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Admiralty

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THIRD CIRCUIT REVIEW

Admiralty

ADMIRALTY LAW — 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT — "SITUS" TEST IS NO LONGER TO BE USED; INJURED WORKMAN NEED PROVE ONLY HIS "STATUS" AS A MARITIME WORKER.

Sea-Land Service, Inc. v. Director (1976)

Wallace Johns, a member of the International Longshoremen's Association,¹ was hired for one day as a "shape-up"² employee by Sea-Land Service, Inc. (Sea-Land), a freight carrier that performed both shipping and motor freight operations.³ Assigned the job of shuttle driver, he moved items by rig between Sea-Land's old and new terminal facilities.⁴ On a return trip from the new terminal, Johns was injured when his rig overturned on a public street.⁵

Johns filed a claim against Sea-Land with the New Jersey Department of Labor and Industry and received payments under the New Jersey compensation plan.⁶ Later, he filed a second claim under the Federal Longshoremen's and Harbor Workers' Compensation Act (Act),⁷ which provided for greater benefits.⁸ The administrative law judge, finding that Johns was engaged in maritime employment at the time of the accident, but that he was not injured at a site covered by the Act, denied recovery.⁹ However, the Benefits Review Board (Board) determined that the site of the accident was within the covered area and granted recovery.¹⁰ On appeal,¹¹

1. *Sea-Land Serv., Inc. v. Director*, 540 F.2d 629, 632 (3d Cir. 1976).

2. *Id.* A "shape-up" employee is an individual employed under a system of hiring longshoremen by having applicants gather in a semicircle at least once a day for selection of a union-appointed hiring boss of those to work on that day or shift. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2087 (1971). Technically, the *Sea-Land* court misused the term "shape-up," since that type of employment arrangement had been illegal in New Jersey since 1953 and had been replaced by statutorily prescribed employment information centers. Waterfront Commission Act, N.J. STAT. ANN. §32:23-52 (West 1963). Johns was actually hired at one of these employment information centers. 540 F.2d at 632.

3. 540 F.2d at 631.

4. *Id.* at 632.

5. *Id.*

6. *Id.*

7. 33 U.S.C. §§901-950 (1970), *as amended by Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972*, Pub. L. No. 92-576, §§1-22, 86 Stat. 1251-1265.

8. 540 F.2d at 632.

9. *Id.* at 631; *see notes 29 & 30, and accompanying text infra.*

10. 540 F.2d at 631.

11. Johns proceeded under a provision in the 1972 Amendments to the Act which allows an employee to appeal directly to the circuit court from a final Board order. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C. §921(c) (Supp. V 1975).

the Third Circuit,¹² concluding that both the administrative law judge and the Board had misinterpreted congressional intent,¹³ remanded, *holding*, that as long as an employee is engaged in maritime activity at the time of the injury, compensation under the Act is available regardless of the situs of the accident. *Sea-Land Service, Inc. v. Director*, 540 F.2d 629 (3d Cir. 1976).

The Longshoremen's and Harbor Workers' Compensation Act of 1927 was drafted to fill a void created by Supreme Court maritime compensation decisions of the previous decade. In three companion cases decided in 1917, the Court held that state workmen's compensation statutes were constitutional.¹⁴ However, in *Southern Pacific Co. v. Jensen*,¹⁵ decided shortly thereafter, the Court held that state workmen's compensation laws were inoperative where the injury occurred upon the navigable waters of the United States.¹⁶ In reaction to *Jensen*, Congress attempted by statute in 1917¹⁷ and 1922¹⁸ to allow state compensation laws to cover injuries to maritime workers which occurred on the navigable waters of the United States. Both statutes, however, were declared unconstitutional on the ground that Maritime workers came under congressional admiralty jurisdiction,¹⁹ which required uniform federal regulation.²⁰

Congress passed the Act in 1927 to provide uniform coverage to all maritime workers who could not be constitutionally covered by state laws.²¹ Unfortunately, the Act contained several provisions which limited its

12. The case was heard by Judges Aldisert, Garth, and Gibbons. Judge Gibbons wrote the opinion.

13. 540 F.2d at 634.

14. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). In each case, the employers had argued that the imposition on them of liability without fault for industrial accidents violated the due process clause of the Federal Constitution. 243 U.S. at 235; 243 U.S. at 214; 243 U.S. at 204.

15. 244 U.S. 205 (1917). In this case the Supreme Court held that the New York State compensation law could not be applied to *Jensen*, who had been injured on a gangplank connecting the ship to the pier. Since he was injured on "navigable waters of the U.S.," he could be compensated only by Congress. *Id.* at 216-17.

16. *Id.* at 216, 218.

17. Act of Oct. 6, 1917, Pub. L. No. 82, §2916, 40 Stat. 395.

18. Act of June 10, 1922, Pub. L. No. 239, § 745, 42 Stat. 634.

19. Article III of the Constitution grants admiralty jurisdiction to the Supreme Court, U.S. CONST. art. III, § 2, but the Court has held that the Constitution also extends this jurisdiction to Congress: "As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures." *Butler v. Boston S.S. Co.*, 130 U.S. 527, 557 (1889).

20. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). In *Dawson* the Court stated:

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States.

264 U.S. at 227.

21. This congressional purpose was made evident in the House Report:

The bill . . . , therefore, will enable Congress to discharge its obligations to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits

coverage and which left the relationship between the Act and "the otherwise applicable State Compensation Act shrouded in impenetrable confusion."²² In particular, the Act imposed both status and situs requirements upon the injured employee: one seeking to recover was required to be engaged "in maritime employment" at the time of the injury,²³ while the injury itself must have occurred "upon the navigable waters of the United States (including any dry dock)."²⁴ However, even if these two requirements were met, coverage would be extended only if the employee was not covered by a state compensation plan.²⁵ Thus, the statute, instead of extending federal coverage for the entire longshoring operation,²⁶ merely provided a remedy for the gap created by the *Jensen* holding:²⁷ seamen were covered by the Jones Act;²⁸ longshoremen working on land were covered by state compensation plans; and longshoremen working on the navigable waters of the United States were covered by the Act.

For four decades the Court, in interpreting the situs and status requirements of the Act, wrestled with the questions of how far inland the "navigable waters of the United States (including dry dock)" extended and which acts of employment were maritime in nature and which were not.²⁹ In 1969, the court attempted to clarify its position in *Nacirema Operating Co. v.*

of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union.

H.R. REP. No. 1767, 69th Cong., 2d Sess. 20 (1927).

22. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §6-46, at 409 (2d ed. 1975); see *id.* §§6-45 to -51.

23. 33 U.S.C. §902(4) (1970). The complete section reads as follows: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." *Id.*

24. *Id.*

25. *Id.* §903(a).

26. Two commentators have stated:

The apparent intention of the Congress was to confine the operation of the Federal Act to the federal or maritime side of the Supreme Court's line; up to that line the State Acts were to continue in full force and effect. That is to say, Congress (apparently) aimed not at the broadest possible coverage (up to the full limits of its own constitutional powers) but at the narrowest possible coverage

G. GILMORE & C. BLACK, *supra* note 22, at 417.

27. For the Court's holding in *Jensen*, see text accompanying note 15 *supra*.

28. 46 U.S.C. §688 (1970). The Jones Act allows seamen injured at their employment to sue their employers in federal courts. *Id.*

29. For example, in *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941), the Supreme Court upheld a federal court award to the widow of a janitor who made a one-time excursion upon navigable waters to help a fellow employee test an outboard engine and died when the boat capsized. *Id.* at 244-45. The Court, attaching no significance to the fact that the decedent had not normally been engaged in maritime activities, stated: "[H]abitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made." *Id.* at 247 (footnote omitted). However, a year later the Court reversed a state court's denial of state compensation to the widow of an employee who died while engaged in dismantling a bridge from a barge situated on navigable waters. *Davis v. Department of Labor & Indus.*, 317 U.S. 249 (1942). The Court admitted that this created a "twilight zone in which the employees must have their rights determined case by case." *Id.* at 256.

Johnson,³⁰ which held that the Act permitted recovery for all injuries on "navigable waters" but that recovery for injuries sustained on land was limited to those occurring on dry docks.³¹ It was the province of Congress, stressed the Court, to expand the scope of coverage for injuries incurred on land.³²

The 1972 Amendments to the Act (1972 Amendments) were Congress' response to this suggestion.³³ Under the Amendments, an employee in maritime employment included any person engaged in longshoring operations,³⁴ and the land area included within the expression "navigable waters of the United States" was expanded to include not just dry docks but also piers, wharfs, terminals, and other areas normally used in the longshoring operation.³⁵ The 1972 Amendments also did away with the limiting reference to state law.³⁶ While many courts interpreted the 1972 Amendments to require both the status and situs tests,³⁷ some commentators proposed that recovery under the Act should hinge not upon the injured employee's status, but only upon his relation to a situs within the coverage

30. 396 U.S. 212 (1969). In this case the Supreme Court reversed the Court of Appeals for the Fourth Circuit, which had granted federal recovery to a longshoreman injured on a pier permanently affixed to the shore. *Id.* at 214, reversing *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968).

31. 396 U.S. at 220-21. The Court stated that "Congress intended to exercise its full jurisdiction seaward of the *Jensen* line." *Id.* at 220.

32. *Id.* at 223. The Court admitted that its holding created a lack of uniform treatment of injured longshoremen, but stated that "[t]he invitation to move that line landward must be addressed in Congress, not to this Court." *Id.* at 224.

33. For a general discussion of the 1972 Amendments, see Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683 (1973); Comment, *Negligence Standards Under the 1972 Amendments to the LHWCA: Examining the Viewpoints*, 21 VILL. L. REV. 244 (1976).

34. Section 902(3) of the Act, 33 U.S.C. §902(3) (Supp. V 1975), defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ." *Id.* This section retains the exclusion of ship masters and crew members, both of whom are covered by the Jones Act, 46 U.S.C. §688 (1970).

35. Section 902(4) of the Act, 33 U.S.C. §902(4) (Supp. V 1975), defines "employer" as follows:

An employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any 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.

Id.

36. *Id.* §903(a). It is clear, therefore, that federal coverage, if appropriate, will be extended, even if state coverage is available.

37. Circuit courts that have considered the question have agreed on the need for both tests. The Fourth Circuit has stated that the recent amendments "established a dual test for coverage." *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1083 (4th Cir. 1975), rehearing *en banc*, 542 F.2d 903 (4th Cir. 1976). In that case the court held that while the three employees working on a pier met the situs test, there could be no recovery since the employees were not directly involved in loading goods from the last point of rest on land to the ship, or in unloading from the ship to the first point of rest on shore. 529 F.2d at 1087-88. According to this court, the definition of the status of maritime workers included only those who were directly involved in loading and unloading ships. *Id.* However, upon rehearing *en banc*, the Fourth Circuit allowed recovery for two of the three injured employees. Recovery was still based upon employment with regard to loading or unloading a ship, but the requirement of being

of the Act.³⁸ Never prior to the *Sea-Land* court, however, had it been suggested that only a status test be employed.

In reaching its decision in the instant case, the Third Circuit examined the legislative history and judicial precedent surrounding the 1972 Amendments to the Act, recognizing that these changes "manifest[ed] an unmistakable congressional intention to afford federal coverage for injuries occurring in areas inland of the navigable waters of the United States where prior to 1972 Congress had deferred to state law."³⁹ In addition, the court stated that the Act and its recent amendments were based upon Congress' admiralty jurisdiction and not upon its commerce power.⁴⁰

Focusing upon the scope of the 1972 Amendments, the *Sea-Land* court determined that the limits of the Act's extended coverage should be defined functionally by examining the employee's status as a maritime worker — *i.e.*, one engaged in the longshoring operation of loading or discharging cargo — rather than spatially by concentrating upon the geographical situs

directly involved was dropped. *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903, 905 (4th Cir. 1976).

In contrast to the Fourth Circuit, the First, Second, and Fifth Circuits have stressed the situs test. In *Stockman v. John T. Clark & Son*, 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), the First Circuit allowed recovery to a plaintiff who was injured while removing cargo from a container that had been off-loaded from a vessel three days earlier. 539 F.2d at 266. The court stated that "a claimant's status need not depend wholly on the job being performed at the very moment of injury." *Id.* at 274. In *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), *cert. granted sub nom.*, *I.T.O. v. Blundo*, 97 S. Ct. 522 (1977), and *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1977), the Second Circuit held that the stripping of cargo from huge containers, even if done at a waterfront area remote from where the ship was actually unloaded, was "the functional equivalent of sorting cargo discharged from a ship," and therefore was an activity covered by the Act. 544 F.2d at 53. For a discussion of the Fifth Circuit's position, see notes 53-57 and accompanying text *infra*. In *Sea-Land*, the administrative law judge and the Board agreed on the necessity of both tests. 540 F.2d at 631. They agreed that Johns met the status test, but disagreed on whether or not he met the situs test. *Id.* at 631, 634. The Board overruled the administrative law judge because it believed that a public street within the terminal area was covered by the amendments. *Id.* at 631.

38. Two commentators have suggested that the line drawn in the congressional committee reports between workers who participate directly or physically in ship loading and unloading, and those who are required to be in the area but who do not participate physically or directly in "maritime" work, will not work in practice. G. GILMORE & C. BLACK, *supra* note 22, at 430. These commentators believe that a grave injustice would be done to secretaries or truckers if they were not allowed to recover for injuries suffered on a pier. *Id.* Moreover, they believe that the courts should ignore the committee reports and follow the same path that prior courts have followed in *Jones Act* cases, *i.e.*, "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that female hairdresser in a cruise ship's beauty salon qualifies as a *Jones Act* seaman." *Id.* For a discussion of the House and Senate Committee Reports, see notes 43 & 44 and accompanying text *infra*.

39. 540 F.2d at 634.

40. *Id.* at 635. Although the court recognized that Congress could have used its commerce power to enact a federal workmen's compensation scheme, it believed that Congress did not intend to get involved in jury trial problems that would thereby be involved. *Id.* The court stated that "it is well-settled that no right to jury trial exists" under congressional admiralty jurisdiction. *Id.*

of the injury.⁴¹ In support of its position, the court noted that the primary goal of Congress in extending coverage to areas previously left to state control was to provide uniformity in the death and disability compensation system for all maritime workers, regardless of where the injury occurred.⁴² The court relied upon House and Senate reports accompanying the 1972 Amendments,⁴³ which stressed that one result of the 1927 Act was a disparity in benefits for the same type of injury to the same class of employee "depending on which side of the water's edge . . . the accident occur[red]."⁴⁴

The court stated that the reference in sections 902(4) and 903(a) of the 1972 Amendments to the "navigable waters of the United States" was merely a means of relating the "function being performed by the injured employee to waterborne transportation, the jurisdictional nexus."⁴⁵ Finding that the list of land areas included in the definition of "navigable waters" was not exclusive,⁴⁶ the court noted that although "Congress was cautious in its language . . . , the fact remains that it intended to expand the scope of LHWCA to provide a federal workmen's compensation remedy for all maritime employees."⁴⁷

41. *Id.* at 636. The court explained:

The limits of federal coverage is [*sic*] defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air land and the water modes of transportation. If that interface is customarily located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal," a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing.

42. *Id.* at 638. The court believed that Congress wanted to eliminate the feature of the original act that allowed workers to "walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work." *Id.*

43. *Id.* at 637-38, citing S. REP. NO. 1125, 92d Cong., 2d Sess. 12-13 (1972) [hereinafter cited as SENATE REPORT], and H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10-11 (1972) [hereinafter cited as HOUSE REPORT], reprinted in [1972] 3 U.S. CODE CONG. & AD. NEWS 4707-08.

44. SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10. The legislators noted that increases in federal benefits would sharpen this disparity. SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10. The reports, which clearly show Congress' goal in enacting the amendments, state that "the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or on water." SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10. However, the reports also state that Congress did 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." SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10. In addition, the reports state that Congress did not intend to cover individuals "employed by a person none of whose employees work, in whole or in part, on navigable waters . . . , even if injured on a pier adjoining navigable waters." SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10.

45. 540 F.2d at 638. The court explained that "[i]t is the situs of the vessels in maritime commerce, not the situs of their maritime employees at the time of the injury, that in our view Congress referred to by its reference to navigable waters." *Id.*

46. *Id.*

47. *Id.*

Since the court determined that the status of an employee as one engaged in maritime activities was the crucial issue in determining his coverage under the Act,⁴⁸ it agreed with the Board that the fact that Johns' injury occurred on a public street did not eliminate him from federal coverage.⁴⁹ However, because a "shape-up" employee may perform both maritime and non-maritime tasks,⁵⁰ the Third Circuit remanded the case to the administrative law judge⁵¹ to develop evidence as to Johns' specific function at the time of his injury.⁵²

The Third Circuit's decision that the 1972 Amendments require only that the injured employee have the status of a maritime worker may, in certain instances, produce more equitable results than those achieved by the courts utilizing the situs test. This can be demonstrated through an examination of the Fifth Circuit's recent decision in *Jacksonville Shipyards v. Perdue*,⁵³ where relief was denied to a longshoreman injured near his employer's office.⁵⁴ The vessel on which the plaintiff had been working was located a mile away from the office and separated from it by facilities not used for loading or unloading ships.⁵⁵ The Fifth Circuit rejected the argument that the Act, as amended, "covers every point in a large marine facility where a ship repairman might go at his employer's direction."⁵⁶ It is submitted that the Third Circuit would grant recovery to an employee injured at any point in a large marine facility, as long as he met the status test.⁵⁷ In fact, as in the instant case, coverage may extend beyond the marine facility to the public streets. In this regard, the result reached by the Third Circuit appears consistent with the intent of Congress "to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity."⁵⁸

Moreover, the Third Circuit's indication that a broader definition of status is justified⁵⁹ may help to avoid the unjust results which can be produced if too narrow a definition is used. For example, in *I.T.O. Corp. v. Benefits Review Board*,⁶⁰ the Fourth Circuit defined "maritime employment" in such a way as to limit it to only those employees who moved cargo from

48. See notes 37-42 and accompanying text *supra*.

49. 540 F.2d at 639.

50. *Id.*

51. The Act provides that the administrative law judge is the trier of fact. 33 U.S.C. §921(b)(3) (Supp. V 1975).

52. 540 F.2d at 640.

53. 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed sub nom.*, P.C. Pfeiffer Co. v. Ford, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (76-641).

54. *Id.* at 542.

55. *Id.*

56. *Id.*

57. However, the Third Circuit might have denied recovery to the plaintiff in the *Jacksonville Shipyards* case (see notes 53-56 and accompanying text *supra*), not because of the situs test, but because of his lack of maritime status at the time of the injury — he had finished his maritime tasks and was reporting to the office to check out. 539 F.2d at 541. For a discussion of the problems inherent in deciding at what point in time an employee ceases to be engaged in maritime work, see note 67 *infra*.

58. SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10-11.

59. 540 F.2d at 638-39.

60. 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc*, 542 F.2d 903 (4th Cir. 1976). For a discussion of this case, see note 37 *supra*.

the vessel to the first "point of rest" on the pier, or who moved cargo from the last "point of rest" on shore to the vessel.⁶¹ As a result, longshoremen who met the situs test were denied recovery even though they were performing tasks which would normally be considered maritime work.⁶²

While the Third Circuit's elimination of the situs test may in many instances produce more equitable results, it does present several problems. First, it may extend the coverage of the Act well beyond that which Congress intended.⁶³ Moreover, the Third Circuit's elimination of the situs test may adversely affect the recovery of individuals who are injured while working on a pier or another area covered by the Act, but who are not directly engaged in maritime work. In practice, this could result in a less equitable solution than that achieved by courts using only the situs test or a combination of both tests. For example, a person engaged in clerical work may be just as necessary to the job of expediting shipping as the longshoremen who actually loads or unloads a vessel, yet the Third Circuit,

61. 529 F.2d at 1088.

62. *Id.* at 1082. In *Sea-Land* the Third Circuit implied that it agreed with the dissenting opinion in the *I.T.O.* case, which argued that the definition of maritime employment should not be narrowed by the majority's "point of rest" rule. 540 F.2d at 638, *citing* *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1097 (4th Cir. 1975) (Cramer, J., dissenting). The *Sea-Land* court expressed its own perception of congressional intent as follows: "The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter." 540 F.2d at 639.

63. Consider, for example, the case of a draftsman who, while working on the blueprints of a new ship, was injured in his employer's office hundreds of miles inland. Would the Third Circuit allow him to recover under the 1972 Amendments? In deciding such a case, the court would hardly be able to ignore the fact that the reports seem to limit coverage to a specified list of areas and "other area[s] adjoining such navigable waters." SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10. However, the court has stated that it does not "construe this enumeration of covered areas to be an exclusive enumeration." 540 F.2d at 638. Therefore, it is submitted that the court would decide that the congressional intent to extend coverage should override any apparent limitation contained in the actual language of the reports or the Act itself and would allow recovery to such an employee.

Although not going as far as this hypothetical situation, the Third Circuit, in *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), recently reaffirmed and extended its approach in *Sea-Land*. Louis Maxin was injured at Dravo's Engineering Works, located on Neville Island in the Ohio River below Pittsburgh. *Id.* at 376. Employed in making steel plates which would ultimately become bottoms and decks of barges, he never loaded or unloaded ships. *Id.* Although the plant was located at the other side of the island from the boat yards, the court stated:

The great majority of the work performed in the shop is related to shipbuilding or ship repair. There is no delineation of the work into shipbuilding and nonshipbuilding functions. Thus, the structural steel shop and the work performed there is an integral part of Dravo's shipbuilding operations at the complex. Because we feel the Congress was familiar with the assembly-line methods employed in American manufacturing, we hold that the congressional intent underlying the extension of the LHWCA is best effectuated by extending coverage to the labor force in such a building once the "functional relationship" test of *Johns* has been met.

Id. at 381. *But see* *Sea-Land Serv., Inc. v. Director*, No. 75-168 (3d Cir., Mar. 17, 1977), where the court returned to the strict insistence of *Johns* that the employee be engaged in maritime employment at the exact moment of injury and remanded the case for factual findings on the issue.

construing the words "engaged in maritime employment" to mean only those actually involved in longshoring operations, would probably find that such a worker was covered only by state compensation plans and not by the Act.⁶⁴

Another problem inherent in the court's adoption of the status test and elimination of the situs test is timing: when does an employee begin and end his maritime work? In *Sea-Land*, for example, Johns was admittedly engaged in maritime employment on the trip from the old to the new berth,⁶⁵ but the court remanded the case to the administrative law judge to determine the nature of Johns' employment on the return trip.⁶⁶ It is submitted that the court's requirement that the trier of fact look not at the general nature of the injured employee's work, but at the work assignment he was engaged in at the precise moment of injury, will lead to overexact distinctions⁶⁷ leading to inequitable results.⁶⁸

64. Two commentators who believe that the language of the Act does not demand this injustice have stated:

The new statutory language can reasonably be read to mean that all persons who suffer employment-related injuries within the Act's expanded territorial limits are covered, provided only that they are employed "by an employer "any of whose employees are employed in maritime employment" If the language is so read . . . , most maritime workers injured on or near navigable waters will be able to claim benefits

G. GILMORE & C. BLACK, *supra* note 22, at 429, quoting 33 U.S.C. §902(4) (Supp. V 1975). They admit that the congressional reports clearly deny coverage to clerks, truckers, and others who are not "directly involved in loading or unloading functions," SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 11, but they point out that the reports also express a desire to expand coverage and that in the 1972 Amendments, Congress did extend coverage beyond dry docks to all areas "customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. §903(a) (Supp. V 1975). The amendments, unlike the reports, do not say "directly involved in loading or unloading." In fact, it is difficult to understand why Congress would extend coverage to terminals and marine railways if coverage was to be limited to those "directly involved in loading and unloading." For these reasons the commentators would extend coverage to secretaries or janitors injured within the covered areas, as long as they were employed by a maritime employer. G. GILMORE & C. BLACK, *supra* note 22, at 430.

65. There was a factual finding that the cargo Johns was transporting had just been taken off a vessel. 540 F.2d at 639.

66. *Id.* at 640.

67. Under the Third Circuit's order, the administrative law judge will, without any guidelines, have to decide problems such as the following: What if Johns was driving an empty truck at the time of the accident? Did his maritime employment cease at the time he unloaded the maritime cargo at the new berth? Or, was he still engaged in maritime work until he returned to the old berth and received a new assignment? Or, did the status change take place at the halfway point of the return trip?

68. It is suggested that if the Third Circuit had been confronted with the same situation as the Fifth Circuit faced in *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *Petition for cert. filed sub nom., P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (76-641), it would have decided against the injured employee and thereby caused an inequity. The Fifth Circuit denied recovery to the injured employee because, in the court's opinion, he was injured in an area beyond that covered by the Act. *Id.* at 542. Although the Third Circuit would not be concerned that the employee was beyond the covered situs, it would probably deny recovery because at the time he was injured he had ceased maritime employment and was merely checking out for the day. *Id.* at 541. It is arguable that if a worker has been engaged in maritime activity all day, his maritime status should extend until he has checked out.

Finally, it is submitted that even though *Sea-Land* achieved a result more equitable than that proposed in previous cases, the Third Circuit should have adopted an even broader definition of "maritime employment," one that would have included employees who, although not engaged in loading or unloading ships, are essential to the longshoring operation, and those who, although engaged in maritime employment most of the day, were not so employed at the exact moment of injury. Indeed, in *Dravo Corp. v. Maxin*,⁶⁹ the Third Circuit took a large step in this direction when it accepted the maritime status of the injured employee despite the fact that only eighty-five percent of his work day was devoted to maritime employment.⁷⁰ The court did not remand, as it had in *Sea-Land*, for a factual finding regarding the nature of the employee's work at the exact moment of injury. In so holding, the court appeared to modify the timing component of the *Sea-Land* test.⁷¹

Whether the Third Circuit's decision to apply only a status test for determining recovery under the Act is the correct interpretation, and whether its definition of "maritime employment" is too broad or too narrow, will shortly be answered by the Supreme Court, which has granted certiorari in a similar Second Circuit case.⁷² Until the Supreme Court speaks, therefore, in the Third Circuit, while an employee engaged in maritime work will be protected by federal coverage regardless of where his injury occurs, a nonmaritime worker injured on a pier or dry dock must look to state statutes for compensation.

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Equity would seem to demand that the definition of "maritime employment" be at least broad enough to include such an employee.

Moreover, while the Third Circuit's view that a person must be engaged in maritime employment at the exact moment of injury is in keeping with Congress' intention not "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," SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 11; such a policy would seem to ignore the intent of Congress "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." SENATE REPORT, *supra* note 43, at 13; HOUSE REPORT, *supra* note 43, at 10-11.

69. 545 F.2d 374 (3d Cir. 1976); *see* note 63 *supra*.

70. 545 F.2d at 376.

71. In *Dravo*, the Third Circuit acknowledged that "Congress was familiar with the assembly-line methods employed in American manufacturing" and therefore believed that Congress intended to extend coverage to the entire labor force in such a plant. *Id.* at 381.

72. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), *cert. granted sub nom.*, *I.T.O. Co. v. Blundo*, 97 S. Ct. 522 (1977), and *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1977).