was injured while alighting from a bus at his employer's office building. The court held that because the area in which he was injured was not customarily used for a covered activity he did not satisfy the function-oriented situs requirement.¹⁶⁹

The remaining two cases involved persons claiming either as longshoremen or as persons engaged in longshoring operations. Ford and Bryant, claimants in two remaining cases, were employed on opposite ends of the loading and unloading process. Ford's job function, fastening cargo to railroad flat cars, was the last step in transferring cargo from sea to land transportation and as such was directly involved in the process of unloading.¹⁷⁰ Bryant's work was unloading cotton from land transport vehicles to a pierside storage area where it then was taken on board ships by other employees, and "was an integral part of the ongoing process of moving cargo between land transportation and a ship."¹⁷¹

In affirming awards for both Ford and Bryant, the court emphasized that both functions undoubtedly were covered as part of a continuous operation of moving cargo between a ship's hold and land transport.¹⁷² Because neither discontinuity in time nor division of the process into separate parts changed their work's essential nature, loading and unloading cargo, the court allowed coverage for both men.

CONSTRUCTING AND APPLYING CONSISTENT JUDICIAL GUIDELINES

These cases represent the entire body of federal appellate case law construing the LHWCA status requirement. The ambiguity of the terms "maritime employment," "longshoreman," and "longshoring operations" within the status requirement is manifest in the courts'

168. *Id.* at 541.

169. *Id.* at 541-42. The office at which Perdue sustained his injury was approximately one mile from the ship on which he worked. The bus was provided by the employer to transport employees from the work site to the office at the end of the workday. *Id.*

170. *Id.* at 543.

171. *Id.* at 544.

172. *Id.* at 543-44.

non-uniform interpretation of those terms. Despite some divergence in the decisions, by reconciling the discrepancies in interpreting the status requirement, some dominant guidelines emerge.

Point of Rest

The Fourth Circuit's point of rest theory, expressly rejected by the First, Second, Third, and Fifth Circuits, clearly provided the narrowest coverage under the amended LHWCA. The court adopted the point of rest on the basis of a committee report example that designated some of those employees covered by the Act.¹⁷³ Although this "typical example" was couched in broad terms, there was no language in the report supporting its use as an all-inclusive enumeration of employees covered by the Act.¹⁷⁴ As such, the adoption of the example as demarcating coverage was unwarranted. Even assuming arguendo that the committee intended the example to delimit coverage, the point of rest theory interpreted the example narrowly and was consistent with the example only if any movement of cargo landward of the first storage or holding area was defined as transshipment of goods.¹⁷⁵ Yet such a definition of transshipment was supported neither by legislative history nor by judicial precedent.¹⁷⁶

The major deficiency in the point of rest theory is that it confuses the situs and status requirements. In creating two distinct requirements for coverage under the LHWCA, Congress apparently intended the requirements to comprehend separate criteria.¹⁷⁷ Under the point of rest theory, essentially geographic and territorial criteria are determinative in that the court focuses on whether the employee was injured "landward" or "seaward" of the point rather than on the status or activity of the employee.¹⁷⁸ Applying this theory means that workers who fulfill the situs requirement and who

173. See note 68 & 70 *supra* & accompanying text.

174. See S. REP. NO. 92-1125, 92d Cong., 2d Sess. (1972) reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698.

175. See note 70 *supra* & accompanying text.

176. See, e.g., *Garrett v. Gutzeit*, 491 F.2d 288 (4th Cir. 1974); *Chagois v. Lykes S.S. Co.*, 432 F.2d 388 (5th Cir. 1970); *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965); *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964); *McNeil v. Haubor*, 326 F. Supp. 226 (E.D. Pa. 1971); *Olvera v. Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968). But see *Drumgold v. Plouba*, 260 F. Supp. 983 (E.D. Va. 1966).

177. See note 127 *supra* & accompanying text.

178. *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d at 1096-97 (Craven, J., dissenting).

perform the same function and handle the same cargo are treated differently depending on where they are injured.¹⁷⁹ As Judge Craven noted in his dissent in *I.T.O.*, this is precisely the anomaly the 1972 amendments were designed to correct.¹⁸⁰ Because acceptance of the point of rest theory would thus defeat the congressional purpose, it should be abandoned as a guide for determining coverage under the LHWCA.

Although point of rest is an indefensible theory, the deliberations of the Fourth Circuit Court of Appeals in *I.T.O.* contributed some significant interpretive concepts. First, in allowing "longshoremen engaged in moving cargo between ship and point of rest who never cross the water's edge" to recover, despite language in committee reports limiting benefits to employees who crossed the water's edge for part of their activity,¹⁸¹ the Fourth Circuit apparently interpreted the statute as extending coverage, within the confines of the point of rest, to employees on the basis of function rather than on a purely artificial test of whether the employee ever crossed the water's edge. Second, the court excluded from coverage "employees whose only responsibility is to pick up stored cargo for transshipment."¹⁸² Although the court incorrectly defined the point at which transshipment began, such an exclusion would be valid given a defensible interpretation of transshipment, such as those suggested by the other circuit courts. Third, an additional contribution of the *I.T.O.* deliberation was Judge Craven's dissent, forcefully rejecting the point of rest theory and advocating a more workable functional approach similar to that later adopted by the other circuits.¹⁸³

179. *Id.*

180. Judge Craven stated:

[T]he "point of rest" theory, adopted by the majority means that workers performing the *same* function handling the *same* cargo, will be treated differently depending upon *where* they work, even though they are all working on the premises of a terminal conceded to be within the Act's definition of "navigable waters." It was precisely this anomaly, where workers exposed to different risks receive disparate workmen's compensation benefits, which provided the impetus for the 1972 amendments. Thus, the majority effectively holds that the Congress has failed in its attempt to correct a bad situation, and that coverage even yet depends upon a fictional location—point of rest—that has no relation whatever to the inherent risks of employment.

Id. (footnote omitted). See also note 2 *supra* & accompanying text; Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 WASH. U.L.Q. 649, 666.

181. 529 F.2d at 1088.

182. *Id.* The exclusion was taken from the language of the Senate committee report. See note 70 *supra* & accompanying text.

183. *Id.* at 1089.

Defining the Problem

Writing for the Second Circuit in *Pittston*, Judge Friendly emphasized the functional aspects of the status requirement, applying it to employee class and job function criteria. In applying this interpretation of the status requirement, Friendly implicitly categorized waterfront employees into the following classes: (1) persons directly engaged in moving cargo on and off ships; (2) persons handling cargo up to the point at which transshipment begins and who spend a significant part of their employment in the traditional longshoring activity of directly moving cargo on and off ships; (3) cargo handlers who have not spent any significant time in such traditional longshoring activity; (4) employees not directly engaged in movement of cargo; and (5) employees who pick up cargo for transshipment.¹⁸⁴ Concluding that given modern day cargo handling techniques many longshoremen's traditional jobs are performed on shore, Judge Friendly included stripping and stuffing containers within the category of traditional longshoring activities, and afforded coverage to strippers and stuffers as a class.¹⁸⁵ Focusing on the functional characteristics of the terms "longshoremen" and "longshoring operations," the court held any person included in category (1) or (2) to be entitled to coverage.¹⁸⁶ The court, however, did not decide whether cargo handlers who did not cross the water's edge in moving cargo on or off vessels were entitled to coverage as persons engaged in "maritime employment." In dicta Judge Friendly excluded from coverage those employees engaged merely in transshipment¹⁸⁷ or in purely clerical or security functions.¹⁸⁸ As a result, the Second Circuit's decision merely enumerated some but not all of the employees covered by the Act, and some excluded under the Act without attempting to devise a general, comprehensive rule.

Similarly, the First Circuit in *Stockman* applied the LHWCA automatically to strippers or stuffers.¹⁸⁹ Requiring no demonstration by claimants in this class that they ever crossed the water's edge,¹⁹⁰

184. 544 F.2d at 53-56. This view adopted and expanded Judge Craven's view in his I.T.O. dissent that the test is "the nature of his [the maritime worker's] work and not where he performs it." 529 F.2d at 1097.

185. 544 F.2d at 56.

186. *Id.*

187. *Id.* at 54.

188. *Id.* at 52.

189. 539 F.2d 276.

190. *Id.* at 277.

the court held that as members of a class of employees who were covered under the former Act, strippers and stuffers were covered under the amended Act. The First Circuit, however, as did the Second Circuit, expressly refused to decide whether cargo handlers were engaged in "longshoring operations" or "maritime employment".¹⁹¹

One result of these two decisions was a partial itemization of covered employees. More importantly, the excluded category of persons involved merely in further transshipment of stored cargo seemingly was correctly defined by delineating the point at which transshipment begins as that at which the consignee actually has begun movement of the cargo from the pier. Unfortunately, however, due to language in these decisions, the relationship of coverage under the Act to whether an employee or a class of employees crosses the water's edge during a significant part of their employment remained unclear.

The Development of the Functional Approach

Rather than enumerating classes of included and excluded employees, the Ninth, Third, and Fifth Circuits espoused more comprehensive tests. *Weyerhaeuser* established the threshold requirement for federal coverage that the claimant's employment at the time of injury must bear a "realistically significant relationship" to traditional maritime employment involving commercial navigation upon navigable waters.¹⁹² Similarly, the Third Circuit in *Sea-Land* contended that the crucial issue was "the functional relationship of the employee's activity [at the time of injury] to maritime transportation as distinguished from such land-based activities as trucking, railroading, or warehousing."¹⁹³ Although it appears the imprecision of the terms "realistically significant relationship" and "functional relationship" might create difficulties in applying these tests, the Fifth Circuit's *Perdue* test restricting federal coverage to those who, at the time of injury, were performing or were directly involved in the loading, unloading, repairing, building, or

Such an individual, as is a longshoreman working on the pier alongside a ship during unloading operations, is a longshoreman within § 902(3). Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been conclusively established. *Id.*

191. *Id.*

192. 528 F.2d at 961.

193. 540 F.2d at 638.

breaking a vessel¹⁹⁴ seems to be defined more clearly and thus should prove a practical and workable test. Moreover, any blanket coverage of employees as a class, any reference to the water's edge or any other artificial line, or any reference to the amount of time spent by an employee or class of employees aboard ship, does not comport with such a purely functional test.

Application of the Guidelines: White v. Norfolk & Western Railway Co.

The only case to apply the *Perdue* test is *White v. Norfolk & Western Railway Co.*,¹⁹⁵ decided by the Virginia Supreme Court. The plaintiff, White, suffered hearing damage over a period of two years while working for the defendant railroad in excessively noisy electrical rooms in buildings where coal was transferred from railroad cars to ships.¹⁹⁶ The defendant moved to dismiss the suit under the Federal Employees' Liability Act (FELA)¹⁹⁷ on the ground that the state court lacked jurisdiction over the subject matter in that the plaintiff's exclusive remedy was under the LHWCA. Reversing the trial court's dismissal, the court first noted that there was no issue as to situs because the electrical rooms were clearly in areas covered by the LHWCA. Thus, the only question was whether White was engaged in maritime employment under the Act. The precise facts of the coal-loading operation and White's duties were crucial to the court's resolution of the status issue and illustrate the application of the *Perdue* test to a complex set of facts.

Railroad cars were pushed to a dumper house where machinery turned them over and shook coal into bins. A series of conveyer belts transferred the coal to the piers where shiploaders, tall, crane-like structures, fed coal into ships' holds by means of telescoping chutes. On piers not equipped with shiploaders, the cars were pushed onto the pier where a machine picked them up and dumped the coal into a pan that fed it into the vessel through a telescoping chute. White, who neither worked for a stevedore nor was a member of a maritime union, worked in the electrical rooms of the dumper house, the "house" in which coal was transferred between conveyor belts, the shiploader, and the machine on the pier not equipped with

194. 539 F.2d at 539-40.

195. No. 751407 (Va. March 4, 1977).

196. *Id.*, slip op. at 7.

197. 45 U.S.C. §§ 51-60 (1970).

a shiploader. He did not operate any of the machinery during the loading process, but maintained and repaired the electrical equipment: a machine in the dumper house that converted current from A.C. to D.C. and furnished power to dump the cars, a machine generating electricity for the conveyor belts, electrical equipment that prevented the chutes on the shiploaders from moving incorrectly, and electrical equipment that supplied power to the machinery on the pier not equipped with a shiploader. White did not handle cargo either mechanically or manually. He only manipulated the controls of the loading equipment to test it.¹⁹⁸

The defendant urged the court to apply the Third Circuit's functional relationship test, maintaining that all of White's work was functionally related to the loading of coal on ships.¹⁹⁹ Rejecting this argument, the court did not articulate clearly whether it was repudiating the Third Circuit test or whether, even under that liberal test, White still was not engaged in maritime employment under the LHWCA. Rather, relying on language in *Weyerhaeuser* and *Perdue*, the court held that the plaintiff's duties did not have "a realistically significant relationship to the loading of cargo on ships. Stated differently, when plaintiff was injured he was not *directly involved* in the loading of coal."²⁰⁰

In light of the Third Circuit's test, the Virginia Supreme Court's holding is subject to two possible interpretations. First, the court may have been saying that "functionally related" means "has a realistically significant relationship to the loading." Therefore, as the plaintiff's duties had no such relationship, he was not covered under the Third Circuit's test. Alternatively, the court might have been saying that, the Third Circuit opinion notwithstanding, it is not enough that the plaintiff's duties be merely functionally related to loading. Rather, there must be a realistically significant relationship to or direct involvement in loading.

This ambiguity illustrates the advantage of the Fifth Circuit test over the Third Circuit test. Given the complex facts of *White*, whether the vague functional relationship test is met is uncertain. Surely White's function had some relationship to loading ships, but the function of a repairman, employed by the manufacturer of the

198. The facts of the case are summarized at No. 751407, slip op. at 4-8 (Va. March 4, 1977).

199. *Id.* at 9.

200. *Id.* at 11, citing *Perdue* (emphasis in original).

generator, who replaces an essential part in the generator once a year, also would be related to the loading process. It is submitted that the latter person is clearly outside the purview of the LHWCA. Yet the functional relationship test does not clearly distinguish between this person and one who operates loading equipment as it loads ships.

In contrast to its apparent difficulty with the Third Circuit's test, the Court applied the Fifth Circuit's test easily and correctly,²⁰¹ holding that the plaintiff was not directly involved in loading.²⁰² *White*, therefore, illustrates that the Fifth Circuit test is practical and workable.²⁰³ The test includes those physically engaged in moving cargo in the overall process of loading or unloading, but excludes those who are not physically connected with moving cargo although their functions, like those of a guard or clerical worker, may be necessary to that movement. Thus, the *White* holding not only properly applies *Perdue* but also is consistent with the legislative history of the LHWCA.²⁰⁴

A PRACTICAL INTERPRETATION OF THE STATUS REQUIREMENT

These combined judicial interpretations, therefore, provide a framework of guidelines under which to apply the federal coverage provisions. Until the Fifth Circuit in *Perdue* propounded the test of whether the worker actually was participating or directly involved in maritime activity at the time of injury, the courts had failed to resolve the ambiguity in the status requirement of the LHWCA. For example, instead of conclusively interpreting the ambiguities in the

201. Although the court applied the Fifth Circuit test, it did not expressly endorse it. As the court would have reached the same result by applying any of the circuit courts' tests except possibly the Third Circuit's, the court may have chosen a liberal standard to show that even under that standard the plaintiff would not be covered. Indeed, in asserting that the plaintiff's work must have a realistically significant relationship to loading, the court relied heavily upon *Weyerhaeuser*. No. 751407, slip op. at 10 (Va. March 4, 1977).

202. *Id.* at 11 (Va. March 4, 1977).

203. The facts of *White* also demonstrate that the *Perdue* test leads to equitable results. An employer cannot avoid liability under FELA for failing to provide a safe place to work merely because his employee's activities bear some relationship to ship-loading. To the contrary, it could be argued that the court's decision was erroneous because it leads to the anomaly of allowing the dumper operator to recover under the LHWCA for hearing loss, but does not allow the maintenance man, working in the same room, to recover. This argument, however, is invalid because it would lead to the conclusion that guards or janitors working in the dumping room should recover. Yet they clearly are not maritime employees.

204. 539 F.2d at 539, quoting H.R. Rep. No. 92-1141, 92d Cong. 2d Sess. 11 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

status requirement and thereby delimiting the Act's coverage, the First and Second Circuits in effect merely enumerated classes of employees included or excluded, making determinations on the basis of inconclusive language in the legislative history. Because the enumeration of employees either covered or not covered by the Act did not encompass all employees fulfilling the situs requirement, a broad category of employees remained in the undefined area between coverage and non-coverage,²⁰⁵ so that the guidelines they promulgated proffered no workable, comprehensive view of the Act's coverage.

The Fourth Circuit's attempt to establish a firm rule resulted in the overly restrictive point of rest theory.²⁰⁶ In contrast, one commentator has asserted that the statute can be fairly read as including anyone engaged in waterfront employment.²⁰⁷ Although this view arguably was corroborated by the plain language of the statute and would have simplified the administration of the Act, it is not substantiated by the statute as a whole. Inclusion of all injuries sustained on the waterfront could have been accomplished by merely expanding the definition of "navigable waters." As the courts uniformly agreed, however, addition of the status requirement refutes any view of blanket coverage of all waterfront injuries.²⁰⁸ *Weyerhaeuser* emphasized this view by expressly excluding a waterfront employee from coverage;²⁰⁹ *Stockman* and *Pittston* provided examples of waterfront employees, clerical workers, and guards, who were obviously not covered by the Act.²¹⁰ Therefore, although this all-inclusive view of the LHWCA's coverage would have been uniform and easy to apply, neither statutory nor judicial guidelines support it, for in expanding the territorial scope of covered injuries

205. Within the undefined area are most members of categories (3) and (4), as suggested by Judge Friendly. See text accompanying note 184 *supra*.

206. See notes 173-76 *supra* & accompanying text. In disputing the point of rest analysis in his dissent, Judge Craven expressed skepticism about the practicality of applying the theory: "Henceforth, injured employees and their counsel must comb the waterfronts of this circuit, probing hopelessly for that elusive 'point of rest' upon which coverage depends." 529 F.2d at 1089.

207. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-51 (2d ed., 1975).

208. See *Stockman v. John T. Clark & Son*, 539 F.2d 264, 268 (1st Cir. 1976); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 41 (2d Cir. 1976); *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d 1080, 1083 (4th Cir. 1975); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 956, 960 (9th Cir. 1976).

209. 528 F.2d at 959.

210. See notes 187-88 *supra* & accompanying text.

Congress definitely narrowed the group of injured persons entitled to claim compensation.²¹¹

Moreover, as both the situs and status requirements are imposed upon employees, the requirements must complement one another. Because of the legislative purpose in enacting the LHWCA amendments²¹² and because of the inference created by adding a status requirement to the coverage, the focus of the status requirement is employee function and type of activity. Congress also incorporated this functional emphasis into the situs requirement which encompasses "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used . . . in loading, unloading, repairing or building a vessel."²¹³ The common characteristic of a pier, wharf, terminal, and marine railway is that each is an area where loading and unloading occurs. Applying elementary rules of statutory interpretation, the inferences are that the situs requirement was broadened to include all territory in which covered employees performed employment functions and that the essential employment function was intended to be the overall loading and unloading process.²¹⁴

To apply to waterfront conditions, the status requirement must be interpreted in relation to the realities of the overall process of loading and unloading vessels. Traditionally, the process entailed handling cargo piece by piece or unit by unit on slings, pallets, or skipboards at the ship's side. Under contemporary procedures, however, the marshalling area for containers and the sheds where cargo is stored while awaiting vessels for outbound cargo or trucks or rail cars for inbound cargo have become, in reality, an extension of the pier necessitated by new technology. The longshoring work, including that of checkers and ship maintenance and ship repair men, previously done on board the vessel or alongside on the pier now, of necessity, is performed at various locations throughout the terminal. The trucker no longer drives to the ship's side to pick up cargo. He brings his truck to the shed to pick up destuffed cargo or

211. See note 54 *supra* & accompanying text.

212. See note 2 *supra* & accompanying text. All of the courts stressed the congressional purpose of uniformity and fairness. See, e.g., *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 52-54 (2d Cir. 1976).

213. 33 U.S.C. § 903(a) (Supp. II, 1972) (emphasis supplied).

214. For discussion of statutory interpretation rules applicable to the amended LHWCA, see Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683 (1973).

to deliver cargo for stuffing.²¹⁵

Because the status requirement is linked closely to the overall process of loading and unloading, a practical approach to interpreting the status requirement is to extend coverage throughout this process. The realities of modern waterfront activity and the case law on the subject support the contention that the actual loading of a vessel commences when a carrier delivers goods into the custody of a terminal operator and that unloading continues until stored cargo is delivered to a carrier for further transshipment, that is, until the goods are physically on the consignee's truck.²¹⁶ Therefore, all persons engaged in handling cargo between these points are involved in loading or unloading vessels and would be employees within the meaning of the Act. Similarly, persons not physically connected with the movement of cargo through the terminal, including guards, clerical workers, and those who maintain equipment, should not be deemed members of the covered class of workers engaged in the maritime employment.

Modern cargo handling is done by a variety of employees, including longshoremen, in the normal course of maritime employment. The clear language of the status requirement and interpretation by the courts reveal that the criteria for the status requirement were intended to be employee class and function. Because employees performing identical functions should receive identical benefits, all cargo handlers should be entitled to coverage without considering the geographical point at which injury occurred or whether the employee crossed the water's edge in the course of employment. These considerations mandate an interpretation of the status requirement that includes not only all shipbuilders, ship breakers, and ship repairmen, but that also includes all cargo handlers, longshoremen, checkers and others physically engaged in movement of cargo in overall processes of loading and unloading. This functional emphasis is consistent with those guidelines provided by the Courts of Appeals for the Fifth Circuit in *Perdue* and for the Third Circuit in *Sea-Land*.²¹⁷

Significantly, this interpretation also vindicates the purpose of the amendments. To effectuate legislative intent, remedial

215. Brief of International Longshoremen's & Warehousemen's Union as Amicus Curiae at 6, *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d 1080 (4th Cir. 1976).

216. See note 138 & text accompanying note 154 *supra*.

217. See notes 133-72 *supra* & accompanying text.

legislation such as the 1972 LHWCA amendments should be construed liberally.²¹⁸ The purpose of amending the Act's coverage, to insure uniform recovery by maritime employees on the basis of employment function and status independent of arbitrary territorial lines, compels the proposed interpretation. The precise definition of the terms of coverage further corroborate this proposed interpretation, in that it indicates Congress did not intend or understand the coverage provisions to require intricate distinctions to be made in an overlapping and complex area. Consistent with legislative intent the most clearly defined employee category to which coverage should be accorded would be the category of all employees, including checkers, cargo handlers, strippers, stuffers, and longshoremen, actually performing or directly involved in the physical movement of goods during the overall process of loading and unloading. Persons engaged in job functions of this nature at the time of their injury should be entitled to compensation under the amended LHWCA.

CONCLUSION

The Supreme Court's grant of certiorari in *Pittston*²¹⁹ corroborates Judge Friendly's pronouncement in *Stockman*:

Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said.²²⁰

As indicated by its willingness to consider the question, the Supreme Court recognizes the importance of uniformity in interpreting the LHWCA's amended coverage provisions and in applying the status requirement. Uniformity, however, may be achieved by various means. The LHWCA of 1927 imposed uniformity by limiting coverage to injuries occurring seaward of the *Jensen* line; the Fourth Circuit, in *I.T.O.*, suggested a point of rest at which coverage would uniformly terminate. Yet the problem confronting the Supreme Court is not simply to achieve a uniform application of the LHWCA, but rather to propound a uniform rule effectuating the equitable

218. See *I.T.O. Corp. v. Benefits Rev. Bd.*, 529 F.2d 1080, 1091 (4th Cir. 1975) (Craven, J., dissenting).

219. *Northeast Marine Terminals Inc. v. Caputo*, 97 S. Ct. 522 (1976).

220. 544 F.2d at 39.

purposes of the 1972 amendments. Excluding the point of rest theory of the Fourth Circuit, the appellate courts focused on the functional aspects of the status requirement, beginning with Judge Craven's *I.T.O.* dissent and culminating in the Fifth Circuit's workable, purely job function approach. Adherence to the *Perdue* standard of determining the nature of the employee's work at the time of injury provides an adequate framework of guidelines for applying the LHWCA by limiting coverage to all persons either actually performing or directly involved in the physical movement of cargo during the overall process of loading and unloading. Interpreting the statute to include these persons advances the legislative goal to protect employees on the basis of status or function rather than on the purely geographical criteria of the original Act. Moreover, that this suggested delineation is also the most clearly defined functional or status category, facilitates practical, uniform application of the statute to diverse facts. Thus, by adopting this interpretation of the status requirement, the Supreme Court would insure uniform recovery by injured maritime employees without regard to the employee's fortuitous position at the time of injury.