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Director, Office of Workers' Compensation Programs v. Perini North River Associates: Judicial Dilution of the Longshoremen's and Harbor Workers' Compensation Act's 'Status' Requirement

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS V. PERINI NORTH RIVER ASSOCIATES: JUDICIAL DILUTION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT'S "STATUS" REQUIREMENT

To protect industrial enterprises from bankrupting liability by workmen's compensation claims, Congress has enacted various federal compensation programs.[1] The Longshoremen's and Harbor Workers' Compensation Act[2] [LHWCA] governs those industries conducting their business on the navigable waters of the United States. The LHWCA was passed by Congress in 1927 largely in response to judicial refusal to allow maritime coverage by state workers' compensation programs.[3] Courts had held state programs extending coverage to workers injured on the navigable waters of the United States constitutionally impermissible because they treaded on federal admiralty jurisdiction.[4]

The LHWCA of 1927 provided that to recover under the Act, a worker must: 1) suffer a "disability or death occurring upon the navigable waters of the United States"; 2) suffer an "accidental injury or death arising out of

1. *See generally* 1 A. LARSON, WORKMEN'S COMPENSATION LAW (1982 & Supp. 1983) [hereinafter cited as 1 A. LARSON]. Workers' compensation acts generally began to appear in the United States at the end of the nineteenth century. In 1908, Congress passed the Federal Employers' Liability Act which applied to employees of common carriers engaged in interstate or foreign commerce. In 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act which applied to maritime workers. This Act will be the focus of this Note. Enactment of compensation acts in the states followed the pattern of industrial development. By 1920, all but eight states had adopted compensation acts. By 1940, 81.5% of all state and federal employees were covered by compensation acts. *Id.* § 5.3.

2. The Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 92-576, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901-950) [hereinafter cited as LHWCA].

3. *See* 1 NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 56 (3d ed. 1975 & Supp. 1983). Norris notes that the "application of State systems of compensation to maritime workers in a field already pre-empted by Congress, . . . ultimately brought about a federal compensation law for harbor workers." *Id.; see also* Tucker, *Coverage and Procedure under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments*, 55 TUL. L. REV. 1056, 1057 (1981).

4. *See, e.g.*, South Pacific Co. v. Jensen, 244 U.S. 205, 212 (1917). For a discussion of *Jensen*, see *infra* notes 26-28 and accompanying text.

and in the course of employment"; 3) be employed by a statutory employer, defined as "an employer any of whose employees are employed in maritime employment, in whole or in part. . . ." The 1927 Act excluded from its coverage workers who were "master[s] or member[s] of any crew, and any person[s] engaged by the master to load or unload or repair any vessel under 18 tons net." The Act also excluded claims for which recovery may "validly be provided by State law."[5] The LHWCA of 1927 had no provision requiring a worker to have been engaged in maritime employment. The 1927 Act's coverage extended to all injuries sustained on "actual navigable waters of the United States (including any dry dock)."[6]

Congress amended the LHWCA in 1972[7] after policymakers realized that the 1927 Act excluded from coverage a large segment of maritime workers who either performed most of their work on land or merely "happened" to be injured on land rather than on water.[8] The 1972 amendments purported to remedy this problem by extending the "situs of injury" provision of the 1927 Act to include certain adjoining land.[9] They also imposed an additional requirement that the injured worker be engaged in maritime employment.[10] Thus, under present law an employee must satisfy both "situs of injury" and "status of injury" tests to recover under the Act.

By adding a "status" test to the LHWCA, Congress unwittingly created the possibility that an employee who would have been covered under the Act before 1972 might not receive benefits after 1972 because of failure to meet the new "status" requirement. "Nonmaritime" employees, those em-

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5. LHWCA, 33 U.S.C. §§ 902, 903. *See supra* note 2.

6. LHWCA, 33 U.S.C. § 903(a). *See supra* note 2.

7. LHWCA, 33 U.S.C. §§ 901-950 (1976).

8. S. REP. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. No. 1441, 92d Cong., 2d Sess. 10 (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4707.

9. Section 3 of the LHWCA, as amended in 1972, provides in relevant part:

> Compensation shall be payable . . . 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).

33 U.S.C. § 903(a) (1976 & Supp. V 1981).

10. Section 2(3) of the LHWCA, as amended in 1972, provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any vessel under eighteen tons net.

33 U.S.C. § 902(3) (1976 & Supp. V 1981).

ployees who do not hold traditional maritime positions[11] but who nevertheless actually perform their work on water, present unique problems. Although the nature of their work is not within the scope of traditional maritime employment, an injury to a nonmaritime employee on actual navigable waters of the United States would seem to fall within federal admiralty jurisdiction.

In *Director, Office of Workers' Compensation Programs v. Perini North River Associates*,[12] decided in early 1983, the United States Supreme Court addressed the issue of "nonmaritime" employees under the LHWCA "status" requirement. Relying largely on the legislative history of the 1972 amendments and case law interpreting the 1927 Act, the Court concluded that "nonmaritime" employees retain their "traditional coverage" under the LHWCA.[13]

Raymond Churchill, a dockbuilder foreman for Perini North River Associates, sustained injuries to the head, leg, and thumb when, in the course of supervising the unloading of a caisson from a crane barge, a line snapped against his leg, pitching him into the air.[14] An Administrative Law Judge (A.L.J.) determined that Churchill was not engaged in maritime employment but rather in land-based construction work.[15] The Benefits Review Board (BRB) affirmed the A.L.J.'s decision, finding that Churchill's employment did not have a "significant relationship to maritime activities."[16] The United States Court of Appeals for the Second Circuit, holding that the BRB's position conformed with Supreme Court precedent, denied Churchill's petition for review of the Board's decision.[17]

The Supreme Court, in an eight to one decision, reversed and held that the LHWCA covered Churchill because he sustained injuries while actually working on navigable waters.[18] In a concurring opinion, Justice Rehnquist avoided the issue of "nonmaritime" employees by categorizing Churchill as a worker engaged in longshoring activities—a traditional

11. Nonmaritime employees include those workers who are often employed on actual navigable waters but who are not longshoremen, harbor workers or other workers engaged in maritime employment. The most common nonmaritime workers are construction workers and security guards.

12. 103 S. Ct. 634 (1983).

13. *Id.* at 637.

14. Churchill v. Perini North River Assocs., 652 F.2d 255, 257 (2d Cir. 1981).

15. *Id.*

16. *Id.*

17. *Id.* at 256-58. The court found the BRB's interpretation consistent with the Supreme Court's decisions in Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980), and with P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). *See infra* notes 108-19 and accompanying text for a discussion of these cases.

18. 103 S. Ct. at 635; *see infra* notes 120-44 and accompanying text.

maritime classification.[19] Justice Stevens, in his dissenting opinion, asserted that legislative history was not sufficiently clear to permit departure from the plain wording of the Act, which by its terms requires all employees to meet a "status" test.[20]

Recently, the United States Senate passed a bill amending various sections of the LHWCA.[21] Section 2(3), the "status" requirement, was amended to exclude various shore-side activities from the scope of the Act.[22] The amendments, however, did not affect the Supreme Court decision in *Perini* nor did they shed any additional light on the problem of "nonmaritime" workers injured on the navigable waters of the United States.[23]

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19. *Id.* at 652 (Rehnquist, J., concurring). *See infra* notes 145-47 and accompanying text.

20. *Id.* (Stevens, J., dissenting). *See infra* notes 148-70 and accompanying text.

21. S.38, 98th Cong., 1st Sess., 129 CONG. REC. S8655 (daily ed. June 16, 1983). At the time of this writing, a similar bill, H.R. 2816, was before the House of Representatives.

22. *Id.* Section 2(3) was amended to read in relevant part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and ship-breaker, but such term does not include—
>
> (A) any ship repairman, shipbuilder, or ship-breaker engaged by employers described in section 2(4)(B)(iii);
>
> (B) employees exclusively performing office clerical, secretarial, security, or data processing work;
>
> (C) club, camp, restaurant, museum, retail outlet, and marina personnel;
>
> (D) personnel of suppliers, transporters, or vendors temporarily doing business on the premises of employers described in section 2(4)(A);
>
> (E) aquaculture workers;
>
> (F) any person engaged in operating an independently or cooperatively owned grain elevator and who is not engaged in the loading or unloading of a vessel;
>
> (G) any person employed to build or repair any recreational vessel under sixty-five feet in length;
>
> (H) a master or member of a crew of any vessel; or
>
> (I) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
>
> if employees described in clauses (A) through (G) are subject to coverage under a State workers' compensation law.

Id.

23. 129 CONG. REC. S8662 (daily ed. June 16, 1983) (statement of Sen. Hatch). Senator Hatch indicated that:

> [T]he committee has not given any consideration to the *Perini* decision. Instead, the committee report reiterates the position adopted in the preceding Congress as to jurisdictional changes. Briefly, the committee did not attempt an overall evaluation or rationalization of the existing body of statutory and decisional law. . . . Except for . . . limited changes, the committee decided not to endorse or reject, explicitly or implicitly, a large body of decisional law relative to traditional mari-

This Note will provide an historical overview of judicial interpretation of the LHWCA. Particular emphasis will be placed on the reasoning behind the passage of the original 1927 Act and its subsequent amendment in 1972. An analysis of *Perini* will suggest a Supreme Court formulation of the LHWCA harmonious with constitutional guidelines governing admiralty jurisdiction but which ignores the plain meaning of the Act. The Note will conclude with a discussion of the possible impact of *Perini* and the future of the LHWCA "status" requirement.

I. LEGAL DEVELOPMENT OF THE LHWCA

A. Pre-LHWCA: The Birth of State Funded Workers' Compensation Programs

Between 1902 and 1920 states began to develop workmen's compensation programs.[24] Many of these statutes did not provide comprehensive coverage, but some included maritime workers.[25] In *South Pacific Co. v. Jensen*,[26] the Supreme Court upheld the constitutionality of state compensation laws but struck down their application to those injured during the course of employment on the navigable waters of the United States.[27] Reasoning that the imposition of one state's workers' compensation law on vessels and workers of other states would undermine uniformity of maritime matters under the Constitution,[28] the *Jensen* Court left maritime workers without a remedy by opening a gap in coverage of state workers' compensation laws.

Five years later, the Supreme Court attempted to ease the burden *Jensen*

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time employment. . . . [T]he committee's intentionally nondecisive stance clearly should not be construed as presumptive adoption of *Perini*.

Id.

24. *See* 1 A. LARSON, *supra* note 1, at §§ 5.2-.3. Although some of these programs provided for comprehensive coverage, most were limited either to a particular field or to "hazardous" employment. Some of these workers' compensation acts were bold enough to impose no-fault liability on the employer. Not surprisingly, suits were brought alleging a variety of constitutional challenges to these statutes. *Id.*

25. *See* 1A JHIRAD, BENEDICT ON ADMIRALTY § 2 (7th ed. rev. 1982) [hereinafter cited as 1A BENEDICT]. BENEDICT notes that when workers' compensation statutes were enacted in the various states, it was uncertain whether maritime workers would be covered by them. However, while the constitutionality of these statutes was being litigated, many maritime employers voluntarily complied with the new state compensation statutes. *Id.*

26. 244 U.S. 205 (1917). *Jensen* involved a claim under the New York Workmen's Compensation Act by a widow whose husband was killed when he broke his neck during the course of transporting lumber from a ship to a pier. *Id.* at 208.

27. *Id.* at 217-18.

28. *Id.* at 218.

imposed on maritime employees. In *Grant Smith-Porter Co. v. Rohde*,[29] a carpenter sustained injuries while engaged in construction work on a ship in a harbor. In upholding the application of a state workers' compensation law to the carpenter, the Court held that as to certain "maritime but local" matters[30] having no "direct relation to navigation or commerce," the application of state law does not materially affect federal maritime authority established under the Constitution.[31]

Thus, whereas before *Rohde* a line defining the boundary between state and federal jurisdiction could be drawn at the water's edge,[32] after *Rohde* one had to guess at the meaning of "maritime but local" in order to attempt to define this boundary. The Supreme Court's failure to fashion an equitable rule and its constant call for federal legislative action[33] finally brought Congress to the aid of maritime workers left without a remedy.

B. The LHWCA of 1927: Congress Fills the Gap

Congress passed the Longshoremen's and Harbor Workers' Compensation Act in 1927[34] after two unsuccessful attempts to authorize extension of state remedies to maritime workers.[35] The remedy Congress provided placed strict coverage requirements on workers wishing to recover under

29. 257 U.S. 469 (1922).

30. "Local matter" was left undefined by the *Rohde* Court. The term suggested any maritime injury that occurred over water but not while performing a task directly related to navigation or commerce on navigable waters. However, the *Rohde* Court's application of the term "local matters" must be viewed in the narrow context of an unusual contractual provision in which both parties had agreed to be bound by the state workmen's compensation law. It is not clear in *Rohde* whether the Court, in using the term "local matters," was referring to the contractual agreement or to the nature of the worker's employment. *Id.* at 477. For a general discussion of the "maritime but local" doctrine, see 1A BENEDICT, *supra* note 25, at § 6.

31. 257 U.S. at 477. This language was borrowed from an earlier Supreme Court decision, Western Fuel Co. v. Garcia, 257 U.S. 233 (1921), involving a stevedore who was killed on a ship anchored in a bay when coal was negligently allowed to fall on him.

32. This original line drawn at the water's edge is often referred to as the "*Jensen* line." *See, e.g.*, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 259 (1977); Tucker, *supra* note 3, at 1057.

33. *See* Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924). The *Dawson* Court noted:

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgement. 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.

34. *See supra* note 5 and accompanying text.

35. *See generally Dawson*, 264 U.S. at 219; *Knickerbocker*, 253 U.S. at 149.

the Act.[36] Additionally, to allow state compensation schemes to operate to their fullest extent, Congress codified the "maritime but local" doctrine in section 3(a) of the Act by ordering that compensation not be paid if relief could "validly be provided by state law."[37] Presumably, then, a worker could not recover under the Act unless he showed his work had a direct relation to navigation or commerce upon navigable waters. In allowing the vague "maritime but local" doctrine to determine the line between state and federal coverage, Congress created an unworkable and unpredictable standard.[38] Thus, passage of the LHWCA was not the panacea hoped for by the courts. Rather, it required courts to attempt to remedy constitutionally legitimate claims without violating the strictures of the Act.[39]

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36. *See supra* note 5 and accompanying text.

37. Section 3(a) of the 1927 Act provides in relevant part that, "[c]ompensation shall be payable . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 44 Stat. 1424, 1426. The only reason compensation for an injury occurring on navigable waters might "validly" be provided by state law instead of federal law would be that the work involved was so "local in character" that it did not disturb the uniformity of maritime matters under the Constitution. In providing an exception for local matters, commentators have suggested that Congress codified the "maritime but local" doctrine. *See, e.g.*, 1A BENEDICT, *supra* note 25, at § 7 ("[T]he congressional draftsmen [of the 1927 Act] took refuge in finding a formula which on the face of it appeared to reflect in statutory language the effect of the *Jensen* rule as modified by the 'maritime but local' doctrine."); Note, *Coverage Under the LHWCA Amendments of 1972: Developing A Practical, Uniformly Applicable Interpretation of the Status Requirement*, 18 WM. & MARY L. REV. 555, 559 n.27 (1977) ("The restriction that federal compensation was not obtainable if recovery could be validly provided by state law essentially incorporated the 'maritime but local' doctrine originating in pre-1927 Supreme Court decisions into the 1927 Act.").

38. *See* Holland v. Harrison Bros. Dry Dock and Repair Yard, 306 F.2d 369 (5th Cir. 1962). The *Holland* court stated that "[a]lthough the Act chartered a course for thousands of workers, many weary and frustrated litigants were unable to navigate the legal complexities of state and maritime jurisdiction, misjudged their course, and pursued the wrong remedy. . . ." *Id.* at 371. *See also* Tucker, *supra* note 3, at 1059 ("only a soothsayer with a crystal ball could tell on which side of the jurisdictional line a claimant should fall"). *See also* 1A BENEDICT, *supra* note 25, at § 8 (noting that employers also suffered from the uncertainties perpetuated by the LHWCA because "[a]n employer who had believed himself to be governed by the state law and contributed to the state insurance fund could find that his contributions afforded him no protection if a court held that the federal law applied "). *But cf.* 4 A. LARSON, WORKMEN'S COMPENSATION LAW § 89.22 (1983) [hereinafter cited as 4 A. LARSON]. Larson suggests that a distinction was drawn between those employees involved in "local" work and those involved in work affecting commerce on navigable waters. Construction work done by an artisan (plumber, painter, carpenter) on an uncompleted vessel did not "affect commerce" and thus did not trigger federal admiralty jurisdiction. Maintenance work done on a completed vessel, however, did "affect commerce" and thus came under federal jurisdiction.

39. The constitutional limit of federal jurisdiction was determined by *Jensen* to be at the water's edge. *See supra* note 32 and accompanying text. However, the LHWCA narrowed

After thirteen years of conflicting decisions on the extent of coverage of the LHWCA, the Supreme Court decided *Parker v. Motor Boat Sales*.[40] In *Parker*, a nonmaritime employee, hired primarily as a janitor and porter, drowned while testing one of his employer's outboard motors on a boat trip.[41] Troubled that an injury occurring squarely on navigable waters might not be covered by the LHWCA,[42] the Supreme Court held that the Act was intended to encompass any employee injured while employed on the navigable waters of the United States regardless of whether the workers' activities on those waters were traditionally maritime in nature.[43] Upon a closer examination of the facts of *Parker*, particularly as explained in the circuit court opinion, the Court appears to have deemed the janitor covered under the Act because of equitable reasons irrelevant to the legal issues before the Court. In *Parker*, the petitioner could not recover under Virginia State law because his employer did not employ the requisite number of workers under the Virginia compensation act.[44] Nevertheless, *Parker's* retreat to the *Jensen* line of demarcation at the water's edge indicated an end to the "maritime but local" doctrine.[45]

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the scope of federal jurisdiction by allowing state laws to penetrate past the water's edge to cover workers whose employment was "local in character." *See supra* note 37. Thus, after passage of the Act, some workers with constitutionally legitimate claims were not covered by the Act.

40. 314 U.S. 244 (1941).

41. The United States Court of Appeals for the Fourth Circuit held that the janitor's widow could not recover benefits under the LHWCA because the janitor was not acting pursuant to his employment at the time of the accident, and because the janitor's employment was so "local in character" as to be valid under the state workmen's compensation act. *Id.* at 245-46 (discussing Motor Boat Sales v. Parker, 116 F.2d 789 (4th Cir. 1941)). Although the circuit court ruling seemed to follow exactly the analysis prescribed by the Act, the Supreme Court reversed.

42. The Court evinced its concern that any worker injured on navigable waters should be covered by federal law in stating that "even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area, which, although of shadowy limits, doubtless embraces the case before us." *Parker*, 314 U.S. at 247-48.

43. *Id.* at 250.

44. *See* Motor Boat Sales, Inc. v. Parker, 116 F.2d 789 (4th Cir. 1941). The Fourth Circuit indicated that Motor Boat Sales, Inc. was not subject to the Virginia Workmen's Compensation Act "because it did not employ the minimum number of employees [necessary] to bring it under the Virginia statute." *Id.* at 793. The fact that the janitor was not covered under the relevant state act meant that his widow would recover no benefits at all if the Supreme Court decided against LHWCA coverage.

45. *See* 1 NORRIS, *supra* note 3, at § 60. Norris notes that in finding in favor of LHWCA coverage of a nonmaritime employee, the *Parker* Court appeared to retreat from the "maritime but local" doctrine. *See also* Note, *Journey Into The Twilight Zone*, 23 LOY. L. REV. 504, 507 (1977), arguing that the *Parker* decision "appeared to deal a serious blow to the maritime but local doctrine, for the relation to navigation and commerce of a casual and unauthorized ride in a small outboard motor boat approached the vanishing point." *Id.*

Perhaps as a result of the unique facts of *Parker*, the Supreme Court announced the novel "twilight zone" rule just one year later in *Davis v. Department of Labor and Industries of Washington*.[46] The "twilight zone" rule signaled the definitive end to the "maritime but local" doctrine.[47] In *Davis*, a structural steel worker, employed to examine steel loaded onto a derrick barge, drowned when he fell or was knocked into the water. The Court, attempting to clarify the jurisdictional uncertainty between state and federal remedies,[48] stated that there is a "twilight zone" in which an employee's claims might be covered by either state or federal law.[49] Acknowledging that justice could not be served by such a jurisdictional guessing game, the Supreme Court held that cases falling into this "twilight zone" of concurrent coverage should presumptively be covered by state, rather than federal, law.[50] Although *Davis* clearly eased the burden on employees, employers, and the courts confronted with LHWCA coverage cases, the *Davis* Court controverted the specific wording of the Act by allowing state statutes to encroach upon the exclusive federal jurisdiction over maritime injuries established in section 5 of the 1927 Act.[51]

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46. 317 U.S. 249 (1942).

47. In setting up a "zone" of concurrent juridiction where both state and federal law might apply, the Supreme Court eliminated the need to inquire into the "local" character of an employee's work. *See* 4 A. LARSON, *supra* note 38, at § 89.24 (The revolutionary aspect of the *Davis* decision was that "no attempt was made to reach [a result] by an extension of the 'local concern' doctrine.").

48. For a full discussion of the Act's vague boundary line, see *supra* note 38 and accompanying text.

49. 317 U.S. at 256.

50. In upholding its novel decision to extend a presumption of state coverage towards maritime employees whose claims fell within the "twilight zone" of concurrent jurisdiction, the Supreme Court analogized the conflict between state acts and the LHWCA to conflicts between state enactments regulating interstate commerce and the commerce clause of the United States Constitution. The *Davis* Court noted that courts make factual judgments to determine whether particular state acts unduly burden interstate commerce by relying heavily on the presumption of constitutionality in favor of the state act. *Id.* at 257; *accord* South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) (upholding a state statute prohibiting the use of certain motor trucks on state highways as a restriction reasonably adapted to the ends of conserving highways and promoting safety). *But see* 4 A. LARSON, *supra* note 38, at § 89.24. Despite the *Davis* Court's clear language and relevant analogies, Larson has interpreted the *Davis* ruling as providing for a presumption of constitutionality in favor of coverage of the first act, state or federal, under which application is made by the claimant.

51. 317 U.S. at 261 (Stone, J., dissenting). Section 5 of the LHWCA of 1927, provided in relevant part that: "The liability of an employer [under the Act] shall be exclusive and in the place of all other liability of such employer to such employee." 33 U.S.C. § 905, 44 Stat. 1424, 1426 (1927). This provision of exclusivity of the LHWCA found in § 5 would seem to prohibit employer liability under a state act if the employee could be covered by the LHWCA, thus contradicting the validity of concurrent jurisdiction theories under the Act.

Twenty years after *Davis*, the Court, in *Calbeck v. Travelers Insurance Co.*,[52] answered the jurisdictional question posed by *Davis* regarding the limits of state and federal law. *Calbeck* modified *Davis* so that state and federal law shared concurrent jurisdiction only to the extent that state law could *validly* penetrate past the water line to cover workers injured on navigable waters.[53] The *Calbeck* interpretation of section 3(a)'s requirement that recovery may not validly be provided by state law eliminated the confusing effect of the "maritime but local" doctrine. *Calbeck* rendered section 3(a) superfluous because a worker could now recover under either federal or state law regardless of whether the nature of an injured employee's work was "local in character."

The Supreme Court squared its decision in *Calbeck* with its rulings in *Parker* and *Davis* by focusing on the impact of those decisions on federal law. The Court declared that, like *Calbeck*, *Parker* and *Davis* repudiated the "maritime but local" doctrine by holding that the true line of federal jurisdiction under the LHWCA was at the water's edge.[54]

By drawing the line of federal jurisdiction at the water's edge, the *Parker*, *Calbeck*, and *Davis* decisions gradually made the 1927 Act and its confusing section 3(a) requirement consistent with constitutional notions of federal admiralty jurisdiction. Together, these cases permitted *any* em-

52. 370 U.S. 114 (1962).

53. *Id.* at 126-27 (emphasis added). The Court also stated that Congress did not intend to carve out an exemption for areas of "local concern", disclaiming what most courts and commentators believed to be the purpose of § 3(a) of the 1927 Act. *See supra* note 37 and accompanying text. The *Calbeck* Court asserted that Congress inserted § 3(a) in the 1927 Act because the constitutionality of congressional delegation of admiralty jurisdiction to the states had been repudiated twice before enactment of the LHWCA. In the *Calbeck* Court's view, this section functioned only to save the Act from judicial condemnation by making it clear that this time Congress did not intend to legislate beyond its constitutional power. *Id.* at 129-30.

This unique interpretation of the rationale for the addition of § 3(a) is consistent with the Act's legislative history. In its original form, § 3(a) *exactly* followed the language of the "maritime but local" doctrine by providing an exception for "employment of local concern and of no direct relation to navigation and commerce." The Senate, however, rejected this language, presumably because of the uncertainties in coverage provided by the "local concern" doctrine. *Calbeck*, 370 U.S. at 122-23. *See Hearings Before the Senate Judiciary Committee on S. 3170*, 69th Cong., 1st Sess. 95 (1927) (The Senate indicated that the original wording of § 3(a) was indefinite. The Senate provided that "[t]he exception of 'employment of local concern and of no direct relation to navigation and commerce' is vague and will be the subject of continual litigation").

54. *Calbeck*, 370 U.S. at 127-29. *See also supra* note 43 and accompanying text. *But see* 4 A. LARSON, *supra* note 38, at § 89.26. Larson states that "[a]ctually the entire twilight zone development, from *Parker* through *Davis* to *Calbeck* was concerned, not with the navigable waters boundary line, but with the absence-of-state-power boundary line" as codified in § 3(a) of the Act.

ployee injured on navigable waters to recover under the LHWCA, regardless of the nature of their work. Even as the jurisdictional issue was being settled, however, it became apparent that Congress would have to amend the Act to encompass an increasingly large segment of maritime workers whose employment required them to be both on land and over water.[55]

C. The LHWCA Amendments of 1972: Congress Accepts the Judicial Invitation to Expand the Scope of the Act

Congress amended the LHWCA in 1972 to upgrade the benefits provided under the LHWCA and to extend coverage to protect maritime workers in certain shoreside areas because of the limited benefits provided under most state workers' compensation acts.[56] The 1972 amendments expanded the territorial coverage of the Act specifically to include the contiguous dock area of navigable waters of the United States.[57] In addition, the amendments added a "status" provision requiring anyone covered under the Act to have been engaged in "maritime employment" at the time of injury.[58] Thus, the plain wording of the amendments required that in order to recover under the Act, a worker must be injured within a proper situs and be engaged in maritime employment.

The Senate and House committees considering the amendments published identical reports detailing the amendments' impact on the Act.[59] The committee reports did not specifically define the word "maritime employment" as used in the new "status" test; however, the narrow examples used by the reports to describe the limits of the "status" requirement clarified Congress' intended use of the term.

The reports evince a consistent concern only for longshoremen.[60] The term "maritime employment" is used only in context with other more spe-

55. Seven years after *Calbeck*, the Supreme Court decided Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). In *Nacirema*, one longshoreman was killed and two others injured on piers permanently affixed to the shore. In holding that the LHWCA never applies unless an injury occurs upon actual navigable waters of the United States, the Supreme Court stated that there was "much to be said for uniform treatment of longshoremen injured while loading or unloading a ship." *Id.* at 223. The Court concluded, however, that an invitation to move the boundary line of the Act landward would have to "be addressed to Congress, not to this Court." *Id.* at 224. Congress accepted the invitation three years later.

56. S. REP. 1125, *supra* note 8, at 1.

57. *See supra* note 9 and accompanying text.

58. *See supra* note 10 and accompanying text.

59. S. REP., *supra* note 8; H.R. REP. *supra* note 8.

60. S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 10. The committee reports suggested that a major reason for LHWCA's landward extension was "that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than here-to-fore." *Id.*

cific terms such as longshoreman, ship builder, or shipbreaker.[61] In setting out examples of persons who might be covered or excluded by the 1972 amendments,[62] the broadest example given is the occupation of "checker." The reports state that "checkers" may be covered under the LHWCA only to the extent that they are "directly involved in loading or unloading."[63] Thus, the reports' language indicates that a worker not specifically involved in loading or unloading must show a direct relationship to that activity in order to be covered, much like the requirements of the early "maritime but local" doctrine.[64] Finally, the reports state that the committees 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."[65] Nowhere does Congress suggest that nonmaritime employees such as construction workers, security guards or even janitors are intended to either benefit from the expansion of the Act or be included under the maritime employment requirement. Moreover, the plain wording of the Act suggests that *all* employees be engaged in "maritime employment." Although the legislative history of the 1972 amendments did not specifically indicate what impact Congress intended the term "maritime employment" to have on those injured on navigable waters, Congress arguably intended to include only a narrow class of workers within the scope of the Act.[66]

Although the considerations influencing the passage of the amendments were documented in a comprehensive manner by the committee reports, the addition of the "status" provision necessarily raised questions unan-

61. S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 10. "[T]he bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment. . . ." *Id.; see also infra* note 153 and accompanying text.

62. *Id.* Congress gave a positive example of workers who would be covered: "To take a typical example, cargo . . . is typically unloaded from the ship and immediately transported to a storage or holding area. . . . The employees who perform this work would be covered under this bill." *Id.* Congress also gave a few specific examples of workers who would not be covered: "[E]mployees 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." *Id.*

63. S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 11.

64. *See supra* notes 30-31 and accompanying text.

65. S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 11.

66. *See* 4 A. LARSON, *supra* note 38, at § 89.41. Larson suggests that there was no "status" test before 1972 because the number of cases where railway workers, truckers or deliverymen crossed onto navigable waters was not large enough to cause concern. Larson states, however, that "when the covered situs was expanded . . . it became obvious that some additional limitation had to be superimposed to prevent coverage of every trucker or railway worker that entered a terminal. . . . The solution chosen was to place a special limitation on the definition of 'employee.'" *Id.*

swered by legislative history about the extent to which the 1972 amendments had changed the original Act. Although there was no question that the amended Act continued to cover longshoremen, harbor workers, ship builders, ship repairers, and other maritime workers specifically mentioned by Congress, controversy arose in the courts over whether nonmaritime employees, such as construction workers and security guards, who would have been covered under the original Act, were still covered after the 1972 amendments.[67]

Because the legislative history was inconclusive as to whether Congress intended to retain coverage of nonmaritime employees under the new amendments, federal courts adopted diverse interpretations.[68] The United States Court of Appeals for the Fifth Circuit, which has considered many claims under the LHWCA, has taken an expansive approach to the problem, maintaining that Congress did not intend to withdraw coverage from those employees "traditionally covered" by the LHWCA.[69] Other circuits have taken a restrictive approach based on a narrow reading of the amendments. They have contended that the insertion of a new status requirement could mean only that Congress intended to restrict coverage to those employees whose work is maritime in nature.[70]

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67. *See* Tucker, *supra* note 3, at 1068-69. "The Senate Committee Report . . . indicated . . . Congress intended to cover only those employees engaged in loading and unloading vessels. . . . Otherwise, the courts were free to develop their own tests to determine the class of workers covered by the Act." *Id.*

68. *See* 1A BENEDICT, *supra* note 25, at § 16(a). BENEDICT notes that Congress failed to define clearly the exact terms of the "status" test. "[T]he critical terms in section 2(3)—'maritime employment', 'longshoremen' and 'longshoring operations'—are nowhere defined in the Act." *Id.* BENEDICT concludes that because of congressional silence, the courts of appeals, in first confronting the limitations of the status test, "failed to arrive at a uniform method of analysis and, indeed, had set forth contradictory theories, each one providing a different point of reference." *Id.* For specific examples of this thesis, see Stockman v. John T. Clark & Son, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) (court must examine the nature of the worker's regularly assigned duties); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (court must determine whether an employee had spent a significant amount of his time performing longshore duties); Sea Land Serv. Inc. v. Director, O.W.C.P., 540 F.2d 629 (3d Cir. 1976) (worker's duties must be linked to maritime employment); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), *vacated and remanded sub nom.* Director, O.W.C.P. v. Jacksonville Shipyards, 433 U.S. 904 (1977), *aff'd*, 575 F.2d 79 (5th Cir. 1978) (worker must play an "integral" part in a longshoring operation to satisfy the "status" test).

69. *See, e.g.*, Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 815 (1983). *See infra* notes 91-103 and accompanying text.

70. *See, e.g.*, Graziano v. General Dynamics, 663 F.2d 340 (1st Cir. 1981); Lynn v. Heyl & Patterson, Inc., 483 F. Supp. 1247 (W.D. Pa.), *aff'd without opinion*, 636 F.2d 1209 (3d Cir. 1980); Fusco v. Perini North River Associates, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981); I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080 (4th Cir. 1975), *modi-*

1. The Narrow Approach: Judicial Alignment with the Actual Wording of the 1972 Amendments

The earliest interpretation of the 1972 "status" requirement adhered closely to the plain wording of the Act.[71] In *Weyerhaeuser Co. v. Gilmore*,[72] the United States Court of Appeals for the Ninth Circuit considered the case of a logger who was injured when he fell from a floating walkway into a "pond" area for logs next to a salt water bay. The Ninth Circuit held that the logger was not engaged in maritime employment at the time of injury and, therefore, was not entitled to benefits under the LHWCA.[73] The *Weyerhaeuser* court took a restrictive view of the 1972 amendments, concluding that in expanding the situs covered by the Act, "Congress clearly did not intend to broaden the class of covered employees to include *anyone* injured in an adjoining area."[74] Asserting that the pre-1972 judicial history of the Act was irrelevant because the 1972 amendments "radically changed" the basis for coverage under the LHWCA,[75] the court determined that the intent of Congress in extending the Act was not to cover *all* employees injured while working over water but, rather, to "minimize the adverse effect of a shoreside location or situs when a *maritime* employee is injured."[76] Arguing that the reason for the LHWCA was to provide relief for those subject to the "traditional hazards of ship's service," the Ninth Circuit concluded that to recover under the Act, an employee's work must have a realistic relationship to the traditional duties of ship's service.[77] The *Weyerhaeuser* court stated that a broader interpreta-

fied, 542 F.2d 903 (1976) (en banc); Weyerhaeuser v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). *See infra* notes 71-78.

71. *Weyerhaeuser*, 528 F.2d at 959 ("So far as we are advised, no court has yet construed or given a definition to the phrase ['engaged in maritime employment'] . . . .").

72. 528 F.2d 957 (9th Cir. 1975).

73. *Id.* at 962.

74. *Id.* at 960 (emphasis in original).

75. *Id.* "We relegate those [pre-1972] decisions to limbo because it is obvious to us that the 1972 amendments radically changed the basis for an employee's entitlement to federal compensation." *Id.*

76. *Id.* at 961 (emphasis in original). In support of its restrictive view the court quoted Representative William Steiger who argued, in debate before the House of Representatives, that "the expansion of coverage [of the Act] is intended to bring about a measure of compensation uniformly applicable to *persons customarily considered to be working in the business*. Thus, . . . an employee . . . will be covered *as long as he is working as a longshoreman or harbor worker*. . . ." *Id.* at 960; *see also* 118 CONG. REC. 36,385 (1972) (emphasis added by court).

77. 528 F.2d at 961. In formulating its "significant relationship" test, the *Weyerhaeuser* court relied on three sources: Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Olney v. South Carolina Elec. & Gas Co., 488 F.2d 758 (4th Cir. 1973); Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973). *Executive Jet* was the seminal case originating this analysis. *Executive Jet* involved airline workers who were injured when their jet aircraft

tion would act to nullify the clear language of "maritime employment" and, in effect, cause it to read "any employment."[78]

Shortly after the *Weyerhaeuser* decision the United States Court of Appeals for the Fourth Circuit considered *I.T.O. Corp. v. Benefits Review Board.*[79] In *I.T.O. Corp.*, three workers were injured in the course of transporting items in the storage area of a marine terminal. Although the injuries did not occur over water and did not involve nonmaritime employees, the Fourth Circuit's arguments for a narrow view of the "status" requirement are significant. Citing a 1914 case[80] and with no apparent reference to the Ninth Circuit's decision in *Weyerhaeuser*, the Fourth Circuit stated that " '[m]aritime employment' is a phrase that embodies the concept of a direct relation to a vessel's navigation and commerce."[81] Additionally, the *I.T.O. Corp.* court concluded that the effect of the 1972 amendments was to broaden the territory covered by the Act, and to narrow the class of persons eligible for benefits by the imposition of a "status" test.[82] *I.T.O. Corp.* and *Weyerhaeuser* thus provided initial impetus for the subsequent adoption of the narrow view of the 1972 "status" provision by other circuits.[83]

The United States Court of Appeals for the Second Circuit first articulated its view of the 1972 amendments in *Fusco v. Perini North River Asso-*

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crash landed and sunk in the navigable waters of Lake Erie. The Supreme Court held that federal admiralty jurisdiction under the Act exists with regard to aviation tort claims "only when there is a significant relationship to traditional maritime activity." 409 U.S. at 249.

78. 528 F.2d at 961.

79. 529 F.2d 1080 (4th Cir. 1975), *modified*, 542 F.2d 903 (1976) (en banc).

80. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914). The Fourth Circuit developed a restrictive "significant relationship" test similar to that developed by the Ninth Circuit. *I.T.O. Corp.*, 529 F.2d at 1084. Unlike the Ninth Circuit, however, the Fourth Circuit did not rely on the Supreme Court's decision in *Executive Jet*. It instead relied on *Imbrovek*, 234 U.S. 52 (1914). In *Imbrovek*, a stevedore, engaged in loading and stowing copper on a ship, was injured when an iron crossbeam accidentally struck him. In holding that the stevedore came under federal admiralty jurisdiction, the Supreme Court stated that "the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, [is] quite sufficient." 234 U.S. at 62.

81. 529 F.2d at 1084.

82. *Id.* at 1083.

83. *See, e.g.*, Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 113 (5th Cir. 1980) ("[W]here the job being done clearly had a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . [employee's] work at the time of his injury was maritime."). Dravo Corp. v. Banks, 567 F.2d 593, 595 (3d Cir. 1977) ("[Employee's] duties have no traditional maritime characteristics, but rather are typical of the support services performed in any production entity, maritime or not."); Stockman v. John T. Clark & Son, 539 F.2d 264, 277 (1st Cir. 1976) ("We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act.").

ciates.[84] In *Fusco*, a construction laborer was injured while engaged in the construction of a substructure for a sewage disposal plant which was to extend over navigable waters. The *Fusco* court stressed that "maritime employment" as used in the 1972 amendments was an occupational, not a geographic concept, suggesting that the focus of the "status" test should be on the nature of the employee's occupation regardless of where he performs it.[85] Reasoning that the construction worker's activities had no significant relationship to navigation or commerce on navigable waters, the Second Circuit held that the worker failed to satisfy the "status" requirement and, thus, was not entitled to benefits under the Act.[86]

The significant number of circuits following the *Weyerhaeuser* analysis of the 1972 "status" requirement proves the broad base of support that exists for a view of the 1972 amendments that would deny coverage to any injured workers who could not meet a "significant relationship" test. However, because this restrictive view presumably subjects many workers to the hardships of inadequate state compensation, it was not surprising that one circuit switched to an expansive view of the LHWCA which would allow coverage to *any* worker injured on navigable waters regardless of "status".[87]

2. *The Broad Approach: A Search for the Meaning of the 1972 "Status" Test*

The broad approach to the 1972 "status" test is characterized by an alternative reading of the legislative history of the LHWCA highlighting congressional omissions, a liberal reading of the actual wording of the "status" test, and a reliance on earlier interpretations by the Supreme Court,[88] the Department of Labor,[89] and the Benefits Review Board.[90]

The United States Court of Appeals for the Fifth Circuit had initially followed the restrictive *Weyerhaeuser* line of cases.[91] In an abrupt depar-

84. 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). The Second Circuit also considered Director, Office of Workers' Compensation Programs v. Perini at the appellate level. *See supra* note 14.

85. 622 F.2d at 1112.

86. *Id.* at 1113.

87. Boudreaux v. American Workover, Inc., 680 F.2d 1034 (5th Cir. 1982). *See infra* notes 91-103 and accompanying text.

88. *See infra* notes 104-19 and accompanying text.

89. *See infra* note 97 and accompanying text.

90. *See infra* note 96 and accompanying text.

91. *See, e.g.*, Miller v. Central Dispatch, 673 F.2d 773 (5th Cir. 1981). *Miller* involved an employee who worked on land but was required to be on board a ship five to six times per day. The employee was injured aboard ship while guarding a ship detainee. Although the Fifth Circuit held that the employee was covered by the LHWCA, it stated that the

ture in 1982, however, the court decided *Boudreaux v. American Workover*.[92] In *Boudreaux*, a wireline rigger on a drilling barge in inland waters was injured during the course of his employment. Finding that the rigger was entitled to benefits under the LHWCA, the Fifth Circuit concluded that "the 1972 change in the definition of 'employee,' section 2(3), was not intended to withdraw coverage from those previously considered to be in 'maritime employment' for purposes of LHWCA coverage."[93]

The *Boudreaux* court stressed earlier Supreme Court cases[94] interpreting the 1972 amendments in developing its broad approach to the LHWCA. Although these cases dealt exclusively with land-based employees covered under the expanded shoreside situs of the Act, the Fifth Circuit noted that in upholding coverage under the Act, the Supreme Court consistently afforded the LHWCA a liberal construction.[95] Maintaining that this broad view also had the support of the Benefits Review Board,[96] the Director of

"status" test requires an analysis of "whether the [employee's] work is maritime, that is, whether the employee's activities had a realistically significant relationship to traditional maritime activity." *Id.* at 781; *see also* Pippen v. Shell Oil, 661 F.2d 378, 382 (5th Cir. 1981) (wire-line operator working aboard a drilling barge); Gilliam v. Wiley N. Jackson Co., 659 F.2d 54, 56-57 (5th Cir. 1981) (construction foreman employed in construction of bridge over waterway); Hullinghorst Indus., Inc., v. Carroll, 650 F.2d 750, 756 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (employee injured while erecting scaffolding beneath pier); Trotti & Thompson Co. v. Crawford, 631 F.2d 1214, 1221 (5th Cir. 1980) (construction worker injured building a pier); Odom Constr. Co. v. United States Dep't of Labor, 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) (employee injured while performing land-based construction repair on mooring blocks in a canal).

92. 680 F.2d 1034 (5th Cir. 1982).

93. *Id.* at 1042. The court's analysis of the 1972 legislative history is critical to a broad reading of the LHWCA. If one interprets the legislative history as showing a congressional intent not to exclude workers previously covered by the Act then, presumably, *any* worker injured on a water situs would satisfy the "status" test because the "status" test did not exist before 1972. *Cf.* 4 A. LARSON, *supra* note 38, at § 89.27(c). Larson notes:

> It is not difficult to reconstruct the reason why the enlarged situs test had to be accompanied by something like the new status test. Without such a limitation every nonmaritime employee of any employer who had so much as one maritime employee would be covered if he merely happened to be somewhere in a terminal, shipyard or other adjoining area.

Id.

94. *See, e.g.*, Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). *See also infra* notes 104-19 and accompanying text.

95. 680 F.2d at 1038.

96. *Id.* at 1046. The Benefits Review Board supported the view "that the amended Act does not exclude coverage from anyone who would have been covered under the original Act; and thus that any injury upon the navigable waters is still compensable." *Id; see, e.g.*, Stewart v. Brown & Root, Inc., 7 BEN. REV. BD. SERV. (MB) 356, 361 (1978), *aff'd on other grounds sub nom.* Brown & Root, Inc. v. Joyner, 607 F.2d 1087 (4th Cir. 1979) (benefits under the LHWCA awarded to general excavation foreman who was killed, and painter sandblaster who was injured, while working on a dry dock construction project); Weyer-

the Office of Workers' Compensation Programs,[97] and the majority of commentators in this area of the admiralty field,[98] the *Boudreaux* court held that an employee injured on a water situs satisfies the "status" test "because employment on the water *is* 'maritime employment' within the meaning of the LHWCA both before and after its 1972 revision."[99] The *Boudreaux* court was also critical of the restrictive *Weyerhaeuser* view for borrowing its "significant relationship to commerce or navigation" test from an inapposite Supreme Court decision.[100]

Maintaining that the committee reports on the 1972 amendments evinced legislative intent only to *extend* coverage,[101] the Fifth Circuit concluded that the 1972 amendments did not decrease the traditional coverage of workers injured "on navigable waters, who under the Act have been and are considered to be in 'maritime employment.' "[102] The *Boudreaux* court's abrupt departure from its previously narrow view of the 1972 "status" test left the Fifth Circuit standing alone among the major maritime

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haeuser v. Gilmore, 1 BEN. REV. BD. SERV. (MB) 180, 182-83 (1974), *rev'd*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976).

97. 680 F.2d at 1046 n.22. The Director filed amicus briefs espousing the same liberal view of the Act held by the Benefits Review Board in several decisions, and once favored guidelines consistent with such a view. *Id.*

98. *Id.* at 1046. "[T]he majority view of the commentators, including the highly respected Gilmore & Black, is that the amended Act does not exclude coverage from anyone who would have been covered under the original Act . . . ." *Id. See, e.g.*, GILMORE & BLACK, THE LAW OF ADMIRALTY 428-30 (1975); 1A BENEDICT, *supra* note 25, at § 17. "On the basis that there can be nothing more maritime than the sea, every employment on the sea or other navigable water should be considered as maritime employment." *Id.*; 1 NORRIS, *supra* note 3, § 66, at 87. "The [1972 LHWCA] amendments are remedial legislation and, as such, should receive a liberal interpretation. In the opinion of this writer, all who are engaged in maritime employment [except those specifically barred in the Act's legislative history] should come within coverage of the Act." *Id. Contra* 4 A. LARSON, *supra* note 38, at § 89.41. "The addition of the 'status' test . . . had both an expansive and constrictive effect. . . . The constrictive effect was to exclude from coverage . . . nonmaritime workers who before 1972 . . . might have found themselves within the Longshoremen's Act through the sheer accident of having been upon navigable waters at the time of injury." *Id.*; Tucker, *supra* note 3, at 1062. "Thus, although the 'coverage' section of the Act was amended to *include* employees whose injuries occurred landward of the *Jensen* line, the effect of the change in the definition of 'employee,' was to *exclude* previously covered persons unless they were engaged in 'maritime employment.' " *Id.* (emphasis in original).

99. 680 F.2d at 1039 (emphasis in original).

100. *Id.* at 1049. "*Weyerhaeuser* derived its 'significant relationship' test for coverage . . . by direct quotation from Executive Jet v. City of Cleveland . . . . That decision is inapposite to the issue now before us [because] . . . 'the fact that an aircraft happens to fall in navigable waters is wholly fortuitous.' " (quoting from *Executive Jet*, 409 U.S. at 267) (citation omitted). *See also supra* note 77 and accompanying text.

101. *Boudreaux*, 680 F.2d at 1043, 1045-46, 1050.

102. *Id.* at 1054.

circuits.[103]

3. The Supreme Court: Ignoring the Problem of "Nonmaritime" Employees Injured on Water

While the circuit courts were considering the impact of the 1972 "status" requirement and addressing the issue of change in coverage after the 1972 amendments, the Supreme Court considered only cases involving workers injured in the expanded shoreside situs provided by the Act. In *Northeast Marine Terminal v. Caputo*,[104] the Court had its first opportunity to interpret the 1972 amendments. The issue before the Court was whether two land-based marine terminal workers satisfied the "status" requirement of the LHWCA even though their occupations were not expressly included by Congress in expanding the coverage of the Act landward.[105] The workers in *Caputo* would not have been covered by the Act before 1972 because their injuries did not occur upon navigable waters. The Supreme Court expressly withheld consideration of whether Congress, in enacting the 1972 amendments, intended to advance coverage to all workers who would have been covered by the Act before 1972.[106] Nonetheless, in holding that the examples of covered workers given in the legislative history were not exclusive, the Court dealt a setback to proponents of the restrictive view.[107]

Two years later, the Supreme Court again reviewed the 1972 amendments, this time issuing a decision subsequently interpreted by circuit courts as supporting a restrictive view of the LHWCA.[108] In *P.C. Pfeiffer*

103. *See id.* (Gee, Garwood, JJ., dissenting).

104. 432 U.S. 249 (1977).

105. One worker, Blundo, was injured while marking barges unloaded from a ship. The other worker, Caputo, was injured rolling a dolly loaded with ship's cargo onto a truck. Relying on discerned congressional intent to expand the Act to cover marine workers located on the shore, the Supreme Court held that both workers satisfied the requirements of the "status" test.

106. 432 U.S. at 265 n.25. "This case also does not involve the question whether Congress [in enacting the 1972 amendments] excluded people who would have been covered before the 1972 amendments . . . ." *Id.* The Court suggested that language in the Act made it clear that the "category of persons engaged in maritime employment includes more than longshoremen and persons engaging in longshoring operations," but found it was unnecessary to look beyond those two categories in deciding this particular case. *Id.*

107. *See, e.g.*, 1A BENEDICT, *supra* note 25, at § 19, which notes that following *Caputo*, "the maritime character of the employment is no longer of primary importance in determining whether an employee will receive compensation under the Act." *Id.*

108. *See, e.g.*, Fusco v. Perini North River Assocs., 622 F.2d 1111, 1112 (2d Cir. 1980) (The Second Circuit reversed an earlier, broader position after the Supreme Court had vacated and remanded the case for consideration in light of P.C. Pfeiffer v. Ford, 444 U.S. 69 (1979). The *Fusco* court, in reversing, stated "[t]he conclusion upon which our earlier opinion rested has been rendered untenable by the holdings in *P.C. Pfeiffer v. Ford*, . . . that . . . the term 'maritime employment' refers to the nature of a worker's activities . . . and that it

Co. v. Ford,[109] two land-based employees brought claims under the LHWCA.[110] The Supreme Court again avoided the issue of the scope of the 1972 amendments because, as in *Caputo*, both employees involved in the suit were shoreside workers who would not have been covered under the original Act. The issue that the Court confronted in *Pfeiffer* was whether two shoreside employees involved in loading and unloading goods recently delivered by ship engaged in "maritime employment." The Court held that both workers satisfied the "status" test and were therefore entitled to recover benefits under the LHWCA.[111] In dicta, however, the Court asserted that section 2(3) (the "status" provision) of the Act "*restricts* the scope of coverage by further requiring that the injured worker must have been engaged in 'maritime employment.' "[112] The *Pfeiffer* Court cited specific congressional language in support of its conclusion that section 2(3) was meant to define the Act's occupational, not geographic, requirements.[113]

In 1980, the Supreme Court turned to the problem of drawing a new line between state and federal jurisdiction in light of the 1972 expansion of the Act. In *Sun Ship v. Pennsylvania*,[114] the Supreme Court held that a state may apply its workers' compensation statute to injuries occurring in the expanded shoreside situs of the LHWCA. *Sun Ship* involved five employees injured while conducting ship building and ship repairing activities on the Delaware River. The workers filed claims under the Pennsylvania State Workmen's Compensation Act even though they were also covered under the LHWCA. The issue in *Sun Ship* was whether maritime employ-

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is 'an occupational rather than a geographic concept.' "); Duncanson-Harrelson Co. v. Director, O.W.C.P., 644 F.2d 827, 830 (9th Cir. 1981) (The Ninth Circuit attributed to *Pfeiffer* the rule that an employee can recover for injury "only if he was 'engaged in maritime employment' at the time of his injury."); *but cf.* Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1047 (5th Cir. 1982) ("Ironically, the case that proved to be the catalyst for the widespread acceptance of the restrictive *Weyerhaeuser* view regarding accidents upon the actual water was the Supreme Court's decision in [P.C. Pfeiffer v.] Ford . . . a case that actually *expanded* LHWCA shore-side coverage.").

109. 444 U.S. 69 (1979).

110. In *Pfeiffer*, one worker was injured during the course of fastening a recently delivered military vehicle onto a railroad flatcar. The other worker was injured unloading a bale of cotton from a wagon into a pier warehouse. The Supreme Court held that both employees satisfied the LHWCA "status" requirement in allowing coverage. *Id.* at 71, 84.

111. *Id.* at 71.

112. *Id.* at 78 (emphasis added).

113. *Id.* at 78 n.8. The *Pfeiffer* Court maintained that the actual language of the "situs" requirement supports its conclusion that Congress focused on "occupation rather than location" in formulating the "status" test. The Court stated that the expanded situs includes specific *areas* adjoining navigable waters. *Id.*

114. 447 U.S. 715 (1980).

ees injured on a proper landward situs could recover benefits under a state compensation act despite clear LHWCA jurisdiction.

Relying heavily on *Calbeck*,[115] the Court stated that concurrent jurisdiction of state and federal remedies should be allowed when the expanded shoreside situs of the Act is involved.[116] The *Sun Ship* Court reasoned that the line of demarcation between state and federal remedies in the expanded situs is no clearer than the vague line drawn by the "maritime but local" doctrine.[117] Contending that it could find no indication of congressional intent to overturn the *Calbeck* decision or to require exclusive application of a federal remedy, the Court found Congress' overall intent to aid injured maritime workers sufficient to allow concurrent jurisdiction of state and federal remedies.[118]

The impact of these earlier cases on circuit court decisions is significant even though the Supreme Court never reached the problem of nonmaritime employees. The Fifth Circuit, in *Boudreaux*, based much of its inclusive interpretation of the 1972 amendments on the Supreme Court's expansive view of the LHWCA as outlined in *Sun Ship*, *Pfeiffer*, and *Caputo*.[119] Additionally, the *Sun Ship* decision served notice on the cir-

115. For a full discussion of *Calbeck*, see *supra* notes 42-55 and accompanying text.

116. 447 U.S. at 721.

117. *Id.* at 725. *See generally Pfeiffer, supra* note 109; *Caputo, supra* note 104; 4 A. LARSON, *supra* note 38, at § 89.70 ("What, if anything, did the 1972 amendments do to change the law as to the 'twilight zone' and concurrent jurisdiction doctrines? The answer seems to be: Factually, a great deal; legally, nothing.").

118. 447 U.S. at 725-26 ("The legislative policy animating the LHWCA's landward shift was remedial; the amendments' framers acted out of solicitude for the workers."). *See Caputo*, 432 U.S. at 268-72. The *Caputo* Court noted that the language of the 1972 amendments was "broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." *Id.* at 268. In determining that the 1972 amendments were remedial legislation, *Caputo* relied on three specific passages from the committee reports. First, the Court argued that a primary motivation underlying Congress' decision to extend the Act was that " 'modern cargo-handling techniques' had gradually moved much of a longshoreman's work off the vessel and onto the land." *Id.* at 269-70; S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 10. Second, the Court stated that Congress wanted a uniform compensation system to apply to workers who otherwise would have been covered by the Act for part of their activity. 432 U.S. at 272; S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 10-11. Finally, the *Caputo* Court determined that Congress sought a system that did not depend on the "fortuitous circumstance of whether the injury occurred on land or water." 432 U.S., at 272; S. REP., *supra* note 8, at 13; H.R. REP., *supra* note 8, at 10. *But see* 4 A. LARSON, *supra* note 38, at § 89.41. Although recognizing that the expansion of the Act landward may have been guided by remedial motives, Larson suggests that those motives are irrelevant in a discussion of the "status" test because the "status" provision was specifically inserted to exclude from coverage any "nonmaritime" personnel injured while "fortuitously" located on a covered situs of the Act. *Id.*

119. *See supra* notes 94-95 and accompanying text.

cuits that the Supreme Court considered the pre-1972 judicial history of the Act important in interpreting the impact of the 1972 amendments. Finally, in liberally construing the Act's coverage of shoreside maritime employees excluded before 1972, these Supreme Court opinions served as persuasive precedent for the Court's ultimate conclusion in *Perini* that the amendments to the Act did not exclude nonmaritime employees covered before 1972.

After ten years of examining and clarifying the impact of the expanded shoreside situs of the LHWCA, the Supreme Court finally shifted its focus to the Act's new "status" requirement, and particularly to the question whether the 1972 amendments exclude nonmaritime employees who would have been covered under the Act before 1972.

II. *Director, Office of Workers' Compensation Programs v. Perini North River Associates*: Attempting to Clarify the Position of "Nonmaritime" Employees Under the 1972 Amendments to the LHWCA

A. Reconciling legislative intent and case history with public policy

In *Director, Office of Workers' Compensation Programs v. Perini*,[120] the Supreme Court for the first time confronted the issue of whether a nonmaritime employee who would have been covered under the LHWCA before 1972 was excluded after the 1972 amendments. Justice O'Connor, writing for the majority, held that Congress did not intend to withdraw coverage from those workers who had been "traditionally" covered by the LHWCA before 1972.[121] Although the Supreme Court formulated a test of LHWCA coverage under the "status" requirement that is within constitutional guidelines, it manipulated the Act's plain meaning and justified its action by relying on legislative history that is, at best, ambiguous.

In an exhaustive analysis of the 1972 legislative history, Justice O'Connor maintained that Congress intended to "*extend* coverage to protect *additional* workers,"[122] and that the Senate committee had expressly provided that inclusion of the "status" requirement was not meant "to exclude other employees traditionally covered" by the Act.[123] Additionally, the Court asserted that "Congress . . . assumed that injuries occurring on the actual navigable waters were covered, and would remain covered."[124]

120. 103 S. Ct. 634, 638 (1983).
121. *Id.* at 637.
122. *Id.* at 647 (emphasis in original).
123. *Id.* at 649.
124. *Id.* at 648.

Finally, the Court maintained that Congress, in abolishing the old section 3(a) requirement (prohibiting LHWCA coverage if recovery could be provided by state law)[125] had demonstrated their intent not to limit coverage to only those workers whose employment had a significant relation to navigation or commerce on navigable waters.[126] In setting forth a broad view of the Act, the O'Connor majority drew various inferences of congressional intent from ambiguous legislative history. In order to justify these inferences, the Court stressed congressional failure to explicitly overrule the Court's own pre-1972 decisions.[127]

In determining whether Congress intended to restrict coverage with the addition of the 1972 "status" requirement, the Court examined its three major decisions under the 1927 Act: *Parker*, *Davis* and *Calbeck*.[128] In seeking support for an expansive view of the Act, the Court recounted the confusion caused by the "maritime but local" doctrine and its codification in section 3(a) of the 1927 LHWCA.[129] The majority then highlighted the Court's attempts to correct the inequities that existed in the 1927 Act. Turning to *Calbeck*, the Court noted that the *Calbeck* decision relied partly on *Davis* to create an overlap between federal and state coverage of injured workers and to allow maritime workers to recover for injuries sustained on navigable waters with minimal hardship.[130] Further, the Court pointed to its decision in *Parker* and its holding that the Act covered a land-based janitor injured on navigable waters.[131] Finally, the Court observed that the "consistent interpretation given to the LHWCA before 1972 by the Director [of the Office of Workers' Compensation Programs], the deputy commissioners, the courts, and the commentators was that . . . *any* worker injured upon navigable waters in the course of employment was covered" by the LHWCA.[132] The Court concluded, therefore, that

125. For further discussion of § 3(a), see *supra* notes 37-38 and accompanying text.

126. *Id.* at 649.

127. *Id.* The Court argued that even though Congress did not mention any pre-1972 cases in the legislative history of the 1972 amendments, elected representatives, like other citizens, know the law. The Court, therefore, concluded that Congress' use of 'employees traditionally covered' must refer to those workers covered under the 1927 Act as a result of *Parker, Davis*, and *Calbeck*. *Id.*

128. *Id.* at 642-45; *see also supra* notes 40-55 and accompanying text.

129. *Id.* at 642. *See also supra* notes 37-38 and accompanying text.

130. *Id.* at 643.

131. *Id.* at 644. The Court stated that *Parker* allowed a "nonmaritime" worker to recover for an injury sustained on navigable waters "without any further inquiry whether the injured worker's employment had a direct relation to navigation or commerce." *Id.*

132. 103 S. Ct. at 644 (emphasis in original); *see also* GILMORE & BLACK, *supra* note 98, at 429-30. Gilmore & Black assert that the pre-1972 case law on the scope of the 1927 Act

Raymond Churchill (the foreman claimant in *Perini*) would have been covered under the Act before 1972.

Turning to post-1972 case law interpreting the 1972 amendments, the Court compared the contrasting positions of the various circuit courts as reflected in the arguments of both Churchill[133] and Perini North River Associates. Churchill argued that the addition of the "status" requirement was meant to restrict coverage of workers injured on the expanded shoreside situs.[134] Perini argued that the "situs" and "status" tests were to be considered together, regardless of the site of injury, and that therefore a worker may recover under the LHWCA only if his employment has a significant relationship to navigation or commerce on navigable waters.[135] The Court adopted Churchill's construction of the 1972 amendments and thus affirmed the liberal interpretation previously adopted by the Fifth Circuit.[136] It reasoned that the LHWCA must be broadly construed to avoid harsh results.[137] The Court therefore determined that since Congress evinced no intent to withdraw coverage from those workers who would have been covered before 1972, the intent and effect of the 1972 amendments was merely to extend the scope of the Act to cover additional workers.[138]

Addressing issues of public policy, the Court emphasized that a narrow reading of the 1972 amendments would limit many employees injured on navigable waters to state compensation remedies which Congress had

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stood for the proposition that any worker injured on navigable waters was covered "without any inquiry into what he was doing (or supposed to be doing) at the time of his injury."

It appears that, based on the extensive changes introduced by the 1972 amendments to the LHWCA, the majority's emphasis on pre-1972 case law is misplaced. Clearly, the addition of the "status" test in 1972 must have been intended to have some effect on the scope of the Act. *See Weyerhaeuser, supra* note 75; 4 A. LARSON, *supra* notes 93, 98, 118.

133. Churchill was joined in his appeal to the Benefits Review Board by the Director, Office of Workers' Compensation Programs (O.W.C.P.) of the Dep't of Labor. The Director participated as a respondent and filed a brief supporting Churchill's position before the Second Circuit. *Perini*, 103 S. Ct. at 639. It was the Director who sought Supreme Court review when the Second Circuit denied Churchill's claim. Thus, the Director of the O.W.C.P. assumed Churchill's position before the Supreme Court. In addition to Churchill's primary claim, the Supreme Court addressed the question of the Director's standing to seek review, which the Court resolved in the Director's favor. *Id.* at 639-41.

134. *Perini*, 103 S. Ct. at 646.

135. *Id.*

136. *Id.* at 646-47; *see also* discussion of *Boudreaux*, *supra* notes 91-103 and accompanying text.

137. *Id.* at 647; *see* Voris v. Eikel, 346 U.S. 328, 333 (1953) ("[The LHWCA] must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.")

138. *Perini*, 103 S. Ct. at 647.

found to be often inadequate.[139] The Court also indicated, in a final footnote, that it expressed no opinion as to "whether [LHWCA] . . . coverage extend[ed] to a worker injured while transiently or fortuitously upon actual navigable waters."[140] Interestingly, in a retreat from the main focus of their argument, the O'Connor majority stated that its decision should not be read as exempting water-based workers from the new status test.[141]

Concluding its discussion, the Court pointed to its recent decision in *Sun Ship*[142] as consistent with the interpretation of the 1972 amendments it now advanced. According to the Court, the narrow view advocated by *Perini* would require employees injured on navigable waters to meet both "situs" and "status" tests, thus resurrecting the hazardous pre-*Davis* jurisdictional guessing game.[143] The *Sun Ship* decision, in holding that the 1972 LHWCA amendments were intended to "supplemen[t], rather than supplan[t], state compensation law," reflected the same broad view of those amendments that the *Perini* Court now employed to resolve the meaning of the "status" requirement.[144]

In a brief concurrence, Justice Rehnquist avoided the difficult issue of whether Congress intended to exclude workers previously covered under the Act by categorizing Churchill's job as one that was "very much like the work of longshoremen, who typically load and unload vessels."[145] Interestingly, Rehnquist's concurrence addressed the phrase in the "status" requirement that workers are covered under the LHWCA if they engage in longshoring operations or are harbor workers. Although the term "longshoring operations" generally has been interpreted broadly by the courts to include many diverse occupations,[146] the term "harbor worker" generally

139. *Id.* at 648 n.28. *See also* S. REP., *supra* note 8, at 12-13; H.R. REP., *supra* note 8, at 10 ("[M]ost State Workmen's Compensation laws provide benefits which are inadequate.").

140. *Perini*, 103 S. Ct. at 651 n.34.

141. *Id.*

142. *See supra* notes 114-18 and accompanying text.

143. *Perini*, 103 S. Ct. at 650. The jurisdictional guessing game would resurface if workers injured on navigable waters had to satisfy a "status" test because an injured worker would then have to guess whether his particular occupation met the requirements of the test.

144. *Sun Ship*, 447 U.S. at 720.

145. *Perini*, 103 S. Ct. at 652 (Rehnquist, J., concurring).

146. *See* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 269-70 (1977) (Congressional intent "clearly indicates that [such tasks as stripping a container] are included in the category of 'longshoring operations' [under § 902(3)]."); Hullinghorst Indus., Inc. v. Carroll, 650 F.2d 750, 756 (5th Cir. 1981) (Carpenter working to erect a scaffolding on a pier "directly furthered the maritime goals of the . . . port facility—the loading and unloading of ships."); Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978) ("[A] gear lockerman's function is an 'integral and essential part of the overall longshoring operations.' "); Handcor, Inc. v. Director, O.W.C.P., 568 F.2d 143, 144 (9th Cir. 1978) ("[T]he work of a [container] stuffer is the functional equivalent of loading cargo aboard [a] ship.");

has been construed narrowly to include only those workers engaged in the construction, repair or maintenance of a pier or a dock.[147] However, because Rehnquist viewed Churchill's work as "maritime" in nature, he did not reach the question of the status of "nonmaritime" employees under the Act.

Justice Stevens, in a lengthy dissent, criticized the majority's failure to adhere to basic principles of statutory construction by maintaining that the Court departed from the plain meaning of both the amendment's text of the statute and its legislative history.[148] Stevens, adopting the narrow view of the Act taken by Perini and most lower courts,[149] noted that the title of the Act itself suggests that a federal remedy is available only for longshoremen and harbor workers.[150] He concluded that coverage under the Act must be determined by reference to both the situs and status tests. In Stevens' view, these tests work together to provide compensation for only those who perform longshore and ship repair work.[151]

Citing principles of statutory construction, Justice Stevens denounced a broad view of the Act. According to Stevens, statutes generally should be construed in light of specific examples provided to define terms.[152] He noted that the term "maritime employment" is consistently defined in the Act by reference to the words "longshoremen" and "harbor workers".[153]

Valcin v. Schiavone & Sons, Inc., 8 BEN. REV. BD. SERV. (MB) 384 (1977) ("A welder's helper whose duties involved repair and maintenance of equipment used to load vessels . . . [is] a maritime employee . . . since his . . . duties [are] an integral part of loading operations."); Carmitros v. B.T. Ilsley, Inc., 6 BEN. REV. BD. SERV. (MB) 295, 296 (1977) (A scaleman or weigher whose "duties involved an element of supervising in the unloading of ships [and] weighing [of] cargo" is involved in the "traditional work of longshoremen.").

147. *See* Trotti & Thompson Co. v. Crawford, 631 F.2d 1214, 1222 (5th Cir. 1980) (An employee constructing a wharf for future loading and unloading of vessels is covered under the Act.); Brown & Root, Inc. v. Joyner, 607 F.2d 1087, 1089 (4th Cir. 1979) (An excavation foreman and painter/sandblaster were found to be covered as harbor workers because they were "directly involved in the construction . . . of harbor facilities."); Matson v. Perini North River Assocs., 9 BEN. REV. BD. SERV. (MB) 967 (1979) (A crane operator involved in the repair of a dock was covered under the Act.).

148. 103 S. Ct. at 652-53 (Stevens, J., dissenting).

149. *See supra* notes 71-86 and accompanying text.

150. *Perini*, 103 S. Ct. at 652.

151. *Id.* In Steven's view, the coverage of the LHWCA "is defined by two basic tests—a *situs* test focusing on the place where the injury occurred, and a *status* test focusing on the character of the injured employee's occupation. An injured person is entitled to compensation under the Act only if he satisfies both tests at the time of injury." *Id.*

152. *Id.* at 652-53. "The words 'other persons,' following in a statute the words 'warehouseman' and 'wharfinger,' must be understood to refer to other persons *ejusdem generis*, viz., those who are engaged in a like business, or who conduct the business of warehousemen and wharfingers with some other pursuit, such as shipping . . . ." *Id.* at 653 n.2. *Accord* J. SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION, § 273 (1891).

153. 103 S. Ct. at 652-53.

Moreover, Stevens asserted that the definition of "employee" for purposes of the Act should be independent of the situs of the injury. He rejected the majority's contention that status should be analyzed only when the injury occurs on a shoreside situs, noting that the statute itself fails to make such a distinction. According to Stevens, a claimant must always satisfy both tests to come within the scope of LHWCA coverage.[154]

Referring to the legislative history of the Act, Justice Stevens, in a footnote, criticized the Court's assumption that the words "traditionally covered" were intended to refer to the claimants in *Parker*, *Davis* and *Calbeck*.[155] Noting that none of these decisions were expressly mentioned by Congress in the legislative history, Stevens interpreted the phrase "traditionally covered" as referring to longshoremen and harbor workers whose work is clearly maritime in nature.[156]

Turning to the reasons for the Act's passage, Justice Stevens asserted that Congress had passed the 1927 Act specifically to provide longshoremen with a uniform remedy.[157] He pointed to House hearings on the 1972 amendments suggesting that Congress passed the amendments to protect workers whose employment required them to be both on land and over water.[158] Testimony before the House revealed that only longshoremen have this problem.[159]

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154. *Id.* at 652. Thus, under Stevens' view of the Act a litigant would have to prove: 1) that he was injured on the proper situs covered by the Act; and 2) that he was engaging in an activity substantially similar to longshoring, in order to recover any benefits under the Act. It is not at all apparent that Congress favored such a restrictive view of the "status" test. It does appear, however, from the plain and clear wording of the Act, that Congress intended that workers satisfy both a situs and a status test in order to recover.

155. *Id.* at 654 n.6; *see also supra* note 123 and accompanying text.

156. 103 S. Ct. at 654 n.6. Distinguishing the claimants in *Parker, Davis*, and *Calbeck*, Stevens stated that in his opinion "the reference to the 'traditional coverage' of the Act [in the committee reports] was intended to identify the coverage of longshoremen and harbor workers as opposed to the special categories of coverage defined by specific statutory enactment." *Id.* For examples of the special categories referred to by Stevens, see *Perini*, 103 S. Ct. at 652 n.l:

> By reason of several specific statutory enactments, the LHWCA's compensation scheme is, or has been, also applied to: (a) employees on defense bases . . . (b) employees of nonappropriated fund instrumentalities such as post exchanges . . . (c) employees of government contractors injured overseas by war risk hazards . . . (d) workers in the District of Columbia . . . and (e) workers on oil drilling rigs on the outer continental shelf . . . .

Id.

157. *Perini*, 103 S. Ct. at 656.

158. *Id.* at 655-56 nn.10-11.

159. *Id.* at 655; *see, e.g., Hearings Before the House Labor Subcommittee on H.R. 12006*, 92d Cong., 2d Sess. 297 (1972) (Joseph Leonard of the International Longshoremen's Association stated: "Federal compensation law stops at the gangplank to the pier. When you come off the gangplank you come under a different law; you come under the State. . . . The

In a lengthy footnote, Justice Stevens highlighted two contradictions in the majority's interpretation of the 1972 legislative history.[160] First, Stevens observed that although the Court held that coverage under the Act extended to *any* worker injured on navigable waters, it later retreated from that broad assertion by stating that coverage might be denied workers injured while "transiently or fortuitously" on navigable waters.[161] Second, he observed that although the Court interpreted congressional references to workers "traditionally covered" to mean the plaintiffs in *Parker*, *Davis* and *Calbeck*, it later declared that those cases did not limit the LHWCA to only "traditional" maritime activities.[162]

In response to the majority's assertion that the deletion of the original Act's section 3(a) requirement evinced congressional intent to retain coverage of all workers injured on navigable waters, Stevens countered that Congress merely replaced the section 3(a) requirement with the new "status" test, thereby leaving in place the exemption for those workers injured on navigable waters who are engaged in "local" (nonmaritime) activities.[163] Turning to *Calbeck* and *Davis*, Stevens maintained that the establishment of a "twilight zone" of concurrent jurisdiction placed employers in the position of having to acquire duplicate insurance coverage,[164] presumably because of uncertainty as to which remedy an injured worker would choose. Stevens concluded that Congress, concerned about uncer-

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longshoremen are the only workers in the United States who must worry about their injury to determine the compensation . . . ."). *But cf.* Miller v. Cent. Dispatch, 673 F.2d 773 (5th Cir. 1982) (specialized maritime employee, required to be on ship five to six times a day, walks in and out of LHWCA coverage); Holcomb v. Kirk, 655 F.2d 589 (5th Cir. 1981) (watchman, injured on routine safety check of ship, walks in and out of LHWCA coverage).

160. *Perini*, 103 S. Ct. at 661 n.26.

161. *Id.; see also id.* at 651 n.34.

162. *Id.* at 660-61 n.26; *see also id.* at 644 n.21.

163. *See id.* at 659.

164. *Id.* at 658-59. Stevens noted that Congress was concerned about duplicative insurance costs when it amended the Act in 1972. He asserted that while LHWCA insurance premiums were relatively low before 1972 because of the smaller amounts of benefits provided under the Act, after 1972 insurance costs necessarily rose because the amendments generally increased benefits provided. *Id.* at 659 n.22; *see also* Gardner, *Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen*, 71 HARV. L. REV. 438, 450 n.34 (1958) ("In preparing the [insurance] policy the scope of the insured's operations is determined and names of those states in which he is under the workmen's compensation law are set forth. . . . If, in addition, he has exposure under the [LHWCA] our endorsement, Form UC828, is added."); Note, *Injured Maritime Workers and the "Twilight Zone,"* 50 CALIF. L. REV. 342, 347 (1962) (Duplicative insurance coverage was not a problem because 44 states permitted employers to self-insure. Thus, "the only extra expense to the employer for coverage under both [state and federal] acts [was] a small fee that the carriers charge for the endorsement to the second act." (footnote omitted)). Stevens did not document to what extent, if any, insurance costs have increased since 1972.

tainty of coverage and duplicative insurance costs, replaced section 3(a) with a "status" test which would define the scope of LHWCA coverage more clearly therefore obviating the need for concurrent jurisdiction and providing reduced insurance costs.[165]

Justice Stevens did not rely to a significant extent on case law before or after 1972. He responded, however, to the majority's reliance on *Parker*. The majority contended that allowing recovery by a nonmaritime employee in *Parker* demonstrated the Court's view that the 1927 Act covered "nonmaritime" employees injured on navigable waters. Stevens declared that the *Parker* decision was an aberration based on irrelevant equitable considerations.[166] The injured employee in *Parker* had been unable to recover under state law because his employer did not meet the statutory requirements of the state workers' compensation act.[167] Stevens concluded that *Parker*, the only case based on the original Act involving a "nonmaritime" employee,[168] was devoid of convincing statutory analysis, and therefore did not provide a sound basis for the *Perini* majority's conclusion that a nonmaritime employee such as Churchill would have been covered before 1972 merely because he happened to be working on navigable waters when injured.

Justice Stevens concluded by reiterating his criticism of the Court's failure to give adequate consideration to the language of the statute itself. In the absence of clearly expressed congressional intent to apply the 1972 "status" requirement to workers other than longshoremen and harbor workers, Stevens found the statutory language conclusive.[169]

B. Perini *and Its Effect on the "Status" Test of the LHWCA*

Although *Perini* provided courts with a fair and workable test of LHWCA coverage which comports with constitutional notions of federal admiralty jurisdiction, it engrafted an interpretation that departs from the

165. *Perini*, 103 S. Ct. at 659. Stevens stated: "Both of these concerns [duplicative insurance costs and uncertainty of coverage] are alleviated by defining the scope of the statutory coverage in terms of the *status* of the covered employee." *Id.*

166. *Id.* at 660.

167. *Id.; see also supra* note 44 and accompanying text.

168. 103 S. Ct. at 656.

169. *Id.* at 660-61; *see also, e.g.*, Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980). This case involved a release of certain accident reports, pursuant to a Freedom of Information Act request, allegedly in violation of the procedure established for such disclosures in § 6(b)(1) of the Consumer Product Safety Act. In analyzing the requirements of § 6(b)(1) the Court stated: "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

plain meaning of the Act—a result at odds with traditional notions of judicial review. Moreover, in interpreting the LHWCA, the Supreme Court failed to demonstrate that its departure from the language of the text was justified by indications of *clear* congressional intent.

Justice Rehnquist, concurring with the *Perini* majority, reached a conclusion that clearly is not supported by the facts of the *Perini* case. Rehnquist maintained that Churchill should be covered under the Act because he engaged in the act of unloading at the time of injury—a task deemed to be a "longshoring operation."[170] Although the courts have defined the term "longshoring operation" broadly to include various occupations, the courts have also limited the expansive definition to occupations that can demonstrate some link to the loading and unloading of ships.[171] Churchill was supervising the unloading of a caisson from a barge that was to be used as part of the substructure for a sewage treatment facility. A crane operator performed the actual unloading. Thus, Churchill was a construction worker whose supervisory task was only an incidental function to his primary job of constructing the substructure.

In the majority opinion, Justice O'Connor's assumption that Congress, in cautioning that it did not intend to withdraw coverage from "traditionally covered" workers was referring to the nonmaritime claimants in *Parker*, *Davis*, and *Calbeck*,[172] is without foundation. As Justice Stevens noted in his dissent, *Calbeck* involved ship builders who are expressly included by the statute.[173] *Davis* concerned employees seeking state, not federal coverage,[174] and *Parker* seemed to turn on equitable rather than analytic considerations.[175] More importantly, Congress did not expressly approve the Court's conclusions in any of these cases when considering the 1972 amendments.[176] It is well established that congressional silence is an unreliable indicator of acceptance of judicial decisions.[177] Viewed prop-

170. *See supra* notes 145-47 and accompanying text.

171. *See supra* note 146.

172. *Perini*, 103 S. Ct. at 649; *see also supra* note 127 and accompanying text.

173. *Perini*, 103 S. Ct. at 654 n.6; *see also supra* notes 52-54 and accompanying text.

174. *Perini*, 103 S. Ct. at 654; *see also supra* notes 46-51 and accompanying text.

175. *Perini*, 103 S. Ct. at 654; *see also supra* notes 40-45 and accompanying text.

176. *Perini*, 103 S. Ct. at 654. "None of these cases was cited at any time in the [congressional] hearings or reports." *Id.* at 654 n.6.

177. *See, e.g.*, Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The *Glenshaw* Court refused to conclude that Congress meant to codify an earlier court decision merely because, in reenacting a certain provision of the tax code with an amendment, Congress failed to expressly disclaim the decision. The Court stated: "Re-enactment—particularly without the slightest affirmative indication that Congress ever had the [particular] decision before it—is an unreliable indicium at best." *Id.*

erly, *Parker, Davis* and *Calbeck* are irrelevant to a determination of legislative intent underlying the 1972 "status" requirement.

Furthermore, the majority failed to consider the possible ramifications of congressional silence. The majority cited the Senate committee report for the proposition that Congress intended to extend the Act to protect additional workers.[178] This statement does not necessarily preclude an intent also to *withdraw* coverage from some workers. It is just as plausible that in extending the Act to protect an additional class of workers on the shoreside, Congress also may have acted to restrict the seaward coverage of the Act.[179]

The majority also maintained that a reading of the Act which so restricts its coverage would force many workers to seek relief from inadequate state compensation plans.[180] Although a strong policy argument, the more appropriate remedy would be to seek modification of state compensation statutes, not to apply the strained interpretation of the LHWCA proposed by the majority. The Court's rationale is overly broad and might apply to any circumstance in which an injured worker must seek relief from a state remedial plan.

The *Perini* Court stated that Congress' deletion of the section 3(a) "maritime but local" provision demonstrates that Congress no longer intended that an injured employee prove that the nature of his employment is directly linked to navigation or commerce on navigable waters.[181] However, the majority did not consider Justice Stevens' well reasoned position that Congress merely substituted the old section 3(a) provision with the new section 2(3) "status" test.[182] Indeed, the "status" test has had virtually the same effect on post-1972 case law that the section 3(a) provision had on pre-1972 case law.[183] Interpreting the LHWCA as amended in 1972, the Second Circuit, in *Weyerhaeuser*, reasoned that the "status" test requires that an employee show a significant relationship between his employment and a traditional ship's service in order to recover under the Act.[184] Similarly, in interpreting the LHWCA of 1927, commentators have suggested that section 3(a) incorporated the "maritime but local" doctrine requiring an employee to prove a direct link between his employment and naviga-

178. *See supra* note 122 and accompanying text; S. REP., *supra* note 8, at 1.

179. *See* 4 A. LARSON, *supra* note 38, at § 89.27(c). "[T]he expansion [of the LHWCA] took place *solely* in the enlargement of the 'situs' covered. The additon of the 'status' test is not an expansion but a contraction [of coverage]." *Id.*

180. *Perini*, 103 S. Ct. at 648 n.8; *see also supra* note 139 and accompanying text.

181. *See* 103 S. Ct. at 649.

182. *Id.* at 659; *see also supra* note 165 and accompanying text.

183. *See supra* notes 37-55 and accompanying text.

184. *Weyerhaeuser*, 528 F.2d at 961; *see also supra* notes 71-78 and accompanying text.

tion or commerce upon navigable waters.[185]

The *Perini* majority concluded that the LHWCA should be liberally construed to avoid "harsh and incongruous" results. This expansive view of the LHWCA can be traced to the Fifth Circuit's consideration of the Act in *Boudreaux*.[186] *Perini*, like *Boudreaux*, relied on earlier Supreme Court cases as well as on commentary on admiralty law to formulate a liberal construction of the Act.[187] The extent to which the *Perini* majority utilized *Boudreaux*'s analysis is revealed by the Court's adoption of the *Boudreaux* thesis that Congress did not intend to "withdraw coverage from those previously considered to be in 'maritime employment' " and that Congress meant to "extend coverage to protect additional workers."[188] Though the Supreme Court in *Perini* reached the same result as the Fifth Circuit in *Boudreaux*, the *Boudreaux* court arguably employed a better reasoned analysis. The *Perini* majority might have avoided the difficulties of its strained interpretation of the Act by finding, as the *Boudreaux* court did, that any employee injured on navigable waters satisfies the "status" test because employment on navigable waters *is* maritime employment per se.[189] Instead, *Perini* suggests that a worker may recover under the LHWCA without any inquiry whatsoever into his status if he is injured upon navigable waters.

In effect, *Perini* changes the plain meaning of section 2(3) of the LHWCA from requiring that all employees be engaged in maritime employment, to requiring that an employee be engaged in maritime employment *only if he is injured on a shoreside situs*. This new meaning imposed by the *Perini* Court is, as Justice Stevens pointed out, unsupported by the very terms of the "status" requirement, which does not differentiate between seaward and shoreside sites.

III. CONCLUSION

In *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, the Supreme Court effectively deleted from the LHWCA the section 2(3) "status" requirement as it pertains to workers injured on actual navigable waters of the United States. The Court's generous view of the 1972 amendments will clearly result in more workers being able to recover benefits under the Act. At the same time, however, the Court's means of expanding the Act without relying on *clear* congressional intent

185. *See supra* note 37.
186. 680 F.2d at 1039.
187. *See supra* notes 95-98 and accompanying text.
188. 680 F.2d at 1043 (quoting S. REP., *supra* note 8, at 1); *see also supra* note 102.
189. *See supra* note 99 and accompanying text.

disturbs traditional notions of judicial review and implies an attempt at judicial legislation.

Although the Court noted that it intended to express no opinion as to the status of those workers injured while "transiently or fortuitously" upon navigable waters, the broadness of the Court's decision in *Perini* virtually assures an exception from the "status" requirement for these workers as well. The Court's overly expansive view of the LHWCA controverts the plain meaning of the Act, and restricts Congress' attempt to apply a test of maritime status to *all* workers injured on the actual navigable waters of the United States.

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