SHORESIDE COVERAGE UNDER THE LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT[1]

In 1914, longshoreman Christen Jensen died of a broken neck which he suffered when he failed to lower his head while driving an electric freight truck through a hatchway of a steamship he was unloading.[2] The fatal injury occurred on a gangway which connected the vessel with the pier.[3] In *Southern Pacific Co. v. Jensen*,[4] the United States Supreme Court reversed[5] an award of survivor benefits made to Jensen's widow and two children under the New York Workmen's Compensation Act.[6] Reasoning that the Constitution vested in Congress the paramount power to determine the maritime law which shall prevail throughout the country,[7] the Court held that it was unconstitutional for the state of New York to apply its workmen's compensation statute to an injury such as Jensen's which occurred over the navigable waters of the United States.[8] Since Congress had never created a federal maritime compensation remedy, however, the *Jensen* decision resulted in a significant gap in the coverage of maritime workers: while longshoremen injured on land could seek a recovery under the workmen's compensation law of that state, longshoremen injured over the navigable waters were left without a compensation remedy.[9]

In an attempt to correct this lack of coverage on the seaward side of the pier, Congress enacted the Longshoremen's and Harbor Worker's Compensation Act (LHWCA)[10] in 1927. Under this Act, an injured longshoreman could recover benefits only if the accident occurred upon the navigable waters of the United States[11] and if recov-

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[1] Act of March 4, 1927, c. 509, 44 Stat. 1424, as amended by Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, 33 U.S.C. § 901 *et seq.* (Supp. 1976) (hereinafter cited "LHWCA," or "the Act").

[2] Southern Pacific Co. v. Jensen, 244 U.S. 205, 208 (1917).

[3] *Id.*

[4] 244 U.S. 205 (1917).

[5] *Id.* at 218.

[6] Chapter 67 of the Consolidated Laws as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 316 of the Laws of 1914. The award of the New York Workmen's Compensation Commission had been affirmed without opinion by the Appellate Division of the Supreme Court, 167 App. Div. 945, 152 N.Y.S. 1120 (1915), and by the Court of Appeals, 215 N.Y. 514, 529, 109 N.E. 600, 604 (1915).

[7] 244 U.S. at 214-17.

[8] *Id.* at 217-18.

[9] *See, e.g.*, State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263, 272-73 (1922). The Supreme Court twice rejected congressional attempts to validate the application of state remedies to longshoremen injured over the navigable waters. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 166 (1920); Washington v. W. C. Dawson & Co., 264 U.S. 219, 228 (1924).

[10] Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (1970).

[11] LHWCA § 3(a), 33 U.S.C. § 903(a) (1970).

ery for the disability or death through workmen's compensation proceedings could not validly be provided by state law.[12] The statute was thus a limited measure designed merely to plug the gap in coverage left by the *Jensen* decision.[13] The nature of the claimant's employment function was irrelevant to the determination of coverage.[14] Rather, recovery under the Act was predicated on the maritime situs of the injury, with coverage stopping at the water's edge.

Predicating coverage on the lone circumstance of whether the injury occurred on land or over the water, however, resulted in an incongruous and entirely fortuitous application of the federal compensation scheme.[15] The additional fact that a disparity existed between the benefits payable under the Act and those payable under various of the state laws[16] meant that the fortuitous nature of the situs-based federal coverage often resulted in individual injustices, as illustrated by two separate incidents occurring in 1963. In that year, longshoreman John Robert Vann died in a pier-based accident when a cable he was lifting suddenly straightened out, catapulting him off the pier and into the Elizabeth River where he drowned.[17] Since Vann's death occurred upon the navigable waters of the United States, his wife was awarded survivor benefits under the LHWCA.[18] During the same year, longshoreman Joseph Klosek was also killed in a pier-based accident when a ten ton draft of steel beams being loaded onto a ship swung back and struck him, lifting him into the air and dropping him head first onto the pier.[19] Since Klosek's death had *not* occurred upon the navigable waters, but rather had occurred on the pier—legally, merely an extension of the land[20]—Klosek's wife was denied recovery under the Act.[21] In *Nacirema Operating Co. v. Johnson*,[22] the Supreme

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[12] *Id.* The statutory deference to state coverage resulted in the judicial creation of a "twilight zone" of concurrent federal-state coverage of certain injuries. *See, e.g.*, Davis v. Department of Labor and Indus., 317 U.S. 249, 255-56 (1942); Calbeck v. Travelers Ins. Co., 370 U.S. 114, 115-31 (1962). This overlapping jurisdiction existed only over the navigable waters, however. The landward reach of federal jurisdiction under the Act continued to be strictly enforced at the water's edge. For a general history, see G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-45 (2d ed. 1975) (hereinafter cited as GILMORE & BLACK).

[13] Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 250 (1941).

[14] Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 340 (1953).

[15] *See, e.g.*, Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 911 (4th Cir. 1968) (dissenting opinion), *rev'd sub nom.* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

[16] *Compare, e.g.*, 33 U.S.C. § 906 (1964) (maximum disability compensation of seventy dollars per week) *with* MASS. GEN. LAWS ANN. ch. 152, § 34 (1958) *as amended by* Acts of 1963, ch. 460, § 1 (maximum disability compensation of fifty-three dollars per week). *See also*, Davis v. Department of Labor and Indus., 317 U.S. 249, 255 (1942); Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 907 (4th Cir. 1968).

[17] Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 901-02 (4th Cir. 1968), *rev'd sub nom.* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

[18] *Id.* at 909 (appeal of the Vann award was not taken to the Supreme Court).

[19] *Id.* at 902.

[20] Nacirema Operating Co. v. Johnson, 396 U.S. 212, 214-15 (1969).

[21] *Id.* at 214.

[22] 396 U.S. 212 (1969).

Court noted that there was much to be said for the uniform treatment of longshoremen who were injured during the loading or unloading of a ship. Nevertheless, the Court denied recovery under the Act for Klosek's shoreside death.[23] The *Nacirema* Court concluded that while Congress might have provided for shoreside coverage under the Act, it had chosen instead "the line in *Jensen* separating water from land at the edge of the pier."[24] The Court indicated that "[t]he invitation to move that line landward must be addressed to Congress, not to this Court."[25] Thus, due to the strict situs-orientation of the Act, the Vann death was covered under the more generous federal compensation system[26] while the Klosek death was not, despite the fact that both men were longshoremen killed in similar pier-based loading operations.

Acknowledging that amendments to the LHWCA were long overdue,[27] Congress effected a broad overhaul of the Act in 1972,[28] and extended coverage under the LHWCA to shoreside areas.[29] In a clear rejection of the prior deference to state law, the proviso that recovery be granted only where state law does not furnish a valid workmen's compensation remedy for the disability was deleted. The

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[23] *Id.* at 223.

[24] *Id.* at 223-24.

[25] *Id.* at 224.

[26] *Compare* 33 U.S.C. § 909 (1964) (maximum survivor benefits of seventy dollars per week) *with*, in Klosek's case, MD. CODE ANN. Art. 101, § 36(8) (1957) (maximum survivor benefits of forty-eight dollars per week) *and*, in Vann's case, VA. CODE ANN. § 65.1-65 (1950) *as amended by* 1962 Va. Acts ch. 503 (maximum survivor benefits of thirty-seven dollars per week).

[27] H. R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4698.

[28] Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, 33 U.S.C. § 901 *et seq.* (Supp. 1976).

[29] LHWCA § 3(a), 33 U.S.C. § 903 (a). In addition to the changes involved in extending coverage under the Act to shoreside areas, the 1972 amendments substantially upgraded the level of benefits payable under the Act, *compare* 33 U.S.C. § 910 (1970) *with* 33 U.S.C. § 910 (Supp. 1976), and eliminated both the longshoremen's right to maintain an unseaworthiness action against the ship and the vessel's right to maintain an indemnity action against the stevedore, the longshoremen's employer. 33 U.S.C. § 905(b) (Supp. 1976). The unseaworthiness remedy had allowed a longshoreman to recover damages from a ship when he was injured due to the shipowner's failure to discharge his absolute and non-delegable duty to maintain the vessel and all its appurtenances in a seaworthy condition. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 92-95 (1946). Since the stevedore had impliedly contracted to perform workmanlike service when he was hired to load or unload the vessel, however, the shipowner could recover from the stevedore the money which he had been forced to pay the injured longshoreman if the stevedore's actions had been responsible for the unseaworthy condition. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132-33 (1956). In eliminating the unseaworthiness remedy and the indemnity action, the amendments accomplished a legislative overruling of *Sieracki* and *Ryan*, putting an end to the expensive tripartite litigation which they had engendered. H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4701-05.

The amendments also effected a number of administrative changes. For a comprehensive listing of all the 1972 changes see Note, MARITIME JURISDICTION AND LONGSHOREMEN'S REMEDIES, 1973 WASH. U. L. Q. 649, 667 n.101.

coverage provision of the Act, section 3(a), now reads:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .[30]

The amended Act thus presents a dual test for coverage. Claimants must satisfy both a "status" test requiring that the claimant be an employee as defined under the Act, and a "situs" test requiring that the injury occur upon the parenthetically extended area of the navigable waters. Yet, while the amendments sweep coverage ashore, they provide no precise tidemark measure of just how far the coverage extends. The present uncertainty surrounding the Act's landward reach is significant in view of the fact that the 1972 amendments substantially improved the benefit structure of the Act,[31] resulting in an enormous disparity between the amount of compensation payable under the Act and that payable under the various state laws.[32] Understandably then, the proper application of this dual test has been the subject of considerable controversy, not only between injured claimants and their employers, but also among the various circuit courts which have considered the Act.[33] It is submitted that the resulting

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[30] LHWCA § 3(a), 33 U.S.C. § 903 (a) (Supp. 1976).

[31] For twelve years prior to 1972, the maximum compensation for disability had been frozen at seventy dollars per week. 33 U.S.C. § 906(b) (1970). *See also,* H.R. REP. NO. 1441 *reprinted in* [1972] U.S. CODE CONG & AD. NEWS 4698, 4700. The amended Act provides that the maximum compensation for disability shall not exceed 200% of the national average weekly wage as determined annually by the Secretary of Labor. 33 U.S.C. § 906(b).

[32] The amount payable under the Amended Act, as explained in note 31 *supra,* is in sharp contrast to the fixed amounts provided under most of the state laws. Stockman v. John T. Clark & Son, Inc., 539 F.2d 264 (1st Cir. 1976) is a good illustration of the significant disparity which usually exists between the amount payable under the Act and that payable under a state statute. Under Massachusetts law, Stockman was entitled to $80.00 a week, whereas under the LHWCA he was entitled to more than $180.00 a week. *Id.* at 265. For the amounts payable by various states at the time the LHWCA was amended, see H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4707.

[33] To date, the question of coverage under the amended Act has been considered by the courts of appeal for the First, Second, Third, Fourth, Fifth, and Ninth Circuits. *See* Stockman v. John T. Clark & Son, Inc., 539 F.2d 264 (1st Cir. 1976), *petition for cert. filed,* 45 U.S.L.W. 3332 (U.S. Oct. 22, 1976) (No. 76-571); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *cert. granted* Northeast Marine Terminal Co. v. Caputo, 45 U.S.L.W. 3408 (U.S. Dec. 6, 1976) (No. 76-444), *and* Intercontinental Terminal Operating Co. v. Blundo, 45 U.S.L.W. 3408 (U.S. Dec. 6, 1976) (No. 76-454); Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629 (3d Cir. 1976); I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), *reheard en banc,* I.T.O. Corp. v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976) *petitions for cert. filed,* Marine Terminals, Inc. v. Brown, 45 U.S.L.W. 3401

confusion over the landward limit of the Act's coverage serves to defeat the proper functioning of this federal compensation scheme. As Mr. Justice Frankfurter once noted with respect to the LHWCA, "[a]ny legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement."[34] Obviously that goal is frustrated when a claimant not only faces initial uncertainty as to which remedy to pursue, but, having chosen the federal remedy, is then put to the delay and expense of proving that his claim comes under the Act.

This comment will focus on the current judicial development of the dual requirements of status and situs.[35] The various judicial constructions of those requirements will be set forth as they contribute to an orderly discussion of shoreside coverage under the Act.[36] Throughout this examination, an attempt will be made to define that coverage which Congress most likely intended, and which best effectuates the general purposes of the Act.[37]

(U.S. Nov. 19, 1976) (No. 76-706) *and* Adkins v. I.T.O. Corp., 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed,* P.C. Pfeiffer Co., Inc. v. Ford, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641) *and* Halter Marine Fabrications, Inc. v. Nulty, 45 U.S.L.W. 3450 (U.S. Dec. 27, 1976) (No. 76-880); Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 45 U.S.L.W. 3254 (U.S. Oct. 5, 1976). The courts' conclusions as to the intended extent of the Act's shoreside coverage have differed significantly. It seems that the only point of any real certainty to emerge so far is the observation of Judge Friendly that, "[g]iven 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." *Pittston, supra,* at 39.

[34] Davis v. Department of Labor and Indus., 317 U.S. 249, 258 (1942) (concurring opinion). *See also,* the Introduction to the Report of the National Commission on State Workmen's Compensation Laws, 118 CONG. REC. 26186 (1972).

[35] It should be noted that the cases have presented other issues as well. The courts have uniformly concluded that the extension of coverage to shoreside areas is constitutional. *See, e.g.,* Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 271 (1st Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 56-57 (2d Cir. 1976); Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 633 (3d Cir. 1976); I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1086 (4th Cir. 1975); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 544-46 (5th Cir. 1976). There is some disagreement, however, as to whether the Director of the Office of Worker's Compensation Programs is a proper respondent. *Compare* I.T.O. Corp. v. Benefits Review Board, 540 F.2d 903, 906-09 (4th Cir. 1976) *with Jacksonville, supra,* at 546. *See also, Pittston, supra,* at 42-43 n.5 (the government should settle the question by tidying up its regulations).

[36] The Ninth Circuit's decision in Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), will not be discussed in this comment since that case involved a fact situation totally different from those of the other cases. Gilmore was a "pondman," a type of millworker, who was injured when he fell from a floating walkway while sorting logs and feeding them into a sawmill. The *Gilmore* court denied recovery under the Act, concluding that the claimant was not an "employee" since his job did not have a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters. *Id.* at 961-62.

[37] This is not to imply that the determination of the Act's coverage is merely a discretionary application of general principles; Congress has simply not set forth an explicit definition of the Act's coverage. *See, e.g.,* Stockman v. John T. Clark & Son, Inc.,

I. THE STATUS REQUIREMENT

To recover under the amended Act, a claimant must be an "employee".[38] Prior to 1972, this term was defined only to the extent of specifically excluding certain persons from coverage under the Act.[39] The status orientation of the amended Act, however, is reflected in the more explicit definition of "employee" now found in section 2(3):

> 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, ...[40]

This requirement that a claimant be an employee seems to present two demands—that the claimant's activity constitute "maritime employment," and that the claimant be "engaged in" that activity within the meaning of the Act. These two elements of the status requirement will be discussed separately.

A. *Activity Constituting "Maritime Employment"*

The 1972 amendments represent the first use of the term "maritime employment" within the definition of "employee". Since Congress did not define the concept, the major problem facing the courts in construing the scope of the amended Act has been to determine what types of activity constitute "maritime employment."[41] The first significant appellate construction of this term was a panel decision of the Fourth Circuit in *I.T.O. Corp. v. Benefits Review Board.*[42]

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539 F.2d 264, 265 (1st Cir. 1976) ("The difficulty in determining Stockman's coverage arises from the essential ambiguity of the 1972 amendments insofar as they describe, or fail to describe, the employees for whom coverage is afforded."); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 41 (2d Cir. 1976); Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 634 (3d Cir. 1976) (interpreting the scope of the amendments "a task of no little difficulty"); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 540 (5th Cir. 1976). Rather, it almost seems as if Congress intentionally left this determination to the courts. *See, e.g., Stockman, supra,* at 274. In the absence of explicit legislative guidelines, individual determinations of coverage are likely to depend to a greater degree upon policy considerations and the general purposes underlying the Act.

[38] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976).

[39] The former definition read, "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3) (1970).

[40] LHWCA § 2(3), 33 U.S.C. § 902(3) (Supp. 1976).

[41] It should be noted that this phrase has appeared in the definition of "employer" since passage of the LHWCA in 1927. 33 U.S.C. § 902(4) (1970). The concept was not statutorily defined there either, however. Moreover, case law is of little assistance in defining the concept since the former Act focused solely on the situs of the injury and not on the nature of the claimant's employment function. See text at note 14, *supra. See also,* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 539 (5th Cir. 1976).

[42] 529 F.2d 1080 (4th Cir. 1975), *reheard en banc,* 542 F.2d 903 (4th Cir. 1976).

The procedural situation in *I.T.O.*, as in each of the other cases decided to date, involved employer appeals from orders of the Benefits Review Board[43] awarding compensation under the Act to injured claimants. The consolidated appeals in *I.T.O.* required the court to decide the employee status of three claimants, each of whom had been injured while performing a function in the overall process of loading and unloading a vessel.[44]

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[43] The Benefits Review Board was created pursuant to § 15(a) of the amended Act, 33 U.S.C. § 915(a), to review orders of the administrative law judges. 33 U.S.C. § 921(b) (Supp. 1976). The Board's decisions are in turn reviewable by the court of appeals for the circuit where the injury occurred. *Id.* at § 921(c). As noted, the Board ruled that every claimant in all the cases discussed in this comment had satisfied both the status and situs tests. As regards the status requirement, the Board has concluded that all persons who are engaged in handling cargo which is in maritime commerce are covered under the Act. *See, e.g.*, Avvento v. Hellenic Lines, Ltd., 1 BRBS 174 (1974). Cargo is considered to enter maritime commerce when it is first unloaded from a truck or other carrier and is handled by terminal employees working on the situs area covered under the Act, and waterborne cargo is considered to remain in maritime commerce until such time as it is taken from the terminal for further transshipment. *Id.* See also the cases collected by Judge Craven in *I.T.O.*, 529 F.2d at 1092-93 (dissenting opinion). The Board has also concluded that a claimant need not actually be engaged in loading or unloading a vessel to be performing "longshoring operations" and hence qualify as an employee under the Act. *See, e.g.*, Coppolino v. International Terminal Operating Co., 1 BRBS 205 (1974).

Although this comment will arrive at a statement of coverage similar to that adopted by the Board, the Board decisions will be neither discussed nor relied upon as authority since the Board's decisions have been criticized for their individualized, unsupported, and conclusory treatment of the coverage question. *See, e.g.*, Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 47 (2d Cir. 1976). *See also*, Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 634 (3d Cir. 1976). More importantly, however, the Board's decisions have generally been afforded little or no deference by the courts. *See, e.g.*, Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 269-70 (1st Cir. 1976); *Pittston, supra*, at 48-50; *Sea-Land, supra* at 634. *But see also*, Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 541 (5th Cir. 1976) (note, however, that the court did not hesitate to apply its own interpretation of the Act). As Judge Campbell of the First Circuit noted in *Stockman*, since "the focus is upon the meaning of the statute, the judgement must be our own, not the Board's." 539 F.2d at 270.

[44] 529 F.2d at 1081. Some introduction to the relevant waterfront terminology is necessary before presenting the facts in *I.T.O.* A "container" is a rectangular metal structure six to eight feet square by twenty to forty feet in length which is used to transport cargo. When unloaded from a ship it can be placed on a chassis and driven away. *See* Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 265 n.1 (1st Cir. 1976). For a discussion of the containerization process, see text at note 90 *infra*. The "stuffing" process consists of loading a cargo container with individual pieces of cargo. *See I.T.O.*, 529 F.2d at 1082. The "stripping" process is the unloading and sorting out of the cargo stuffed inside a container, which is often destined for more than one consignee. *Id.* A "hustler" is a vehicle used to transport cargo and containers about the waterfront area. *Id.*

In *I.T.O.*, William Adkins was a forklift operator at a marine terminal in Baltimore who was injured while moving a load of brass tubing from its temporary storage place in a transit shed to a waiting delivery truck. The tubing, having arrived at the terminal stuffed inside a container seven days earlier, had been stripped from the container and stored in the shed until the delivery truck arrived four days later. *Id.* Donald Brown, a forklift operator at a marine terminal in Norfolk, Virginia, suffered carbon monoxide poisoning from fork lift exhaust fumes while in the process of stuffing a

A divided panel of the court reversed each of the awards,[45] holding that none of the claimants was an "employee" within the meaning of the Act.[46] The court concluded that the status element of coverage was limited by the concept of "maritime employment," and that not every person engaged in handling cargo between the ship and the point of discharge to the consignee (and conversely, between the point of receipt from the forwarder and the ship) is engaged in maritime employment.[47] Although the case law on the subject was viewed as establishing that maritime employment is the loading and unloading of ships,[48] the court concluded that the terms "maritime employment," "longshoreman," and "longshoring operations" were not such words of art that it could decide the case without resort to the legislative history.[49] Turning to the committee reports as the most informative source on just how far coverage had been extended, the majority concluded that Congress had not intended to cover persons who were not engaged in loading or unloading a vessel.[50] Moreover, the majority viewed the 1972 change in coverage as primarily a response to *Nacirema*,[51] intended merely to remove the previous inequities which had resulted when a person otherwise engaged in maritime employment was injured on land.[52] Consequently, the court concluded that coverage had not been extended to all persons engaged in the overall process of loading and unloading.[53] Rather, the majority held that the amendments had extended coverage "only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, ..."[54]

In dissent, Judge Craven rejected the majority's construction of the status requirement, criticizing both its reliance on the committee

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container. *Id.* Vernie Lee Harris, a hustler operator at the same marine terminal in Norfolk was injured when the brakes on his hustler failed on the return trip from depositing a stuffed container at the container marshalling area adjacent to the pier. Unable to stop the hustler, he collided with a container. *Id.* But see also discussion at note 175, *infra*.

[45] 529 F.2d at 1081.

[46] *Id.* at 1088.

[47] *Id.* at 1081.

[48] *Id.* at 1084, *citing* Atlantic Trans. Co. v. Imbrovek, 234 U.S. 52, 61 (1914), and Intercontinental Container Trans. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 886 (2d Cir. 1970).

[49] 529 F.2d at 1084-85.

[50] *Id.* at 1087.

[51] *Id.* at 1086. For a discussion of the factual situation in *Nacirema* see text at note 17 *supra*.

[52] 529 F.2d at 1081.

[53] *Id.* at 1087.

[54] *Id.* at 1088. "The term 'point of rest' means a point within a Terminal where the terminal operator designates that cargo or equipment be placed for movement to or from a vessel." *Id.* at 1095 (quoting the Norfolk Marine Terminal Association Tariff (Item 290)). *See also*, the Federal Maritime Commission's definition of the term at 46 C.F.R. § 533.6(c). Hence, under this "point of rest" approach, coverage attaches in the case of loading between the last storage or holding area on the pier and the ship, and in the case of unloading between the ship and the first storage or holding area on the pier.

reports and its inference of the "point of rest" concept.[55] He found resort to the legislative history unnecessary, arguing that the generic term "maritime employment" had an established meaning sufficiently broad and inclusive to cover the activities of all the claimants.[56] In addition, Judge Craven concluded that all three claimants had in fact been involved in the loading and unloading process, and thus reasoned that all three also qualified as employees under the even narrower definitional language of "longshoreman" and "longshoring operations."[57] Hence, Judge Craven would have affirmed the awards on the basis of the plain language of the statute.[58] With regard to the majority's inference of the "point of rest," Judge Craven noted that the concept was nowhere mentioned in either the Act or the legislative history and concluded that the court had no license to find in a statute words which Congress had not put there.[59] Finally, Judge Craven pointed out that application of the point of rest concept would in effect make a claimant's employee status turn on a second situs test, a result which would only frustrate the purpose behind the new status test.[60] He noted:

> A worker's "status," i.e., whether he is engaged in maritime employment, should be determined by the *nature* of his work, and not *where* he performs it. Yet, the "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 ex-

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[55] 529 F.2d at 1094-95 (dissenting opinion).

[56] *Id.* at 1094. *See also* text at note 80 *infra.*

[57] 529 F.2d at 1097. Judge Craven had noted that the loading and unloading of ships was "an occupation which is inherent in the work of longshoremen." *Id.*

[58] 529 F.2d at 1094. In the alternative, Judge Craven felt that even if the statutory language was ambiguous, resort to the legislative history was still unnecessary in light of several available guidelines to statutory construction. He noted that the LHWCA was remedial legislation which should be liberally construed. *Id.* at 1091. *Accord,* Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 275 n.9 (1st Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 51 (2d Cir. 1976); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 541 (5th Cir. 1976). Judge Craven also pointed to a statutory presumption, 33 U.S.C. § 920 (a), that a claim comes within the Act's coverage. 529 F.2d at 1091. This argument has not been as favorably received. *See, e.g., Stockman, supra* at 269; *Pittston, supra,* at 48. *But see also, Jacksonville, supra,* at 541. Finally, Judge Craven argued that the court had only a limited scope of review and that it should defer to the findings of the Board as the contemporaneous construction of a statute by the agency charged with its enforcement. 529 F.2d at 1091-93. Again, the applicability of these guidelines has not been widely accepted. *See, e.g., Stockman, supra,* at 269-70; *Pittston, supra,* at 48-50; Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 634 (3d Cir. 1976). *But see also, Jacksonville, supra,* at 541.

[59] 529 F.2d at 1096.

[60] *Id.* at 1096-97.

> posed to identical risks receive disparate workmen's compensation benefits, which provided the impetus for the 1972 Amendments.[61]

Hence, Judge Craven rejected the point of rest concept as being incompatible with the status orientation of the amended Act.[62]

Citing the importance and novelty of the questions presented, the Fourth Circuit reheard *I.T.O. en banc.*[63] The *en banc* court consisted of six judges.[64] Three judges adhered to the point of rest theory as articulated in the first opinion.[65] Two judges adhered to the broader, plain language construction of the Act set forth in Judge Craven's original dissent.[66] Judge Widener, not having been part of the panel decision, constituted the swing vote on the *en banc* court. Although subscribing to the basic principle that Congress had intended coverage to attach only up to the point of rest, he concluded that the proper test for determining the location of that point is "whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship."[67] By a vote of 4-2 the court reversed the Board's award to a claimant injured while moving previously stripped[68] brass tubing from its temporary storage place in a warehouse to a waiting delivery truck.[69] Judge Widener concluded that since the brass tubing had been stripped from its container[70] and stored in the transit shed the claimant was not in the process of unloading a ship but rather in the process of loading a delivery truck, and thus not covered because he was merely handling goods for transshipment.[71] The Board's awards to a stuffer[72] and a hustler[73] operator, on the other hand, were affirmed by an evenly divided court,[74] Judge Widener concluding both that stuffing a container is part of the loading process, and that in operating a hustler between the stuffing area and the container marshalling area the claimant had been moving goods solely for loading purposes and not for mere convenience.[75]

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[61] *Id.*

[62] *Id.*

[63] I.T.O. Corp. v. Benefits Review Board, 542 F.2d 903 (4th Cir., 1976).

[64] *Id.* at 905.

[65] *Id.*

[66] *Id.*

[67] *Id.* It is somewhat unclear exactly what the language "an otherwise eligible employee" means. That the language simply refers to a claimant who fulfills the situs requirement is questionable since fulfilling the situs test has no bearing on a claimant's status as an "employee."

[68] See note 44, *supra.*

[69] 542 F.2d at 905.

[70] See note 44, *supra.*

[71] 542 F.2d at 905.

[72] See note 44, *supra.*

[73] *Id.*

[74] 542 F.2d at 905.

[75] *Id.*

In dissent, Judge Butzner adopted the reasoning of Judge Craven's dissent in the panel opinion.[76] As for Judge Widener's coverage of stuffers and strippers, Judge Butzner noted that although that construction alleviated some of the harshness of the point of rest theory, it also made a rational and uniform application of that theory even more difficult by adding the factor of lapse of time to the vague concept of place in determining the location of the point of rest.[77]

The disagreement in *I.T.O.* over whether the statutory language was ambiguous, and thus whether resort to the legislative history was necessary, illustrates the threshold problem encountered in attempting to determine the coverage of the Act. Quite simply, the shoreside coverage which seems appropriate from the plain language of the Act is dramatically greater than that which its accompanying committee reports seem to dictate. The language of the Act itself clearly suggests a broad range of covered activity: coverage is extended not only to any person engaged in "longshoring operations," but also to "*any* harborworker" and "*any* longshoreman."[78] Consequently, the Act on its face implies that a longshoreman is covered even while not engaged in traditional longshoring activity.[79] More importantly, however, coverage is extended to any person engaged in "maritime employment."[80] Congress appears to have used that term generically to indicate a broad range of covered activity of which the work of longshoremen, harborworkers, ship repairmen, and shipbuilders are merely lesser included examples.[81] Hence, as one commentator has argued, the statutory language by itself can be read as an attempt to cover all persons who suffer employment-related injuries within the situs area.[82]

The committee reports, on the other hand, indicate a considerably less extensive range of covered activity. Both the House and the Senate reports flatly state, "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel . . . "[83] Under the committee reports, then, involvement in such activity becomes an essential element in demonstrating the requisite status under the Act.

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[76] *Id.* at 910.

[77] *Id.*

[78] LHWCA § 2(3), 33 U.S.C. § 902(3) (Supp. 1976) (emphasis supplied).

[79] *See,* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 52 (2d Cir. 1976). *Cf.*, Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 274 (1st Cir. 1976).

[80] LHWCA § 2(3), 33 U.S.C. § 902(3) (Supp. 1976).

[81] *See, e.g.,* 1A BENEDICT ON ADMIRALTY § 16 (7th ed. 1973); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 52 (2d Cir. 1976); *I.T.O.*, 529 F.2d at 1090 (dissenting opinion).

[82] GILMORE & BLACK, *supra* note 10, § 6-51 at 429 (2d ed. 1975). The approach has been severely criticized. *See, e.g.,* Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 274 (1st Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 56 (2d Cir. 1976).

[83] S. REP. NO. 1125, 92d Cong., 2d Sess. 1 (1972) & H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

The clear manner in which the committee reports thus reduce the arguably broader test of "maritime employment" to the narrower one of loading, unloading, building, or repairing a vessel makes the significance of the dispute over whether or not the statutory language is ambiguous readily apparent. If the term "maritime employment" is found to have an established meaning, making resort to the legislative history unnecessary, then a broad extension of coverage based on a plain language reading of the Act is possible. On the other hand, if the term is deemed ambiguous, then resort to the legislative history is necessary and the sweep of shoreside coverage becomes dependent on the court's view of the loading, unloading, building and repair functions.

To date, the Circuits have been unanimous in referring to the legislative history to determine what activity is covered under the Act.[84] Hence the scope of "maritime employment" has been construed only within the limiting context of the reports. Thus it should be noted that a court bent upon a liberal construction of the amendments could structure an extensive sweep of shoreside coverage simply by adopting a plain language reading of the statute and concluding that resort to the legislative history was unnecessary. Construing the Act with reference to the committee reports, however, the *I.T.O.* majority concluded that coverage had been extended shoreside only a few feet from the pier so as to cover those persons engaged in loading and unloading functions up to the "point of rest." But as Judge Craven noted, the applicability of that concept is severely undercut by the fact that it is nowhere mentioned in either the Act or the committee reports. Moreover, judicial inference of the "point of rest" is not only unfounded but inappropriate as well, for that technical concept is inconsistent with both the modern case law treating the scope of the loading and unloading operations and current operational practices in the longshoring industry.

While case law is of extremely limited assistance in delineating how far shoreward the maritime nature of loading and unloading extends,[85] it is sufficient to underscore the unacceptability of defining the landward limit of that process by means of the "point of rest." Al-

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[84] *See, e.g.*, Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 273 (1st Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 51 (2d Cir. 1976); Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 637 (3d Cir. 1976); I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1084-85 (4th Cir. 1975); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 539-40 (5th Cir. 1976); Weyerhauser Co. v. Gilmore, 528 F.2d 957, 960 (9th Cir. 1975).

[85] Prior to the amendments, the case law on the subject of loading and unloading had been developed solely in the confining context of unseaworthiness actions. Since the gangplank was the presumptive boundary of admiralty jurisdiction, an unseaworthiness recovery for a shoreside injury was allowed only where it was an appurtenance of the ship which had caused the injury. *See, e.g.*, Victory Carriers, Inc. v. Law, 404 U.S. 202, 214 n.14 (1971). Hence, as the Supreme Court noted in *Law*, the attempt to define the loading process had only resulted in "substantial confusion." *Id.*

though the minority view would define the loading process in a narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the vessel,[86] the more prevalent view defines the terms "loading" and "unloading" in a pragmatic and less ritualistic sense.[87] This pragmatic approach considers as within the scope of loading activity those functions which are direct and necessary steps in the process of transferring cargo to or from a ship.[88] As Judge Craven recognized,[89] the weight of authority thus defines loading and unloading in a functional and realistic manner which clearly includes workers who are landward of the first (last) point of rest. Consequently, while the cases fail to describe how far shoreward the maritime nature of the loading and unloading process extends, they do at least reject the limited view of that process represented by the hypertechnical concept of the point of rest.

In addition, application of the point of rest is totally at odds with current operational practices on the waterfront. To determine a claimant's employee status on the basis of whether he was injured on the landward or seaward side of the point of rest is thoroughly incompatible with the practice of containerization, the standard method of transporting cargo in the longshoring industry today. Containerization is a method of cargo transportation developed during World War II in which a ship's bulk cargo is compartmentalized within cargo containers.[90] Cargo can be stuffed in these containers for loading aboard a ship before the ship is even berthed, and can likewise be stripped from the containers after the ship has left. Since the time consuming work of stowage and unstowage can be performed on land in the vessel's absence, the ship's "turn-around time," or time in port, is drastically reduced. In effect, the container is thus a modern substitute for the hold of a vessel,[91] allowing longshoremen who formerly worked within the ship's hold to perform the same work ashore instead. Yet, since these cargo containers are customarily loaded and unloaded at a point landward of the container's first (last) point of rest, application of that concept would preclude coverage of longshoremen engaged in stuffing and stripping activities—the very heart of the loading and unloading process. That Congress intended

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[86] Law v. Victory Carriers, Inc., 432 F.2d 376, 380 (1970), *rev'd on other grounds*, Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).

[87] *Id.* at 383.

[88] *See, e.g.*, Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974); Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), *rev'd on other grounds*, Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971); Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970); Hagans v. Ellerman & Bucknall Steamship Co., 318 F.2d 563 (3d Cir. 1963); Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968); Litwinowicz v. Weyerhauser S.S. Co., 179 F. Supp. 812 (W.D. Pa. 1959).

[89] *I.T.O.*, 529 F.2d at 1097-1101 (dissenting opinion). *See also*, the cases cited in note 88 *supra*.

[90] See note 44, *supra*.

[91] As the Second Circuit has noted, the container is "functionally a part of the ship." Leather's Best, Inc. v. S.S. Mormaclynz, 451 F.2d 800, 815 (2d Cir. 1971) (Friendly, J.).

such a result is highly unlikely, especially in view of the committee reports' explicit recognition of the fact that the advent of containerization has resulted in more of the longshoreman's work being performed on land than ever before.[92]

Finally, inference of the "point of rest" concept is inconsistent with the amended Act itself. Amended section 5(a) of the Act was intended to eliminate both the longshoreman's unseaworthiness remedy and the vessel owner's indemnity action against the stevedore-employer[93] by making the LHWCA the exclusive remedy for all workers covered under the Act.[94] But if longshoremen injured landward of the "point of rest" are not employees covered under the Act, then it would seem that they are not precluded from maintaining an unseaworthiness action against the vessel, and it would also seem that the shipowner is not precluded from maintaining an indemnity action against the stevedore. Hence, it might be that inference of the "point of rest" could serve to provoke the expensive tripartite litigation which the amendments were designed to prevent. It can hardly be presumed that Congress intended the shoreside sweep of coverage under the Act to be so strictly limited as to effectively negate the far more important purpose underlying section 5(a).

Thus, while *I.T.O.* serves as a good illustration of the scope of the coverage problem, its point of rest rationale is an entirely unrealistic solution to the controversy. A more reasonable construction of the Act's coverage is that provided by Judge Friendly in *Pittston Stevedoring Corp. v. Dellaventura.*[95] In *Pittston,* the Second Circuit considered the status of two claimants injured on the Brooklyn waterfront.[96] Both were in the process of handling cargo which had been unloaded from

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[92] S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972) & H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4707-08.

[93] See note 29 *supra*.

[94] 33 U.S.C. § 905(a) (Supp. 1976).

[95] 544 F.2d 35 (2d Cir. 1976).

[96] Although there were four cases consolidated on appeal in *Pittston*, the court considered the merits of the coverage issue in only two of them. One of the employers' petitions to review the Board's award was dismissed as untimely, *Pittston* 544 F.2d at 42-44, 57, and another was dismissed as having been mooted by the insurance carrier's payment of the award, *id.* at 44-46, 57.

Again, presentation of the facts of the case requires an introduction to the relevant waterfront terminology. Goods for more than one consignee are often shipped in a single container. A "checker" checks the goods being stuffed into or stripped from a container against the bill of lading. *See Pittston,* 544 F.2d at 41 n.4. A "shape-up" employee is a person hired from the union hiring hall, usually for only a day at a time. *Id.* at 42.

In *Pittston*, Carmelo Blundo was a checker at the 19th Street pier in Brooklyn who sustained injuries to his head and lower back when he slipped on some ice while checking cargo being stripped from a container. The container had been unloaded at a different pier a few days before and carried by truck to the 19th Street pier. *Id.* at 41. Ralph Caputo was a shape-up employee who was injured while inside a consignee's truck helping the driver load boxes of cheese which had been discharged from a vessel at least five days previously. *Id.* at 42.

the vessel a few days before.[97] The court affirmed each award by a vote of 2-1.[98]

Concluding that the status problem in these cases arose from Congress' failure to define the operative terms found in the definition of "employee,"[99] the *Pittston* court turned to the legislative history for clarification.[100] Significantly, however, the Second Circuit adopted a markedly different view of the basic purpose behind the amendments than that taken by the Fourth Circuit in *I.T.O.*. While the *I.T.O.* court had viewed the extended coverage as merely a direct response to the *Nacirema* invitation,[101] the Second Circuit viewed shoreside coverage as part of the *quid pro quo* which maritime workers had received in exchange for releasing their right to maintain an unseaworthiness action against the vessel.[102] Consequently, although both circuits made the language of the committee reports determinative of the issue, they reached dramatically different conclusions as to the intended shoreside reach of the amendments due to their differing perceptions of the basic purpose behind that extended coverage.

The *Pittston* majority had little difficulty in rejecting the point of rest approach.[103] Observing that persons engaged in loading or unloading between the point of rest and the ship were engaged in "longshoring operations," Judge Friendly reasoned that to limit coverage to persons engaged in just that activity would be to ignore the rest of the language found in the Act.[104] As Judge Friendly noted, "maritime employment" was used in the Act in a manner which clearly established it as a term which is broader than "longshoring operations."[105] He also noted that Congress had provided coverage for "*any* longshoreman" and not just for those persons engaged in longshoring operations.[106] Thus the court reasoned that a longshoreman could be covered under the Act even while he was not engaged in traditional longshoring activity.[107] Yet while concluding that the

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[97] 544 F.2d at 41, 42.

[98] *Id.* at 57.

[99] *Id.* at 41.

[100] *Id.* at 51.

[101] 529 F.2d at 1086.

[102] 544 F.2d at 40. It should be noted that the two courts looked to different reports. The Fourth Circuit looked to the House Report, which does not mention shoreside coverage as a basic purpose behind the amendments. 529 F.2d at 1086. The Second Circuit, however, looked to the Senate Report, 544 F.2d at 40, which states that the primary purpose behind the amendments was "to upgrade benefits, *extend coverage to additional workers*, provide a specified cause of action for damages against third persons and to promulgate administrative reforms." S. REP. NO. 1125, 92d Cong., 2d Sess. 4-5 (1972) (emphasis added).

[103] Judge Lombard endorsed the "point of rest" concept in dissent, however, arguing that it was both more in keeping with the realities of maritime employment and far easier to apply. 544 F.2d at 57.

[104] *Id.* at 52.

[105] *Id.*

[106] *Id.*

[107] *Id.*

statutory language was sufficient to condemn inference of the point of rest concept, the *Pittston* majority further concluded that the Act itself did not adequately describe the intended extent of shoreside coverage.[108] Thus, it found that an examination of the Act's legislative history was necessary.

Turning to the committee reports the court came to two conclusions. First, the court concluded that Congress had extended coverage to shoreside areas because it realized that with the increasing use of modern cargo-handling techniques such as containerization, a much greater percentage of a longshoreman's work is now being performed on land.[109] Reasoning that stuffing a container is part of the loading process and that stripping a container is the functional equivalent of sorting discharged cargo, the court concluded that persons engaged in either stuffing or stripping operations satisfied the status requirement of the Act.[110] Thus the court ruled that a claimant injured while checking[111] the cargo being stripped from a container was covered by virtue of his direct involvement in a stripping operation.[112] The fact that the claimant was injured at a pier other than the exact pier at which the container had first been unloaded was deemed irrelevant: since the cargo had not yet been delivered to the consignee, the unloading process still had not been completed.[113]

The second conclusion drawn from the committee reports was that Congress had attempted to minimize those occasions in which employees moved in and out of the Act's coverage during the course of a day's work by providing for uniform coverage of all those persons engaged in loading or unloading functions on the pier.[114] The court further determined that Congress' concern for uniformity had not been limited merely to the *Nacirema* situation, but rather that it had extended to the unequitable situation resulting where one pier-based longshoreman was deemed covered while another pier-based longshoreman situated further from the water's edge was not.[115] Thus the *Pittston* court concluded that the committee's language was broad enough to cover " a person . . . who spent a significant part of his time in working on vessels"[116] *so long as* he did not fall within either of the two explicit descriptions of excluded persons contained in the reports[117]—"employees who are not engaged in loading, unloading . . . " and "employees whose responsibility is only to pick up stored

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[108] *Id.*

[109] *Id.* at 53.

[110] *Id.*

[111] See note 96 *supra*.

[112] *Id.* The reports specifically provide for coverage of a *checker* who is "directly involved" in a loading or unloading operation. H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

[113] 544 F.2d at 53.

[114] *Id.* at 54.

[115] *Id.*

[116] *Id.*

[117] *Id.*

cargo for further trans-shipment."[118] The court found with regard to a "shape-up"[119] employee injured while loading cheese into a consignee's truck that his responsibility was not only to pick up stored cargo for further trans-shipment.[120] Although viewed as a closer question, the court also found that in loading the cheese into the consignee's truck the claimant had in fact been engaged in the process of unloading a ship.[121] Noting that he clearly would have been "unloading" if his injury had occurred while he was moving the cheese from a position on the pier to the consignee's truck, the court concluded that it would be "wholly artificial" to find that the claimant had not been unloading simply because his injury had occurred while he was inside the consignee's truck.[122]

Formulating a coverage test which will no doubt generate considerable controversy the court held: "[T]he Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stuffing or stripping 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."[123]

The Second Circuit's approach to the question of what constitutes covered activity is thus a bifurcated one, establishing one status standard for stuffers and strippers and a separate standard for all other workers engaged in the maritime handling of cargo. Stuffers and strippers are considered "employees" without further inquiry. "Cargo-handlers," on the other hand, must show that a significant part of their time has been spent in "the typical longshoring activity of taking cargo on or off a vessel."

The primary significance of Judge Friendly's opinion in *Pittston* lies in its conclusion that the extent of shoreside coverage under the Act is not simply dependent upon but is actually co-extensive with the landward sweep of the loading and unloading process. Unlike the

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[118] H. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

[119] See note 96 *supra*.

[120] 544 F.2d at 54. The court noted that the claimant performed a variety of jobs on the pier, including going on vessels. *Id.* More important, the court did not consider the cargo "stored" within the committee's meaning merely because the consignee had delayed five days in picking it up. *Id.* The court specifically did not decide whether cargo should ever be regarded as "stored" so long as it remained in the custody of the stevedore rather than being placed in a public warehouse. *Id.* at 54 n.24. The court noted that one of the cases which it had dismissed, where there was a delay of 133 days, might have demanded such a decision. *Id.* For a further discussion of that type of situation see note 158 *infra*.

[121] *Id.* at 54-55.

[122] *Id.* at 54.

[123] *Id.* at 56.

I.T.O. majority, the *Pittston* court concluded that the amendments were intended to cover the entire loading and unloading process, and not merely a portion of that process.[124] When the entire process is deemed covered, the crucial question becomes what types of shoreside cargo-handling activity can be considered part of loading or unloading a ship. The conclusion that stuffers and strippers are engaged in loading and unloading seems logically inescapable.[125] Much more significant is the court's conclusion that a longshoreman moving cargo inside the consignee's truck was in fact engaged in unloading a ship. For the court thus concluded that the loading and unloading functions, and consequently the type of cargo-handling activity covered under the Act, extended "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)."[126] Selection of that limit makes eminent good sense. In contrast to the Fourth Circuit's "point of rest," which has only a geographic significance,[127] the point at which the consignee relinquishes or assumes control of the cargo has a functional significance as well, marking the most obvious point at which cargo enters or leaves maritime commerce.[128]

While the *Pittston* court's definition of the landward extent of the loading and unloading process is logically compelling, its analysis falters when it requires a cargo-handler to have "spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel" in order to satisfy the status test. This proviso treatment of cargo-handlers raises serious questions not only as to its intended meaning, but more importantly, as to it's necessity.[129] First, the nature of this additional showing required of cargo-handlers is somewhat unclear. Two interpretations seem plausible. The proviso could be in-

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[124] Whereas the Fourth Circuit had concluded that only a portion of the loading and unloading process was covered, *I.T.O.*, 529 F.2d at 1087, the Second Circuit construed the Act as covering Caputo so long as he was not an employee who was "not engaged in loading or unloading a vessel." *Pittston*, 544 F.2d at 54. The proviso aside, then, the *Pittston* court viewed the entire loading and unloading process as covered activity.

[125] See text at note 90 *supra* for a discussion of the containerization process. The *Pittston* court's coverage of stuffers and strippers was later followed by the First Circuit in Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 276-77 (1st Cir. 1976).

[126] 544 F.2d at 56.

[127] *See* Judge Craven's criticism of the "point of rest," *I.T.O.*, 529 F.2d at 1095. It should also be noted that even the geographic significance of a "point of rest" lends no real meaning, stability, or predictability to the application of that concept. For as Judge Craven noted, the location of the "point of rest" will vary from port to port depending upon the sophistication of each port's cargo-handling facilities, and may well vary from day to day in the same port depending on the whim of the terminal operator. *Id.* at 1096.

[128] *See* Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 638 (3d Cir. 1976); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 543-44 (5th Cir. 1976).

[129] Judge Friendly himself posed this question in *Pittston*. 544 F.2d at 56.

terpreted to require merely that a significant part of the claimant's time be spent in the loading and unloading process as realistically construed. The court's use of the language "typical longshoring activity"[130] and its recognition of land-based activity as a new fact of life on the waterfront,[131] coupled with the acknowledgement that its holding had gone some way toward reading the status requirement out of the Act[132] would support such a construction. Interpreted in this manner, the proviso would mean that a longshoreman injured while handling cargo between the ship and the consignee's truck is covered under the Act as long as he has spent a significant part of his time in just such activity, the loading and unloading process. It appears, however, that a stricter showing was intended. The language "taking cargo *on or off a vessel*"[133] seems to require that a cargo-handler actually spend a significant part of his time going on board a ship. This more demanding interpretation of the proviso is supported by the *Pittston* court's repeated mention that the cargo-handler in that case did in fact work "on" vessels.[134] The First Circuit endorsed this narrow "shipboard activity"[135] reading of the proviso by way of dictum in *Stockman v. John T. Clark & Son, Inc.*,[136] interpreting it to require of some claimants that they actually "go aboard a ship" a significant part of the time.[137] Yet to require periodic presence on board a ship is simply unreasonable in light of Congress' explicit recognition that containerization has resulted in a much greater percentage of a longshoreman's work being performed on land.[138] Moreover, to require actual shipboard activity of any claimant contradicts the fact, as recognized by the First Circuit itself, that "even longshoring work in its traditional form is at times organized so that some workers remain at all times on the pier as part of a continuous loading or unloading process."[139]

While the question of the proviso's intended meaning is of obvious importance within the Second Circuit, the more crucial question as regards the future development of the law is that posed by Judge

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[130] 544 F.2d at 56.

[131] *Id.* at 53.

[132] *Id.* at 56.

[133] *Id.* (emphasis added).

[134] *Id.* at 54.

[135] Stockman v. John T. Clark & Son, Inc., 539 F.2d 264, 277 (1st Cir. 1976).

[136] 539 F.2d 264 (1st Cir. 1976).

[137] *See id.* at 276-77. The court did not note, however, that it did not believe that Congress had intended to exclude bona fide members of a class of employees whose members would have been covered some of the time under the earlier Act. Hence the Court did not find that the Act required a demonstration by each claimant that he individually would have been covered. The court determined that it was those who were not plainly includible in some recognized category of maritime employment who might have to demonstrate their entitlement to coverage by showing that their duties encompassed shipboard activity. *Id.*

[138] H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4707-08.

[139] *Stockman*, 539 F.2d at 277. *See also, I.T.O.*, 529 F.2d at 1088.

Friendly; namely, "whether the proviso is essential"[140] in determining the employee status of injured cargo-handlers. It is submitted that regardless of which interpretation is adopted, the proviso itself is neither an essential nor a proper consideration in determining the employee status of a claimant who is injured while handling cargo which is in maritime commerce.

Application of the proviso requirement that a cargo-handler have spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel seems certain to defeat the basic goal of a uniform compensation system for those engaged in maritime employment. In fact, the illogical coverage scheme which the proviso will produce can hardly be called a system at all. A system of coverage should bear a logical relation to the actual operation of the process it is designed to cover. Hence, under a truly uniform compensation system, cargo which is in maritime commerce and on its way to a ship should not pass from a handler protected by the Act to one who is not protected by the Act. Yet, that is exactly what can happen when the proviso is applied. For example, under the *Pittston* formula, a stuffer injured while stuffing a container one thousand feet from the water's edge automatically satisfies the status test. However, a hustler operator who is injured while depositing that same container at a container marshalling area within fifty feet of the ship fulfills the status requirement only if he satisfies the proviso. Thus, despite the fact that the hustler operator performs a *later* function in the overall loading process, he is forced to make a stronger showing of status in order to be covered under the Act. This is clearly illogical. It simply cannot be maintained either that the hustler operator is not engaged in loading a vessel or that he is performing any less essential a function in the overall loading process than that performed by the stuffer. The hustler operator's status as an employee, therefore, should not be made to depend upon the nature of his past activity.

In addition, the proviso seems destined to produce fortuitous results among those performing similar functions in the loading or unloading process. For example, if two hustler operators collided with each other while carrying containers which they had picked up at the same stuffing point and which were destined for the same ship, one might be covered while the other might not since, under the proviso approach, each cargo-handler's coverage would depend on whether a significant part of his time had been spent in the traditional longshoring activity of taking cargo on or off a vessel. Thus, depending upon the nature of their past activity, some cargo-handlers will be covered while others will not—despite the fact that they may be injured in the same way, at the same place, while performing the same task. Yet as Judge Craven noted in his *I.T.O.* dissent, the anomaly which the amendments were designed to correct was the situation "where workers exposed to identical risks receive disparate workmen's compensa-

[140] *Pittston*, 544 F.2d at 56.

tion benefits."[141] To look to past activity in order to determine the employee status of claimants injured while handling cargo in maritime commerce would frustrate the basic goal of uniform coverage. It would promote both illogical differences in coverage among persons performing successive functions in the loading or unloading of a ship, and fortuitous differences in coverage among persons performing similar functions in the loading or unloading process.

Finally, the proviso represents an unwarranted judicial imposition of a condition to recovery. It has been suggested that the reason for requiring cargo-handlers to demonstrate their entitlement to coverage by fulfilling the proviso is that unlike stuffers and strippers they are not plainly includible within some "recognized category of maritime employment."[142] That explanation however is unconvincing. Not only is there considerable controversy as to what is a "recognized category" of maritime employment, but moreover it seems clear that in applying the statutory language the proper inquiry should be whether or not cargo-handlers fall within a category recognized *by the Act.* Significantly, the Act itself does not specify different degrees of covered activity; rather, both the Act and the legislative history mark as employees those persons engaged in loading and unloading.[143] For example, in *Pittston,* the court found that the claimant who was injured while moving cheese inside the consignee's truck was engaged in unloading a ship.[144] That alone is sufficient to establish him as an employee under the Act. By inquiring into the nature of a claimant's past activity, the proviso demands a more stringent showing of status than that called for either by the Act or by the committee reports.

Thus, while the *Pittston* court's conclusion as to the landward sweep of the loading and unloading process seems correct, its proviso treatment of cargo-handlers is unpersuasive. A better approach would simply dispense with the proviso altogether, as was done in the most recent appellate construction of the status requirement, *Jacksonville Shipyards, Inc. v. Perdue.*[145]

In *Jacksonville,* the Fifth Circuit considered five cases consolidated on appeal, two of which involved the employee status of cargo-handlers.[146] Both claimants were injured while handling cargo

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[141] 529 F.2d at 1097.

[142] The rationale is that of the First Circuit by way of dictum in *Stockman,* 539 F.2d at 277. The *Pittston* court did not specify why it had attached the proviso. Rather, the court not only specifically left open the question of its necessity, but was careful to note that the amendments "at least" covered those who satisfied the proviso. *Pittston,* 544 F.2d at 56.

[143] Even the *Pittston* court recognized this fact. 544 F.2d at 54. *See also,* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 539-40 (5th Cir. 1976); Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 638 (3d Cir. 1976).

[144] 544 F.2d at 54.

[145] 539 F.2d 533 (5th Cir. 1976).

[146] *See* 539 F.2d at 543-44. The court did not employ the term "cargo-handler," but the claimants in *Jacksonville* fall within the *Pittston* definition of that term and will

which either was bound for shipping, or had previously been removed from a vessel. A unanimous court affirmed each of the awards.[147]

The *Jacksonville* court rejected the "point of rest" theory,[148] noting the individual injustices which application of that concept would produce.[149] The court considered application of that principle to be inconsistent with the liberal construction which should be afforded remedial legislation such as the Longshoremen's and Harbor Worker's Compensation Act.[150] The court also rejected the proposition that a claimant's job classification, such as "longshoreman" or "ship repairman," or the official name of his union should have any bearing on the determination of his status as an employee.[151] Turning to the legislative history for further assistance, the court concluded that the amendments had extended coverage not only to those actually engaged in loading, unloading, building or repairing a vessel, but also to those "directly involved" in such work.[152] Consequently, the court concluded that both claimants satisfied the status test since they were performing functions which constituted an integral part of the process of moving maritime cargo from a ship to a land mode of transportation.[153]

The *Jacksonville* decision is thus significant in two respects. First, the Fifth Circuit's decision represents the most explicit statement to date of the type of shoreside cargo handling activities which are encompassed within the loading and unloading functions. In concluding,

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be referred to here as such. In *Jacksonville*, Diversion Ford was a member of a "warehouseman's" union in the port of Beaumont, Texas who was injured while securing a military vehicle to a railway flat car for transportation inland. The vehicle had been unloaded off a vessel either two or seventeen days earlier and placed in a storage area. From there it had been lifted onto the flat car on the day before the accident. *Id.* at 543. Will Bryant was a "cotton header" in Galveston who was injured while unloading bales of cotton from dray wagons and stacking them in pier warehouses. The wagons would bring the cotton up to the pier from shoreside warehouses where it had been deposited by inland shippers. After Bryant's "cotton-headers" union had finished stacking the cotton in the pier warehouses it would remain there for anywhere from one day to several weeks until the "longshoremen's" union took it on board a ship. The cotton which Bryant was handling when hurt remained in the warehouse for five days until the longshoremen arrived. *Id.* at 544.

[147] *Id.* at 547.

[148] *Id.* at 540.

[149] Apparently adopting a Widener-like construction of the point of rest theory, the court reasoned that under that theory both Ford and Bryant would have been covered if their handling of the military vehicle and the cotton, respectively, had been part of a continuous operation. 539 F.2d at 543-44. The court further noted, however, that application of the point of rest theory would deny coverage solely because of the brief discontinuity in time created by the temporary storage of the vehicle and the cotton, despite the fact that the brief delay had not altered the essential nature of either man's work. *Id.* Consequently the court refused to adopt the point of rest theory, noting that it could not overlook the individual injustices which it would create. *Id.* at 543.

[150] 539 F.2d at 540 n.20, 21.

[151] 539 F.2d at 539. *Accord, Stockman*, 539 F.2d at 272; *Pittston*, 544 F.2d at 52. *But see also*, Weyerhauser Co. v. Gilmore, 528 F.2d 957, 962 (9th Cir. 1975).

[152] 539 F.2d at 539-40.

[153] *Id.* at 543-44.

as the *Pittston* court had, that the entire loading and unloading process was covered under the Act, the *Jacksonville* court clearly viewed that process as extending landward to the point at which cargo enters and leaves maritime commerce.[154] Hence, loading and unloading activity was seen as the handling of maritime cargo, and the individual claimants were covered because they were performing an integral function in the movement of maritime cargo.[155]

Perhaps the *Jacksonville* court's most significant contribution to the developing law on the status requirement, however, is the uniformity with which it applied its coverage scheme. Once the court found a claimant to be performing covered activity, it considered the status

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[154] Not only did the court conclude that Ford was involved in unloading a ship because he was performing an integral part of the process of moving maritime cargo from a ship to land transportation, but it expressly noted that Ford was performing "*the last step* in transferring this cargo from sea to land transportation." 539 F.2d at 543 (emphasis added).

[155] It is noteworthy that the *Jacksonville* court concluded that a claimant need only be "directly involved" in loading or unloading a ship to satisfy the status test, 539 F.2d at 539-40. The court's use of the phrase "directly involved," which is extracted from the committee reports, represents the only application of that language to persons who physically handle cargo. When read in the context of the reports, however, the phrase seems to apply only to those persons who participate in the maritime transfer of cargo without themselves physically handling that cargo. The reports state:

> 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 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 amendments.

H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708. In that the language "directly involved in" follows the provision excluding "purely clerical" employees who do not even "participate" in loading or unloading, and the selection of a checker as an example, it does not appear to be directed at those who physically handle cargo. *See* GILMORE & BLACK, *supra* note 12, § 6-51 at 430. Note that the *Pittston* court employed the term with regard to the checker Blundo, 544 F.2d at 53, but not with regard to the cargo-handler Caputo. *Id.* at 54.

The objection herein expressed is not meant to imply that there is any significant or even measurable difference between the standards of "directly involved in" and "engaged in." The objection is merely that the committee reports do not constitute the source of a separate "directly involved in" test for cargo-handlers. In this regard it is significant that, having concluded that a claimant need be merely "directly involved in" rather than actually "engaged in" loading or unloading, the *Jacksonville* court did not bother to determine whether Ford and Bryant were actually "engaged in" loading or unloading. The importance of whether or not the "directly involved in" standard is a valid one as applied in *Jacksonville* is diminished by the fact that both claimants were clearly engaged in covered activity not only under the *Jacksonville* court's "integral part of the maritime transfer of cargo" test but also under the definition of the loading and unloading process adopted by the Second and Third Circuits. *See Pittston*, 544 F.2d at 54-55, 56; Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 638 (3d Cir. 1976). Since each claimant was handling maritime cargo, it seems likely that if pressed to decide the issue, the *Jacksonville* court would have found both claimants "engaged in" and not merely "directly involved in" the loading and unloading process.

test satisfied without inquiring into the nature of his past activity. Having marked the landward limit of the loading and unloading process, the court found that everyone who had handled cargo up to that point was an employee. This uniform coverage approach of the *Jacksonville* court is to be contrasted with the fortuitous coverage which is likely to result under the *Pittston* court's proviso approach. It is suggested that in light of Congress' stated concern for a uniform compensation system,[156] the *Jacksonville* scheme is the more appropriate approach.

In summary, it is submitted that the amendments were intended to cover the entire loading and unloading functions, and that the landward sweep of the loading and unloading process should be found to coincide with the point at which cargo enters and leaves maritime commerce.[157] Not only stuffers and strippers, but all those who handle maritime cargo[158] should be considered to be loading or unloading a vessel and hence engaged in maritime employment. Informed discussion of the other types of maritime employment specified in the Act—ship building, ship repairing and ship breaking—is made difficult by the relative absence of case law on those subjects.[159] It is submitted, however, that coverage should attach to any person performing an integral part of those functions as realistically construed.

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[156] H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

[157] The Third Circuit has adopted this view as well. *See* Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629 (3d Cir. 1976). The *Sea-Land* court concluded that, "[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.* at 638. The opinion is not fully discussed in the status section of this comment because that statement of coverage was arrived at in the context of a rejection of the situs test. See the text at note 224, *infra*.

[158] A potentially troublesome question is that of determining when maritime cargo loses its maritime status due to the consignee's delay in picking it up. See discussion at note 120 *supra*. It seems clear that if kept in a public warehouse, the cargo would lose its maritime status. The real problem will lie in determining the maritime nature of cargo which is left with a stevedore who neither operates a warehousing service nor has contracted to provide storage. Decisions of this sort may well rest upon a court's subjective reaction to the length of time involved.

[159] *Jacksonville* presents the only case to date in which the status of someone involved in a function other than loading or unloading has been at issue. Of the two employees involved, the only claimant even arguably performing shipbuilding or ship repair work at the time of his injury was John L. Nulty, a carpenter at a shipyard in Moss Point, Mississippi. Nulty was injured while building a piece of woodwork which was to be installed by someone else in a new ship that had been launched but not yet commissioned. Although he occasionally went on board to take measurements, most of Nulty's work was performed in a fabrication shop 300 feet from the ship. The court found that Nulty was an employee under the Act because he was directly involved in an ongoing shipbuilding operation. 539 F.2d at 543-44.

B. *Determining Whether or not a Claimant is "Engaged in" Maritime Employment*

An employee is "any person *engaged in* maritime employment".[160] Thus, in addition to raising the basic issue of what activities constitute maritime employment, the definition also raises the issue of when a claimant is or need be "engaged in" maritime employment to be considered an employee under the Act. To date, the courts have been unanimous in looking to the nature of the claimant's function at the time he was injured in order to determine whether or not he was engaged in maritime employment.[161] It is submitted that this "at the time of injury" test raises serious questions, however, both as to the proper method for determining a claimant's function at the time of injury and, more importantly, as to whether that test itself represents the legislatively intended meaning of the term "engaged in".

The threshold problem in defining the nature of the claimant's function at the time of injury is determining just how long a period of time should be considered "the time of injury." Focusing too precisely on the nature of the particular act performed at the exact moment of injury can lead to a distorted impression of the claimant's overall function. A good example of such an overly-precise inquiry is that fashioned by the Third Circuit in *Sea-Land Service, Inc.* v. *Johns*.[162] There, Wallace Johns was a "shape-up"[163] employee hired as a shuttle driver to haul trailers between Sea-Land's two terminals in Port Elizabeth, New Jersey.[164] On the day in question, Sea-Land was in the process of moving its operations from an old terminal facility at Berth 52 to its new terminal at Berth 90.[165] Johns began the day by hauling a trailer which had just come off a ship at Berth 52 to the new terminal at Berth 90 where Sea-Land stored its containers.[166] Johns was injured on the return trip from Berth 90 to Berth 52 when his truck overturned.[167] While the record was clear as to the nature of the load on the initial trip from Berth 52 to Berth 90, it was decidedly equivocal as to the nature of the load on the return trip.[168] Johns testified that he thought the crate he was carrying was full and was being

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[160] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976) (emphasis added).

[161] *See, e.g., Stockman*, 539 F.2d at 266; *Pittston*, 544 F.2d at 41-42, 53-54; Sea-Land Service, Inc. v. Director, Office of Worker's Compensation Programs, 540 F.2d 629, 639-40 (3d Cir. 1976); *I.T.O.*, 529 F.2d at 1087-88; *Jacksonville*, 539 V.2d at 539-40. Proposed regulations promulgated by the Secretary of Labor also appear to take this position. *See* Proposed LHWCA Coverage Regulations, 20 C.F.R. § 710.3(a)(1), 39 Fed. Reg. 18269 (1974).

[162] 540 F.2d 629 (3d Cir. 1976).

[163] A "shape-up" employee is one who is hired for the day through the union hiring hall.

[164] 540 F.2d at 632.

[165] *Id.*

[166] *Id.* at 639.

[167] *Id.*

[168] *Id.*

brought to Berth 52 so it could be loaded on board a ship.[169] Sea-Land's representative suggested, however, that Johns had merely been shuttling equipment between the two terminals on the return trip.[170] The court reasoned that if on the return trip Johns had been hauling a crate destined to be loaded onto a vessel then he had in fact been engaged in maritime employment, but that if he had merely been shuttling equipment then he had not been engaged in maritime employment.[171] The case was remanded to determine the nature of the load Johns was carrying on the return trip.[172]

It is submitted that the remand was unnecessary. The court's concern for the nature of the load Johns was carrying on his *return trip* constitutes too specific an inquiry into his activity at the time of injury. A claimant's status simply should not be made to depend wholly on the nature of the job being performed at the very moment of injury.[173] The court reasoned that Johns would have been covered if the accident had happened during the initial trip from Berth 52 to Berth 90.[174] It did not consider whether Johns would have been covered on the return trip if he had been hauling no trailer at all and it had been just his tractor that had tipped over. Clearly, however, coverage must be found in such a situation, for to hold otherwise is to imply that a hustler operation is covered when carrying a load to the container marshalling area but is not covered when returning empty. And since, logically, coverage should apply when a claimant is returning empty from depositing cargo somewhere, there is no logical reason to withhold coverage from Johns merely because he may have taken a load of equipment back with him. Indeed, to deny coverage in such a situation is to reward commercial inefficiency. It is not the claimant's last act, but rather his overall function which is significant to a consideration of whether coverage attaches.[175] Thus, the inquiry into the nature of the claimant's activity at the time of the injury cannot become so narrow that the nature of his overall function becomes lost. Otherwise, countless employees will be walking or driving in and

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 640.

[173] *See Stockman*, 539 F.2d at 275.

[174] 540 F.2d at 639.

[175] *See Stockman*, 539 F.2d at 275 ("Whether the status of at least a steady employee is that of a 'maritime' worker, including 'longshoreman', seems to us to require looking at the nature of his regularly assigned duties as a whole."). Illustrative of this concept, and in sharp contrast to the Third Circuit's handling of the Johns' situation, is the Fourth Circuit's treatment of the facts surrounding the injury to the hustler operator Harris in *I.T.O.*. The panel opinion noted that Harris had been injured on the *return trip* from the container marshalling area. 529 F.2d at 1082. The *en banc* opinion, however, noted that he had been injured while taking a stuffed container *to* the container marshalling area. 542 F.2d at 905. This loose handling of the facts suggests that the Fourth Circuit was less concerned with whether Harris was coming or going, full or empty, at the time of the injury than it was with his overall function as a hustler operator.

out of the Act's coverage all day long—exactly the situation which Congress was attempting to prevent in enacting the 1972 amendments.[176] Moreover, it may well be that the "at the time of injury" test should be considered an unacceptable construction of "engaged in" no matter how it is applied, for it seems destined to produce harsh and somewhat fortuitous results. If a claimant spends ninety-nine percent of his time as a stuffer and only one percent of his time hauling equipment, but he is injured while hauling equipment, then he is not "engaged in" maritime employment under the test and hence is not an employee entitled to recover under the Act. Although that result seems inequitable, the Fifth Circuit reached just such a conclusion when faced with a similar fact situation in *Jacksonville*.

Charles Skipper was a welder at the Jacksonville Shipyards.[177] His usual duties were those of a ship repairman.[178] Upon reporting to work one morning, however, he was assigned to assist in tearing down a building for the purpose of salvaging some steel.[179] He was injured by several steel fragments which struck his forehead when some beams fell from the building during the dismantling process.[180] Refusing to attach any weight to Skipper's regular job classification as a ship repairman, the Fifth Circuit determined his status as an employee solely on the basis of his duties at the time of the injury.[181] The court concluded that the salvage work in question was neither within any of the examples of maritime employment specified in the Act nor sufficiently similar to the statutory categories that it could be considered as encompassed within the general congressional intent.[182] Hence, the court found that Skipper was not an employee under the Act.[183]

The *Jacksonville* result is needlessly inequitable. The mere fact that a claimant may not have been engaged in maritime employment[184] precisely at the moment of injury should not be deemed to foreclose recovery under the Act. Certainly the Act itself contains no such stipulation. The source of the "at the time of injury" test[185] is the committee reports, specifically the statement that, "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

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[176] *See Pittston*, 544 F.2d at 54; *Sea-Land*, 540 F.2d at 637.

[177] 539 F.2d at 542.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] It is by no means certain that Skipper's demolition work was not, in fact, maritime employment. *See, e.g.*, Gorman, *The Longshoremen's and Harbor Worker's Compensation Act–After the 1972 Amendments*, 6 J. of Mar. L. & Com. 1, 10-11 (1974).

[185] *See Jacksonville*, 539 F.2d at 539.

activity."[186] Not only does this language fail to establish "at the time of injury" as the intended meaning of "engaged in", but rather it actually seems to indicate a far different meaning when read in the context of the entire reports. The reports go on to say, "[t]hus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."[187] By specifically limiting the exclusion to persons whose responsibility is "only" to pick up stored cargo, and to persons whose "purely" clerical work does not require them to even "participate" in the loading or unloading of cargo, Congress seems to have indicated that persons who perform such work only some of the time may qualify for coverage. Hence, it seems that not one hundred percent of every employee's time need be spent in the activities specified as maritime employment in order to be protected by the Act. Consequently, instead of looking only to the time of injury, it seems that in determining whether a claimant is "*engaged in* maritime employment", the court should look to "the nature of his regularly assigned duties as a whole."[188]

It is suggested therefore that the language "employees who are not engaged in loading, unloading . . ." should not be interpreted as excluding a person from coverage merely because he was not performing a maritime function at the exact moment of injury. Rather, a claimant should be considered "engaged in maritime employment" under the Act if he is *customarily* engaged in maritime employment. The amendments are, after all, an attempt to correct the fortuitous nature of coverage under the Act.[189] Indeed, the basic purpose behind the amended coverage was to structure a "uniform compensation system."[190] As Judge Friendly has pointed out, Congress wished to minimize those occasions in which a longshoreman would find himself covered under the LHWCA at one moment and under a state compensation law the next.[191] Interpreting the Act to require that the claimant be engaged in maritime employment at the time of his injury, however, simply substitutes the new fortuitous circumstance of *when* an injury occurs for the former fortuitous circumstance of *where* it occurred.[192] For this reason, it is submitted that a claimant should

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[186] H. R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

[187] *Id.*

[188] *Stockman*, 539 F.2d at 275.

[189] H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4708.

[190] *Id.*

[191] *Pittston*, 544 F.2d at 54.

[192] Relevant here is the constantly varying nature of employment on the docks. As one commentator has noted, "The almost infinite range of the conditions of waterfront employment has been detailed in thousands of cases." GILMORE & BLACK, *supra* note 12, § 6-51, at 430. Not only are the many "shape-up" employees hired for only a day at a time, *e.g.* Caputo in *Pittston* and Johns in *Sea-Land*, but even for a worker stead-

be considered an employee under the Act if he was performing a maritime employment function at the time of his injury *or* if he is customarily engaged in maritime employment.

II. THE SITUS REQUIREMENT

Compensation is payable under the LHWCA upon the disability or the death of an employee, "but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."[193] Application of this amended situs requirement has been neither as frequent nor as difficult a problem as the determination of employee status, perhaps due to the very breadth of the parenthetical extension itself.[194]

The only appellate court to date to find the situs requirement unsatisfied is the Fifth Circuit in *Jacksonville*. The *Jacksonville* court concluded that two of the five claimants before it had not been injured on a covered situs.[195] A shipfitter at the Mayport Naval Station in Jacksonville injured his left knee when he stumbled and fell to the pavement while getting off his employer's bus.[196] The bus had taken the claimant from the aircraft carrier on which he was working to an office maintained by his employer a mile away where he was required to punch out.[197] The office area where he was injured was a purely clerical and administrative post located five hundred yards from the nearest body of water.[198] None of the facilities which separated the office from the water were used for loading, unloading, repairing or building vessels.[199] The court found that under no reasonable con-

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ily employed by a single employer there may be little continuity in the type of assignments he is called upon to perform, *e.g.*, Skipper in *Jacksonville*. Hence, it seems quite likely that Congress intended the principle of uniformity to apply not only to a maritime worker's activities during the course of a single day, but also to his activities day in and day out.

[193] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976).

[194] It should be noted that the Benefits Review Board has adopted a broad construction of the situs requirement. In *Sea-Land*, the Board noted that,

> The situs of the claimant's injury qualifies . . . since it is directly related to, and an essential part of, the employer's longshoring operations. To hold otherwise would contravene the legislative intent of the 1972 amendments to the Act, which were enacted, in part, to eliminate the circumstance of having persons engaged in maritime employment walk into and out of the Act's coverage during the workday. 2 BRBS 65, 67-68 (1975).

Although this comment will arrive at a similarly broad statement of the Act's covered situs, the Board decisions will be neither discussed nor relied on for support. *See* discussion at note 43 *supra*.

[195] 539 F.2d at 541-43.

[196] *Id.* at 541.

[197] *Id.*

[198] *Id.* at 542 n.23.

[199] *Id.* at 542.

struction of the Act did the office area in question either adjoin navigable waters or carry out any of the functions specified in the Act. Rejecting the argument that the amended situs area included every point in a large marine facility where an otherwise qualified employee might go at his employer's direction, the court concluded that the location of the shipfitter's injury did not satisfy the situs requirement.[200]

The second claimant whom the court found did not satisfy the situs test was a ship repairman temporarily assigned to assist in tearing down a building for the purpose of salvaging steel.[201] The building which the claimant was tearing down when injured was located about two hundred feet from the water's edge in a marine facility called the Southside Yard, situated just across the St. Johns River from the rest of the Jacksonville shipyards.[202] Although the building had formerly housed a fabrication shop, there was no repair or fabrication work actually being performed there at the time of the injury, since all of the shops in the Yard had previously been closed down.[203] The Southside pier, however, was still used to tie up ships which were undergoing repair.[204] The court reasoned that in determining whether a situs was covered under the Act it had to look past an area's formal nomenclature to see whether that area was in fact customarily used by an employer in loading, unloading, repairing, or building a vessel as of the time of the injury.[205] Noting that the shops in the Southside Yard had been inactive for a year prior to the injury, and that there was no ship repair or shipbuilding activity actually being performed in those buildings as of the time of the injury, the court concluded that the shops had lost their status as a covered situs.[206]

It is submitted that the *Jacksonville* court's approach represents far too conservative a construction of the situs requirement. Not only is the reasoning unpersuasive, but the results are unacceptable. The Act's coverage was amended in an attempt to prevent the inequities which had arisen when employees walked in and out of the Act's coverage during the course of a day's work.[207] Yet, the court specifically provides for just that situation by summarily concluding that the situs area does not cover all those points in a terminal where an otherwise qualified employee might be required to work by his employer. Moreover, the court's conclusion that the specific locus at which the claimant was injured must have been customarily used for loading, unloading, repairing, or building a vessel seems to require

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[200] *Id.*

[201] *Id.* See text at note 177 *supra* for an expanded discussion of the facts.

[202] 539 F.2d at 542.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 541.

[206] *Id.* at 543.

[207] See cases cited at note 176 *supra*.

more of a claimant than does the Act itself. The Act specifically states that coverage is extended to "*any* adjoining . . . terminal, . . . *or other* adjoining area customarily used . . . ."[208] Thus it seems that only "*other* adjoining area[s]" need be used in a particular way, for *any* adjoining *terminal* is covered. Still, even if an adjoining terminal must in fact be customarily used for loading, unloading, repairing or building a vessel, it seems only logical to require that merely part of that terminal need be so used in order that the entire terminal area qualify as a situs invoking the Act's protections.[209]

In light of this reading of the situs requirement, it is submitted that both claimants in *Jacksonville* satisfied the situs requirement. The shipfitter fulfills that test in two ways. First, it appears that the berth where he performed his ship repair work and the office area where he was injured are both part of the same Mayport Naval Station facility.[210] As such, the court should not have required that the office area itself be customarily used for loading, unloading, repairing, or building a vessel. Since the injury occurred on a marine terminal adjoining navigable waters, part of which was used for ship repair work, the situs test was satisfied.[211] Secondly, even if the office area and the berth are not part of the same terminal, the office area nontheless appears to constitute part of an "other adjoining area customarily used by an employer in . . . repairing a vessel." The punch-out office and the facilities which separated it from the water constituted an area adjoining navigable waters, and as part of its ship repair business, the claimant's employer required its employees to punch the time clock at the office twice each day. Thus, it seems that the office area was in fact an area adjoining navigable waters, and was "customarily used" by an employer in repairing vessels. The Southside Yard situs of the ship repairman's injury should also have been found to satisfy the situs test. The Yard appears to qualify as a covered situs not only because of the continued use of part of that area[212]—the Southside pier—but also because of the continued use of the facilities on the other side of the St. Johns River.[213]

It is suggested, therefore, that the *Jacksonville* court adopted too restrictive a view of the situs area covered under the Act. A more appropriate construction of the situs requirement is that fashioned by the First, Second, and Fourth Circuits. Concluding in *I.T.O.* that the area covered under the Act included two warehouses, 685 feet and 850 feet respectively from the water's edge,[214] the Fourth Circuit noted that at a minimum the claimants had been injured at a terminal which adjoined navigable waters and was used in the overall process

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[208] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976) (emphasis added).
[209] *See, Pittston,* 544 F.2d at 51 n.19.
[210] *See* 539 F.2d at 541-42.
[211] *Cf., Pittston,* 544 F.2d at 51 n.19.
[212] *Id.*
[213] See textual discussion at note 220, *infra.*
[214] 529 F.2d at 1082.

of loading and unloading a vessel.[215] The court thus had no doubt that the claimants had satisfied the situs test.[216] In *Pittston*, the Second Circuit saw no question that both the checker injured on the stringpiece of the pier, and the cargo-handler injured inside the consignee's truck further back in the terminal area, had satisfied the situs test.[217] Indeed, the court rejected the argument that the checker had not been injured within the situs area simply because the pier on which he was injured was used solely for stuffing and stripping activities and not for the actual loading and unloading of vessels.[218] Judge Friendly's broad language in *Pittston* is offered as a good illustration of the liberal construction which should be afforded the situs test:

> It would seem that any pier next to the water is included within the situs definition . . . The entire terminal adjoined the water and was enclosed by a single gate . . . [Claimant] was clearly on a "pier" and a "terminal" adjoining the water, *a part of which was used for loading and unloading vessels. This is sufficient.*[219]

The First Circuit, in *Stockman*, has followed the Fourth and the Second Circuits in adopting this broad construction of the situs requirement. The claimant was injured while stripping a container which had been trucked from the unloading site at the Castle Island pier to the stripping area at the Boston Army Base, a distance of two miles by land and 700 to 800 feet across the water.[220] The court reasoned that Congress had not intended to limit coverage only to those areas directly adjoining the berth of the specific vessel being unloaded.[221] Noting that the claimant had not been injured at some inland freight depot having only an incidental connection with navigable waters, but rather at a location which was "generally part of the same Boston waterfront area,"[222] the court concluded that the situs requirement had plainly been met.[223]

The majority of those jurisdictions which have considered the question of coverage, then, have applied the situs requirement in a relatively broad and liberal fashion. The restrictive view of the covered situs area adopted by the Fifth Circuit in *Jacksonville* represents an unwarranted departure from that developing standard. An even more anomalous departure, however, is the refusal of the Third Circuit in *Sea-Land* to apply the situs test at all. There, the shuttle-run which Wallace Johns drove between Sea-Land's two terminals followed the

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[215] *Id.* at 1083-84.
[216] *Id.*
[217] *Pittston*, 544 F.2d at 51.
[218] *Id.* at 51 n.19.
[219] *Id.* (emphasis added).
[220] 539 F.2d at 266.
[221] *Id.* at 272.
[222] *Id.*
[223] *Id.*

public streets of Port Elizabeth, New Jersey for more than a mile and a half.[224] Port Elizabeth is part of the sprawling marine terminal area operated by the Port of New York and New Jersey Authority.[225] Johns' truck overturned at the intersection of Rangoon and Bombay Streets, a distance of one-half mile from the water and one-third mile from the nearest of Sea-Land's terminals.[226]

The *Sea-Land* court followed a rather tortuous and somewhat unnecessary route in concluding that coverage under the Act was not foreclosed by the fact that John's accident had occurred on a public street over which his employer had no control.[227] The court reasoned that it is the existence of the employer-employee relationship, and not the situs of that relationship, which is significant for purposes of admiralty jurisdiction.[228] The Act's reference to the navigable waters was viewed as nothing more than a shorthand way of relating the claimant's employment function to the jurisdictional nexus of waterborne transportation.[229] From the legislative history, the court concluded that the 1972 amendments were an attempt to structure a more uniform federal compensation system so that maritime workers would no longer move in and out of the Act's coverage during the course of a day's work.[230] In the belief that Congress had fully exercised its legislative jurisdiction in admiralty, the court concluded that the amended act was intended to provide a federal workmen's compensation remedy for *all* maritime employees.[231] Consequently, the *Sea-Land* court asserted that as long as the employment nexus with maritime activity was maintained, i.e., as long as the status test was satisfied, then the situs requirement should not be allowed to interfere with Congress' attempt to eliminate the phenomenon of shifting coverage.[232] The court therefore considered the line delimiting the reach of the Act's shoreside coverage to be "functional and not spatial."[233] The key to coverage was seen as the functional relationship of the employee's activity to maritime transportation, and not the situs of that maritime employee at the time of his injury.[234] Hence the extent of coverage was defined not by reference to a geographic relationship with the navigable waters, but rather by the location of the interface between waterborne modes of transportation and land or airborne modes of transportation.[235] The Third Circuit thus viewed

[224] 540 F.2d at 632.
[225] *Id.* at 631.
[226] *Id.* at 632.
[227] *Id.* at 634-39.
[228] *Id.* at 636.
[229] *Id.* at 638.
[230] *Id.* at 637.
[231] *Id.* at 638.
[232] *Id.*
[233] *Id.* at 636.
[234] *Id.* at 638.
[235] *Id.*

the situs test as being subsumed within a more significant status test.

The court's contention that this is what Congress really intended, and that it is only poor draftsmanship which has obscured this purpose,[236] is simply not persuasive. The Act specifically provides that compensation is payable *only* for a disability or death which results from "an injury *occurring upon* the navigable waters."[237] If any explanation of the requirement is necessary, it could be, as Judge Friendly has observed, that "Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did."[238] Yet, the *Sea-Land* court's rejection of the situs test is not only unwarranted in the law, but is also unnecessary on the facts. The location of Johns' injury clearly satisfied the situs test. The court itself recognized that the intersection at which the accident took place was part of the marine terminal.[239] As Judge Friendly has noted, that is sufficient for coverage.[240] The fact that the accident occurred in an area over which Sea-Land had no control is irrelevant, for a "terminal" is a covered situs. Moreover, even as to "other adjoining area[s]," the Act requires merely that it be *used* by *an* employer and not that it be *controlled* by *the* employer.[241]

In summary, it is submitted that the amendments do present a dual test for coverage, and that a claimant must be found to satisfy the separate situs requirement in order to qualify for compensation under the Act. Basic to the amendments, however, was Congress' conviction that coverage under a maritime worker's compensation system should not be made to depend primarily on the situs of the claimant's injury. Consequently, the covered area was greatly expanded so that maritime workers would no longer move in and out of the Act's coverage during the course of a day's work. For this reason, the situs requirement should be liberally construed. It should be found satisfied wherever possible, thereby making the claimant's status as a maritime employee the primary factor in determining coverage under the Act.

CONCLUSION

It is submitted that the 1972 amendments should not be read narrowly, for the LHWCA is remedial legislation which must be liberally construed.[242] A liberal reading of the amended Act is further supported by the fact that the extension of coverage to shoreside areas was prompted not merely by the enormous disparity between state and federal benefits which the Act's improved benefit structure

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[236] *Id.*

[237] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976) (emphasis added).

[238] *Pittston*, 544 F.2d at 53.

[239] 540 F.2d at 632.

[240] *Pittston*, 544 F.2d at 51 n.19.

[241] LHWCA § 3(a), 33 U.S.C. § 903(a) (Supp. 1976).

[242] Voris v. Eikel, 346 U.S. 328, 333 (1953). *See also* note 58 *supra*.

would produce, but also by the fact that those state payments were unconscionably low to begin with.[243] In light of its explicit recognition of and concern for the inadequate benefits being paid injured longshoremen under the various state laws, it is highly unlikely that Congress would have intended only a limited extension of the more generous federal coverage.[244] Rather, it is more logical to conclude that Congress intended to create a widely available federal compensation remedy for maritime workers.[245] The amended act is no longer merely a *Jensen* stop-gap measure; it is an affirmative federal compensation scheme[246] the shoreside coverage of which should be construed as broadly as possible, consistent with the Act's humanitarian purpose.

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[243] After discussing the federal-state disparity the committee reports continued, "To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard . . . ." H.R. REP. NO. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4699.

[244] In fact, the committee reports expressly noted that the past disparity in payments had been a product of not only which side of the water's edge the injury occurred on, but of which state the injury occurred in as well. *Id.* at 4707. Moreover, the reports noted that the disparity would continue to be substantial "if State laws are permitted to continue to apply to injuries occurring on land." *Id.*

[245] Senator Williams, the sponsor of the 1972 amendments, noted that they were a model for the attempt to upgrade workmen's compensation programs, "including if necessary the imposition of Federal standards." 118 CONG. REC. 36270 (1972).

[246] *See Stockman*, 539 F.2d at 271; *Pittston*, 544 F.2d at 54; *Sea-Land*, 540 F.2d at 636.