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# ***Herb's Welding v. Gray*: "Maritime Employment" Remains Undefined**

## **I. Introduction**

In *Herb's Welding, Inc. v. Gray*,<sup>1</sup> the Supreme Court decided in a five-to-four decision<sup>2</sup> that a welder injured while working on a fixed offshore oil and drilling platform<sup>3</sup> in state territorial waters<sup>4</sup> was not engaged in "maritime employment"<sup>5</sup>

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1. 105 S. Ct. 1421 (1985).

2. Justice White delivered the opinion of the Court, joined by Chief Justice Burger, and Justices Powell, Rehnquist, and Stevens.

Justices Marshall, Brennan, Blackmun, and O'Connor, dissented.

3. One commentator explains that:

Two general classes of structures are used in exploring for and production of oil and gas from beneath the ocean. One class of structures floats or is capable of being floated from site to site. Currently, most exploratory drilling occurs on such structures, which include submersible barges, semi-submersible barges, jack-up rigs, and drill ships. . . . The other class of structures are permanently attached to the ocean bottom. These artificial islands and fixed platforms are not vessels. The distinction between vessels and nonvessels is the key to the offshore injury system.

Robison, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L. REV. 973, 982 (1977) (emphasis omitted) (analyzing the history and law of injuries as applied to petroleum workers).

4. State territorial waters are defined for purposes of the Longshoremen's and Harbor Workers' Compensation Act as that area within three geographical miles off the coastline of each state. A worker employed on a rig outside of this limit is working on the Outer Continental Shelf. 43 U.S.C. §§ 1333(b), (c), 1331(a), 1301(a)(2) (1982).

5. Equally important are the different types of workers discussed herein. First, the workers' compensation schemes discussed in this Note, whether state or federal, have never been applied to seamen. Seamen are provided separate personal injury remedies in admiralty under doctrines of maintenance and cure, seaworthiness, and the Jones Act, 46 U.S.C. § 688 (1982). The question of who is a seaman has been the subject of much litigation; however it is generally conceded that a seaman must have some degree of connection to a vessel. See *Offshore Oil Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Seamen's remedies are considered to be the most munificent in law. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, 272-484 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

This Note does not concern seamen and their remedies. The types of marine workers demanding compensation under either state or federal acts are non-seamen, whose work is more or less related to maritime commerce. Respondent Gray is seeking the required work status that permits compensation under the federal Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 902(3) (1982). See statutes cited *infra*

within the meaning of the Longshoremen's and Harbor Workers' Compensation Act [hereinafter cited as LHWCA].<sup>6</sup> Thus, the injured employee was relegated to the less munificent applicable state workers' compensation scheme.<sup>7</sup>

Part II of this Note examines the background of the LHWCA in four sections. Section A discusses the state of law prior to the enactment of the LHWCA in 1927. The period between the 1927 enactment and the 1972 amendments is discussed in Section B of Part II. The post-1972 amendment era is covered in Section C of Part II. Part II concludes with the application of the LHWCA to workers employed in the exploration and recovery of offshore oil. The factual and procedural backgrounds of the *Herb's Welding* cases are discussed in Part III of this Note. Part III also includes a review of the administrative

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note 6.

6. 33 U.S.C. §§ 901-50 (1982 & Supp. I 1983).

Section 903(a) of the Act provides in part:

Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any 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) (1982).

Section 902(3) of the Act provides:

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

33 U.S.C. § 902(3) (1982).

The original Act provided:

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

Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1424, 1426 (1927), amended by 33 U.S.C. §§ 902(3), 903(a) (1982).

The term navigable waters herein refers to that area to which coverage was extended under the original LHWCA, or its amended version. Under either version, work on board a ship is considered to be upon navigable waters. See generally *Herb's Welding*, 105 S. Ct. at 1430-31 (1985) (Marshall, J., dissenting).

7. *Herb's Welding*, 105 S. Ct. at 1429 (1985).

and appellate decisions, as well as the majority and dissenting opinions of the Supreme Court. Part IV analyzes the Court's decision and suggests that the majority has blurred two of the distinct statutory requirements of the LHWCA. The LHWCA as amended requires an examination of the situs of the injury and an examination of the status of the injured employee.<sup>8</sup> However, the majority in *Herb's Welding* exaggerated the impact of the injury's situs upon the injured employee's status. Consequently, the majority did not analyze other characteristics of his employment indicative of status for purposes of the LHWCA. Part IV also suggests that the majority's interpretation of the legislative intent of the LHWCA is unduly restrictive. Parts IV and V conclude by suggesting that the Court should have adopted in part the "realistically significant relationship to traditional maritime activities"<sup>9</sup> test for determining whether an employee has status for purposes of the LHWCA.

## II. Background

### A. *The Pre-LHWCA Period*

In 1917, the Supreme Court in *Southern Pacific Co. v. Jensen*,<sup>10</sup> declared that states were constitutionally barred from applying their workmen's compensation systems to shipboard maritime injuries.<sup>11</sup> The Court concluded that the application of state compensation schemes to shipboard injuries would interfere with the overriding federal policy of a uniform maritime law.<sup>12</sup> Thus, after *Jensen*, longshoremen who were injured while

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8. The situs requirement is set forth in 33 U.S.C. § 903(a), restricting LHWCA coverage to designated work locations. The status requirement is set forth in 33 U.S.C. § 902(3). See statutes cited *supra* note 6.

9. *Herb's Welding v. Gray*, 703 F.2d 176, 179 (5th Cir. 1983).

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

11. *Id.*

12. *Jensen* was killed while unloading a ship docked in New York City. His widow sought compensation under the New York Workmen's Compensation Act. The Court held that:

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statutes, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.

working aboard ship were left without a compensation remedy while longshoremen injured while working on a pier were protected by state compensation acts.<sup>13</sup> Dissatisfied with the gap in coverage thus created, and recognizing that the amphibious<sup>14</sup> nature of longshoremen's work made it desirable to have one law to cover the purview of their entire employment, Congress twice sought to authorize the states to apply their own compensation statutes to maritime injuries occurring seaward of the "Jensen" line.<sup>15</sup> Its attempts to allow such uniform state systems, however, were struck down as unlawful delegations of Congressional power.<sup>16</sup>

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*Id.* at 217. "In *Jensen*, we held that state compensation Acts could not cover longshoremen injured seaward of the water's edge. The line of demarcation between land and water became known as the 'Jensen' line." Director, Office of Worker's Compensation Programs v. Perini N. River Assocs., 459 U.S. 297, 306 n.14 (1983). Had the injury occurred on the pier, Jensen would have been covered by the State Act.

Art. III, § 2 of the Constitution extends "the judicial power of the United States [to] all cases of admiralty and maritime jurisdiction," U.S. CONST. art. III, § 2. This section has been codified at 28 U.S.C. § 1333 (1982).

See also GILMORE & BLACK, *supra* note 5, at 47 (an exposition on the state-federal conflicts in admiralty).

13. In *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922), the Court stated that:

When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied.

*Id.* at 272-73.

14. Longshoremen load and discharge vessels that are usually docked. Their work is amphibious because its location is divided between a dock, and on board a vessel floating alongside the dock. The gap referred to was the coverage provided for longshoremen injured while working on board a vessel, as compared to the coverage provided for longshoremen injured on the dock. The former was not covered during the "Jensen" era under any compensation scheme, the latter was covered under the appropriate state scheme. See L. KENDALL, *THE BUSINESS OF SHIPPING* 119-48 (4th ed. 1983).

15. See Act of June 10, 1922, ch. 216, 42 Stat. 634 and Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.

16. In *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), the Court stated that: And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

At the same time, the Court began to narrow the "Jensen" doctrine by identifying circumstances in which the subject of the litigation might be classified as both maritime and "local in character,"<sup>17</sup> thus making the subject of litigation amenable to the state compensation law.<sup>18</sup> For example, if the employment of an injured maritime worker was determined to have no direct relation to navigation or commerce, and the operation of local law would not materially affect the uniformity of maritime law, then the employment would be characterized as "maritime but local," and the state could provide a compensation remedy.<sup>19</sup> This remedy could be provided notwithstanding the injury's shipboard situs beyond the "Jensen" line. However, if the employment could not be considered "maritime but local," the maritime worker injured aboard ship would be without a compensation remedy.<sup>20</sup>

Convinced that the only way to provide workmen's compensation for longshoremen and harborworkers injured on board ship<sup>21</sup> was to enact a federal compensation scheme, Congress passed the LHWCA in 1927.<sup>22</sup>

#### B. *Period Between the Enactment of the LHWCA and the 1972 Amendments*

The LHWCA provided, inter alia, compensation for employee injuries occurring upon the navigable waters of the United States if recovery through workmen's compensation pro-

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*Id.* at 164. See also *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

17. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717 (1980).

18. *Id.*

19. *Grant Smith-Porter Co. v. Rohde*, 257 U.S. 469 (1922). A carpenter injured while engaged in construction work aboard a nearly completed vessel lying in navigable waters was allowed to recover under the state compensation scheme.

[W]e recently pointed out that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the State applies and defines the rights and liabilities of the parties.

*Id.* at 477.

20. See *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 253 n.2 (1942) (listing representative case law from the "maritime but local" era).

21. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 257-58 (1977).

22. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1424 (1927), amended by 33 U.S.C. §§ 902(3), 903(a) (1982).

ceedings could not validly be provided by state law.<sup>23</sup>

The LHWCA thus linked together federal and state law to provide theoretically complete coverage for maritime laborers.<sup>24</sup> The LHWCA, however, was only intended to cover those workers not already covered under state acts.<sup>25</sup> This included workers whose injuries occurred aboard ship, but could not be considered "maritime but local."<sup>26</sup> However, the boundary at which state remedies gave way to federal remedies was difficult to determine in individual cases.<sup>27</sup> As a result, the injured worker was compelled to make a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum because of differing statutes of limita-

23. 44 Stat. 1424, 1426 (1927), amended by 33 U.S.C. §§ 902(3), 903(a) (1982). See statutes cited *supra* note 6.

24. *Sun Ship*, 447 U.S. at 718.

25. *Caputo*, 432 U.S. at 258.

26. Gilmore and Black explain that:

The—"may not validly be provided by state law" limitation in LHCA § 903(a) was generally—indeed universally—taken to have built the Garcia-Rohde "maritime but local" category into the Act's coverage. That is, a worker like Rohde not only could not sue in admiralty; he could not claim federal compensation under the LHCA either; he was restricted for all purposes to his rights under the relevant state compensation act. On the other hand, a claim for the injury or death of a worker like the decedent in Jensen . . . could be made only under LHCA, since the application of a state compensation act to such workers was, per Jensen, unconstitutional.

GILMORE & BLACK, *supra* note 5, at 419.

27. For example, in *New Amsterdam Casualty Co. v. McManigal*, 87 F.2d 332 (2d Cir. 1937) a worker sought LHWCA coverage for an injury sustained while constructing a lighthouse 12 miles offshore. The LHWCA was held inapplicable, since the employment pertained to local matters to which State Compensation Law could apply.

Litigation concerning the border between state and federal coverage was extensive. Those which have held the matters as local, and within state law are: *Rosengrant v. Havard*, 273 U.S. 664 (1927), *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926), *Motor Boat Sales, Inc. v. Parker*, 116 F.2d 789 (4th Cir. 1941). Cases that were not adjudged as "maritime but local" therefore, decided under federal law are: *Baizley Iron Works v. Span*, 281 U.S. 222 (1930), *Nogueira v. New York, N.H. and H.R.R.*, 281 U.S. 128 (1930).

The incorporation of the "maritime but local" doctrine into the original LHWCA is criticized by Gilmore and Black because:

Only a soothsayer with a crystal ball could tell which claimants were on the state side of the line ("maritime but local") and which were on the federal side ("maritime and national"). For a decade and a half "maritime but local" was one of the most flourishing, as it was surely depressing, branches of federal jurisprudence.

GILMORE & BLACK *supra* note 5, at 419-20.

tions.<sup>28</sup> The matter was raised before the Supreme Court in *Davis v. Department of Labor and Industry*.<sup>29</sup>

In *Davis*, the decedent was killed while dismantling a bridge located over navigable waters.<sup>30</sup> The decedent had helped to cut some steel from the bridge and, at the time of the accident, was working on a barge used for the stowage of cut pieces.<sup>31</sup> The decedent's representative made a claim under the State Compensation Act. However, the Washington State Supreme Court held that the state could not, consistent with the federal Constitution, make an award under its compensation law to the widow of a workman drowned in a navigable river.<sup>32</sup> The state court analogized his employment to a longshoreman engaged in loading operations.<sup>33</sup> Therefore, under *Jensen*, the claim could only be brought under the LHWCA.<sup>34</sup> The Supreme Court granted certiorari and reversed.<sup>35</sup>

Justice Black, writing for the majority, recognized the difficulties involved in determining whether the state or federal act applied,<sup>36</sup> commenting that "[t]his Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation . . . ."<sup>37</sup>

Clearly, there is, in the light of the cases referred to, a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.<sup>38</sup>

This "twilight zone" effectively established a regime of concurrent state and federal jurisdiction.<sup>39</sup>

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28. *Davis*, 317 U.S. at 254. See *Ayres v. Parker*, 15 F. Supp. 447 (D. Md. 1936).

29. 317 U.S. 249 (1942).

30. *Id.* at 251.

31. *Id.*

32. *Davis v. Dep't of Labor and Indus.*, 121 P.2d 365 (1942).

33. *Id.* at 366.

34. *Id.*

35. *Davis*, 317 U.S. 249 (1942).

36. *Id.* at 253.

37. *Id.*

38. *Id.* at 256.

39. Gilmore and Black note about Justice Black that:

[He] did not explain how the majority thought the twilight zone was supposed to



Marine-related injuries prior to the 1972 amendments thus fell within three jurisdictional spheres. At the furthest extreme, the "Jensen" doctrine commanded that maritime injuries upon the navigable waters of the United States were not compensable under state workmen's compensation schemes. They were compensable only under the LHWCA.<sup>40</sup> Second, those injuries classified as "maritime but local" occurring upon the navigable waters of the United States could be compensated either under the LHWCA or under state compensation laws.<sup>41</sup> Third, injuries suffered ashore were compensable only under state laws.<sup>42</sup>

Thus, before 1972, LHWCA coverage was determined largely by the traditional "locality" test of maritime tort jurisdiction.<sup>43</sup> If an accident occurred on the navigable waters (which usually meant on a vessel) the worker was covered under the LHWCA no matter how close the accident may have been to the adjoining land or pier.<sup>44</sup> In contrast, if an accident occurred on the adjoining land, pier, or wharf, there was *only* state coverage, no matter how close the accident may have been to the water's edge.<sup>45</sup> Thus, it was possible for a longshoreman moving cargo from ship to pier to be covered concurrently by the LHWCA and the state act for injuries incurred on board ship. However, a longshoreman was only covered under the state laws for injuries incurred on the pier. A single situs requirement governed the

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work, beyond the obvious point that the State of Washington was being directed to consider and adjudicate the *Davis* claim even if the decedent had been on the "Jensen" side of the Supreme Court's line. Both Justice Frankfurter, concurring, and Chief Justice Stone, dissenting, thought he meant that the claim could have been brought either under the state act or under LHWCA . . . .

GILMORE & BLACK, *supra* note 5, at 420.

40. *Jensen*, 244 U.S. 205 (1917).

41. In *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), the Court held that the LHWCA covered all injuries on navigable waters whether or not a particular one was also within the constitutional reach of a state law. *Id.* at 124. There has been much post-*Calbeck* discussion on whether or not the *Calbeck* decision abrogated the *Davis* "twilight zone". The consensus is that the concurrent jurisdiction established in *Davis* was not affected by the *Calbeck* decision. See GILMORE & BLACK *supra* note 5, at 421-23.

42. See *supra* notes 25-27 and accompanying text.

43. Under this test, the invocation of admiralty subject matter jurisdiction for maritime torts was based solely on the water situs of the tort. This test was changed by the Supreme Court in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). See *infra* notes 191-92 and accompanying text.

44. *Herb's Welding, Inc. v. Gray*, 105 S. Ct. 1421, 1430 (1985).

45. *Id.*

scope of the LHWCA's coverage.<sup>46</sup>

Behind this system of "checkered coverage"<sup>47</sup> was the reality that federal and state workers' compensation schemes usually had very different benefit levels, with state benefit levels often being inadequate.<sup>48</sup> Thus, those workers whose professional lives might require that they move back and forth between water and adjoining land had to rely on an imperfect amalgam of federal and state workers' compensation law for workers' compensation benefits. The adequacy of compensation in any given case was a function of the pure fortuity of a work-related accident's exact location.<sup>49</sup>

### C. *The 1972 Amendments*

In 1972, Congress extended the scope of protection of the LHWCA landward beyond the shoreline of the navigable waters of the United States.<sup>50</sup> As a result, the Act became a source of relief for injuries which had always been the province of state compensation law.<sup>51</sup> The amended LHWCA broadened the definition of "navigable waters of the United States" to include "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."<sup>52</sup>

At the same time, Congress amended the definition of persons covered by the Act to include "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker . . . ."<sup>53</sup> Expanding the situs landward would not only have brought uniform coverage to those occupations previously covered in part, it would also have brought within the covered situs large

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46. *Id.*

47. *Id.* The coverage was "checkered" because longshoremen moved continuously in and out of the two statutory schemes. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), Justice Douglas protested the incongruity and unfairness of having coverage determined by "where the body falls." *Id.* at 225 (Douglas, J., dissenting).

48. *Herb's Welding*, 105 S. Ct. at 1430.

49. *Id.*

50. See *Sun Ship*, 447 U.S. at 719 (for a discussion of the extended protection).

51. *Id.*

52. 33 U.S.C. § 903(a) (1982).

53. 33 U.S.C. § 902(3) (1982). See statutes cited *supra* note 6.

numbers of occupations whose members had never before been covered at all.<sup>54</sup> With the definition of "navigable waters" expanded by 33 U.S.C. § 903(a) to include such a large geographical area, it became necessary to describe specifically the class of workers compensable.<sup>55</sup> Congress therefore added the status requirement of 33 U.S.C. § 902(3).<sup>56</sup> Congress adopted a status test in order to exclude workers on the newly expanded situs not compensable under the LHWCA. The amendments thus changed what had been essentially only a situs test of eligibility<sup>57</sup> to one contemplating both the situs of the injury and the status of the injured.<sup>58</sup>

The legislative history of the 1972 amendments provides in part that:

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . . The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.<sup>59</sup>

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54. *Herb's Welding*, 105 S. Ct. at 1431 (Marshall, J., dissenting). For example, would a truck driver injured while working on a dock (a covered situs under the amended act) enjoy LHWCA coverage?

55. *Id.*

56. See statutes cited *supra* note 6. Whether or not Gray had status pursuant to § 902(3) was the focal issue in the *Herb's Welding* cases.

57. See *supra* notes 43-46 and accompanying text.

58. *Herb's Welding*, 105 S. Ct. at 1431 (Marshall, J., dissenting).

59. H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4708. The legislative history devoted two pages to the amendments' extension of LHWCA coverage to shoreside areas, the situs and status tests. These two pages are minimal when compared to the full 22 pages of legislative history. H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4707-08. The Supreme Court in *Caputo* stated that the newly extended scope of coverage of the LHWCA was not the main concern of the amendments. The predominant concern was the accommodation of three interested groups. *Caputo*, 432 U.S. at 261. First, shipowners who were discontent with the decisions allowing many maritime workers to use the doctrine of "seaworthiness" to recover full damages from shipowners regardless of fault in addition to coverage under the LHWCA. *Id.* A number of Supreme Court decisions, starting with *Seas Shipping v. Sieracki*, 328 U.S. 85 (1946), had made it possible for an injured longshoreman to avail himself of the benefits of the LHWCA, and to sue the owner of the ship on which he was working for damages as a result of this injury. The longshoreman's suit, based on the doctrine of seaworthiness, and normally accorded to seamen only, was essentially one of strict liability. See *Mitchell v. Trawler Racer, Inc.*,

The 1972 amendments provided compensation for maritime workers, as defined by 33 U.S.C. § 902(3), injured while employed on a covered situs, as defined by 33 U.S.C. § 903(a).<sup>60</sup> In order to recover under the LHWCA, an employee must satisfy these two statutory tests.

#### D. LHWCA - Application to Offshore Drilling

Prior to 1953, all claims for injuries on fixed oil drilling platforms proceeded under state workers' compensation schemes.<sup>61</sup> The 1953 passage of the Outer Continental Shelf Lands Act<sup>62</sup> [hereinafter cited as Lands Act] extended LHWCA coverage to workers injured on fixed rigs which were located outside of state territorial waters.<sup>63</sup> However, workers injured on fixed platforms

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362 U.S. 539 (1960) (historical development and application of the seaworthiness doctrine). The 1972 amendments have eliminated this action for longshoremen. See H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4698, reprinted in 1972 U.S. CONG. & AD. NEWS 4698, 4701-03.

Second, the amendments fulfilled the desires of employers of longshoremen who could be required to indemnify owners of ships held liable in an unseaworthiness strict liability action. *Caputo*, 432 U.S. at 261. The result of this was, in effect, a double indemnity paid by the longshoreman's employer to the injured employee. See *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). See also H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4698, reprinted in 1972 U.S. CONG. & AD. NEWS 4698, 4702.

Third, the amendments fulfilled desires of workers who wanted to improve the LHWCA benefit schedule. *Caputo*, 432 U.S. at 261. See H.R. REP. NO. 1441, 92d Cong., 2d Sess. 4698, reprinted in 1972 U.S. CONG. & AD. NEWS 4698, 4700.

60. See statutes cited *supra* note 6.

61. Robison, *supra* note 3, at 993.

62. 43 U.S.C. §§ 1301-1356 (1982).

63. 43 U.S.C. § 1333(b) reads as follows:

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil or seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

*Id.*

The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures of the Outer Continental Shelf. In addition to providing for application of the LHWCA for injuries to workers resulting from operations conducted on the shelf, the Lands Act provides for the application of state law as surrogate federal law when not inconsistent with applicable federal law. See generally P. SWAN, OCEAN OIL AND GAS DRILLING 305-10 (1979).

This is set forth in 43 U.S.C. § 1333(a)(2) which provides that:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . .

within three miles of the shore continued to look to state workmen's compensation as their primary source of reparation for work related injuries.<sup>64</sup>

State coverage for injuries aboard fixed platforms within the three mile limit continued after enactment of the Lands Act for two reasons. First, as noted, the Lands Act did not provide for LHWCA coverage for injuries on state territorial waters.<sup>65</sup> Second, fixed rigs had been adjudged as artificial islands outside the scope of the LHWCA.<sup>66</sup> Fixed platforms were not considered "actual navigable waters" under the original LHWCA.<sup>67</sup> Thus, injuries occurring on fixed platforms within three miles of shore were not compensable under the LHWCA by its own force, nor by virtue of the Lands Act. Injured workers were left to recover under state schemes.

The artificial island concept was established in a series of cases.<sup>68</sup> In *Rodrigue v. Aetna Casualty & Surety Co.*,<sup>69</sup> two oil rig workers died from injuries which were sustained on fixed drilling platforms located outside of Louisiana territorial waters.<sup>70</sup> Each man's family brought suit for wrongful death in the federal courts both under the Death on the High Seas Act<sup>71</sup>

. are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the Outer margin of the Outer Continental Shelf. . . .

43 U.S.C. § 1333(a)(2) (1982).

In *Smith v. Chevron Oil Co.*, 517 F.2d 1154 (5th Cir. 1975), the court held the LHWCA to be the exclusive remedy for an employee injured on a fixed platform on the Outer Continental Shelf, precluding the application of Louisiana Workmen's compensation.

64. In *Freeman v. Chevron Oil Co.*, 517 F.2d 201 (5th Cir. 1975), compensation for an injury occurring 2.9 miles offshore was adjudged according to state compensation law.

65. See *supra* notes 63-64 and accompanying text. Injuries occurring on the Outer Continental Shelf would be compensable under the LHWCA by virtue of the Lands Act.

66. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969).

67. See *Herb's Welding*, 105 S. Ct. at 1425. Fixed platforms are also generally considered outside the scope of the situs requirement of the LHWCA as amended. See *infra* note 180 and accompanying text.

68. See *Rodrigue*, 395 U.S. 352 (1969); *Bertrand v. Shell Oil Co.*, 489 F.2d 293, 295 (5th Cir. 1974); *Callahan v. Flour Ocean Servs.*, 482 F.2d 1350, 1351 (5th Cir. 1973).

69. 395 U.S. 352 (1969).

70. *Id.*

71. 46 U.S.C. §§ 761-768 (1982 & Supp. I 1983). 46 U.S.C. § 761 reads in relevant part:

Whenever the death of a person shall be caused by wrongful act, neglect, or

[hereinafter Seas Act] and under Louisiana law<sup>72</sup> which was assertedly made applicable by the Lands Act.<sup>73</sup> The Court of Appeals for the Fifth Circuit,<sup>74</sup> affirming the district court,<sup>75</sup> held that the Seas Act provided the exclusive remedy for these deaths.<sup>76</sup> Petitioners sought certiorari, arguing that the Lands Act entitled them to additional remedies provided by state law adopted as surrogate federal law.<sup>77</sup>

The Supreme Court reversed, holding that in light of the principles of traditional admiralty law, petitioners' remedies were found exclusively under the Lands Act and Louisiana law.<sup>78</sup> The Court ruled that fixed rigs were "artificial islands" similar to federal enclaves in an upland state.<sup>79</sup> The Court opined that "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea."<sup>80</sup> Drilling platforms have "no more connec-

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default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representative of the decedent may maintain a suit for damages in the district court of the United States, in admiralty . . .

*Id.*

72. LA. CIV. CODE ANN. art. 2315 (West 1985).

73. Claimant argued that the Louisiana statute was in part applicable because Louisiana law, when not inconsistent with federal law, was to be applied on the Outer Shelf as surrogate federal law. *Rodrigue*, 395 U.S. at 352-53. The argument was based on the Lands Act provision at 43 U.S.C. § 1331(a)(2). See *supra* note 63 and accompanying text.

Claimant was not arguing for exclusive application of state law. Claimant argued that unlike the state compensation act, the Seas Act makes no provision for non-pecuniary damages. *Rodrigue*, 395 U.S. at 353. Therefore, the awarding of non-pecuniary damages according to state law was not inconsistent with federal law. In short, claimant wanted damages provided by both statutes. Under Louisiana law, recovery may be had for loss of support, society, pain and suffering, and companionship. LA. CIV. CODE ANN. art. 2315 (West Supp. 1985).

74. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968); *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968).

75. *Rodrigue v. Aetna Casualty & Sur. Co.*, 266 F. Supp. 1 (E.D. La. 1967).

76. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968); *Dore v. Link Belt Co.*, 391 F.2d 671, 677 (5th Cir. 1968).

77. 43 U.S.C. § 1333(b). See *supra* note 63.

78. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. at 355. "Since the Seas Act does not apply of its own force under admiralty principles, . . . Louisiana law is not ousted by the Seas Act, and under the Lands Act it is made applicable. *Id.*

"The [Seas Act] redresses only those deaths stemming from wrongful actions or omissions 'occurring on the high seas,' and these cases involve a series of events on artificial islands." *Id.* at 359.

79. *Id.* at 355.

80. *Id.* at 360. Extension of LHWCA coverage to piers under the 1972 amendments,

tion with the ordinary stuff of admiralty than do accidents on piers."<sup>81</sup> Thus, under these circumstances, the Lands Act made it clear that federal law, supplemented by state law of the adjacent state, was to be applied to these islands.<sup>82</sup>

Although *Rodrigue* did not concern the LHWCA, its "artificial island" concept has important ramifications. The concept effectively denies 33 U.S.C. § 903(a) situs to injured workers aboard these islands, the result of which precludes LHWCA compensation.<sup>83</sup> Therefore, a worker injured aboard a fixed platform within three miles of the shore has traditionally been denied compensation under the LHWCA;<sup>84</sup> his only remedy is under state law. However, a worker injured aboard a fixed platform on the Outer Shelf may recover under the LHWCA, by virtue of its application through the Lands Act.<sup>85</sup> This is so notwithstanding the absence of the required situs.

Floating drill structures have been treated as vessels by the lower courts.<sup>86</sup> Workers on them enjoy LHWCA compensation similar to workers injured aboard ship.<sup>87</sup> However, if a worker can prove that he is permanently attached to the vessel as a crewmember, he is entitled to seamen's remedies in accordance with maritime law.<sup>88</sup>

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33 U.S.C. § 903(a), arguably extends LHWCA coverage to drilling platforms. See *Herb's Welding v. Gray*, 703 F.2d 176, 177-78 (5th Cir. 1983). See also *supra* note 67 and *infra* note 180.

81. *Rodrigue*, 395 U.S. at 360.

82. See *supra* note 63.

83. In *Herb's Welding*, the Court continued the treatment of fixed platforms as artificial islands. "[T]he platforms involved were artificial islands and were to be treated as though they were federal enclaves in an upland State." *Herb's Welding*, 105 S. Ct. at 1426. However, the majority did not treat the platforms as islands for purposes of § 903(a). The majority determined that the welder was not engaged in maritime employment because he was injured on an artificial island. *Id.* at 1422-29. See *infra* note 180 and notes 145-49 and accompanying text.

84. *Herb's Welding*, 105 S. Ct. at 1425.

85. 33 U.S.C. § 1333(b). See *supra* note 63.

86. *Christofferson v. Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976) (jack-up-rigs); *Howard v. Global Marine, Inc.*, 28 Cal. App. 3d 809, 105 Cal. Rptr. 50 (1973) (drill ship); *Adams v. Kelly Drilling Co.*, 273 F.2d 887 (5th Cir. 1960) *cert. denied*, 364 U.S. 845 (1960) (submersible barge).

87. See *Robison*, *supra* note 3 at 982-92 (a discussion on compensation for floating rig workers).

88. See *Bodden v. Coordinated Caribbean Transp., Inc.*, 369 F.2d 273 (5th Cir. 1966) (employees who are more or less permanently attached to floating rigs are seamen). See *supra* note 5 and accompanying text (discussion on seamen's remedies).

In review, the compensation for injured rig workers has developed into a tripartite system that depends upon the type and location of the rig upon which the injury occurs. First, if a rig worker is injured aboard a fixed platform within three miles, his remedy is state compensation only. The rig is deemed an "artificial island" lacking LHWCA situs.<sup>89</sup> If his injury occurs on a fixed platform on the Outer Shelf (outside the three mile limit), he is entitled to compensation under the LHWCA by virtue of the Lands Act.<sup>90</sup> Third, a worker employed on board a floating rig is covered by the LHWCA irrespective of the rig's location because the rig is considered to be a vessel upon navigable waters,<sup>91</sup> unless the worker can show the requisite nexus to the floating rig, thereby qualifying as a seaman entitled to the more munificent remedies accorded seamen by law.<sup>92</sup>

### III. *Herb's Welding v. Gray*

#### A. *Facts*

Gray worked for Herb's Welding, Inc., in the Bay Marchand oil and gas field off the Louisiana coast.<sup>93</sup> Herb's Welding provided welding services to the owners of drilling platforms.<sup>94</sup> The field was located partly in Louisiana territorial waters and partly on the Outer Continental Shelf.<sup>95</sup> Gray spent roughly three-quarters of his working time on platforms in state waters and the rest on platforms on the Outer Continental Shelf.<sup>96</sup> He worked exclusively as a welder, building and replacing pipelines and doing general maintenance work on the platforms.<sup>97</sup>

On July 11, 1975, Gray was welding a gas flow line on a fixed platform<sup>98</sup> located in Louisiana waters.<sup>99</sup> He burned

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89. See *Herb's Welding*, 105 S. Ct. at 1425.

90. See *supra* note 63 and accompanying text.

91. See *supra* notes 86-87 and accompanying text.

92. See *supra* note 88 and accompanying text.

93. *Herb's Welding v. Gray*, 105 S. Ct. 1421, 1423 (1985).

94. *Id.*

95. *Id.* The line of demarcation between Louisiana state territorial waters and the Outer Continental Shelf is three miles offshore. See *supra* note 4.

96. *Herb's Welding*, 105 S. Ct. at 1423.

97. *Id.* at 1423-24.

98. *Id.* at 1424. See *supra* note 3.

99. *Herb's Welding*, 105 S. Ct. at 1425. The fact that Gray's work situs at the time



bottom of the line creating an explosion. Gray ran from the area, and in doing so was injured.<sup>100</sup>

### B. *Administrative Decisions*

Gray sought benefits under the LHWCA for lost wages, disability, and medical expenses.<sup>101</sup> When compensation was denied by the compensation carrier for Herb's Welding, Gray filed a complaint with the Department of Labor.<sup>102</sup> An administrative law judge<sup>103</sup> refused the LHWCA claim finding that Gray was not involved in maritime employment, and therefore did not satisfy the LHWCA's status requirement.<sup>104</sup>

The Benefits Review Board reversed the administrative law judge's finding, concluding that, irrespective of the nature of his employment, Gray could recover by virtue of the Lands Act,<sup>105</sup> which grants LHWCA benefits to offshore oil workers injured on the Outer Continental Shelf.<sup>106</sup> Although Gray had been injured in state waters, and not upon the Shelf, the Board opined that his injury nonetheless could be said to have occurred, in the words of the Lands Act, "as a result of" operations on the Shelf.<sup>107</sup> Petitioners sought review in the Court of Appeals for the Fifth Circuit.<sup>108</sup>

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of his injury was in state territorial waters is significant because the provisions of the Lands Act that extends LHWCA coverage to injured rig workers does not apply. See *supra* notes 62-64 and accompanying text.

100. *Herb's Welding*, 105 S. Ct. at 1424.

101. *Id.* The types of compensation available under the LHWCA are found generally at 33 U.S.C. §§ 906-910 (1982).

102. *Herb's Welding*, 105 S. Ct. at 1424. The Secretary of Labor administers the LHWCA, 33 U.S.C. § 902(6) (1982).

103. Hearings conducted in determination of LHWCA coverage are before an administrative law judge. See 33 U.S.C. § 919(d) (1982).

104. *Herb's Welding*, 105 S. Ct. at 1424.

105. *Herb's Welding v. Gray*, 703 F.2d 176, 177 (5th Cir. 1983). The case was remanded to an administrative law judge who awarded \$10,000 and deducted the \$3000 awarded under the State law. *Id.* Appeals from an administrative law judge's decision are brought before the Benefits Review Board. See 33 U.S.C. § 921 (1982).

106. See *supra* note 63 and accompanying text.

107. *Herb's Welding*, 105 S. Ct. at 1424.

108. 33 U.S.C. § 921(c) (1982) provides that "[a]ny person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred . . . ." *Id.*

### C. The Appellate Decision

The Fifth Circuit affirmed the Benefits Review Board's finding that Gray was covered by the LHWCA.<sup>109</sup> However, the court declined to make this finding by virtue of the Lands Act. The court ruled that Gray was covered by virtue of the LHWCA alone.<sup>110</sup>

Gray's employment aboard a fixed platform in territorial waters was held to be within a covered situs. The court held this notwithstanding the *Rodrigue v. Aetna Casualty & Surety Co.* ruling that fixed platforms were "artificial islands" to be treated like federal enclaves in an upland state.<sup>111</sup> The court noted that *Rodrigue* was a pre-amendment decision,<sup>112</sup> and reasoned that at the time it was written the LHWCA provided coverage only for injuries occurring upon navigable waters.<sup>113</sup> Thus, those injuries occurring upon piers, wharves, or wharf-like structures were excluded from the LHWCA's coverage.<sup>114</sup> However, by virtue of the 1972 amendments, LHWCA coverage was extended to provide compensation for certain employees who were injured in accidents upon piers and wharves.<sup>115</sup> The jurisprudential concept of an island implies that there is an island's shore, and the function of a fixed platform can be analogized to a wharf projecting from that shore.<sup>116</sup> In a word, the function of a fixed platform is

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109. *Herb's Welding v. Gray*, 703 F.2d 176 (5th Cir. 1983).

110. *Id.* at 181.

111. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969). See *supra* notes 69-85 and accompanying text (*Rodrigue's* impact on LHWCA coverage for injuries sustained on board drilling platforms). The *Rodrigue* Court determined that the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982 & Supp. I 1983), did not apply to wrongful death actions brought by families of men killed upon fixed platforms on the Outer Continental Shelf. *Rodrigue*, 395 U.S. at 359-66. Justice White wrote that traditional admiralty jurisdiction did not extend to these platforms. He likened them to wharves located above navigable waters. *Id.*

112. *Herb's Welding*, 703 F.2d 176, 177 (5th Cir. 1983).

113. *Id.* The original LHWCA required the injury to have occurred on the actual "navigable waters of the United States." Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1424, 1426 (1927), amended by 33 U.S.C. §§ 902(3), 903(a) (1982). As noted, workers on board a vessel lying alongside a dock were considered to be on actual "navigable waters." See statutes cited *supra* note 6.

114. *Herb's Welding v. Gray*, 703 F.2d 176, 177 (5th Cir. 1983) (citing *Rodrigue*, 395 U.S. 352).

115. *Herb's Welding v. Gray*, 703 F.2d 176, 177-78 (5th Cir. 1983). See 33 U.S.C. §§ 902(3), 903(a) (1982). See also statutes cited *supra* note 6.

116. *Herb's Welding v. Gray*, 703 F.2d 176, 178 (5th Cir. 1983).

precisely that of a wharf over navigable waters,<sup>117</sup> a situs which is now covered by the LHWCA as amended.

The finding that fixed platform workers in territorial waters are within a covered LHWCA situs did not end the court's inquiry into Gray's case. The status test of 33 U.S.C. § 902(3) requires that the worker be an employee engaged in maritime employment.<sup>118</sup> A claim under the LHWCA can be successfully maintained only when both statutory tests are satisfied.

The court ruled that Gray was clearly employed in maritime employment.<sup>119</sup> The test used in this analysis was whether the work bore "a realistically significant relationship to traditional maritime activity."<sup>120</sup> In finding this relationship, the purpose of the work was the central inquiry, not the particular skills of the worker.<sup>121</sup>

The court reviewed the overall nature of Gray's work, and noted that offshore drilling — the discovery, recovery, and sale of oil and natural gas from the sea bottom — had been adjudged to be maritime commerce.<sup>122</sup> Because Gray's welding work was a central part of that process, it obviously facilitated maritime commerce.<sup>123</sup> Therefore, both status and situs tests having been fulfilled, the order of the Benefits Review Board was affirmed.<sup>124</sup>

## D. *The Supreme Court Opinions*

### 1. *The Majority*

The Supreme Court reversed the decision of the Fifth Circuit, declaring that Gray was not engaged in maritime employ-

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117. *Id.*

118. *Id.* at 179. See *supra* notes 53-58 and accompanying text (a discussion on the development of the status test, as required by 33 U.S.C. § 902(3) (1982)).

119. *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983).

120. *Id.* at 179.

121. *Herb's Welding v. Gray*, 703 F.2d 176, 179 (5th Cir. 1983) (citing *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n.16 (5th Cir. 1980)). The "significant relationship" test has been used frequently by appellate courts when adjudging LHWCA status. For other cases using this test see *infra* note 215 and accompanying text.

122. *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983). In *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), the court accepted offshore drilling and production of oil as maritime commerce for purposes of determining employee status. *Id.* at 385.

123. *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983).

124. *Id.*

ment, and therefore did not satisfy the status requirement of the LHWCA.<sup>125</sup> The Court expressed no determination as to Gray's injury situs.<sup>126</sup>

The majority framed its opinion around four arguments. First, the legislature never intended that the 1972 amendments reach Gray's occupation.<sup>127</sup> The Court noted that there was never any reference to oil rigs in the legislative history of the 1972 shoreside extension of the LHWCA.<sup>128</sup> Congress' concern was to extend coverage to workers on piers, docks, and other areas used to load, unload, build, or repair ships.<sup>129</sup>

Second, the Fifth Circuit's expansive view of maritime employment was inconsistent with Supreme Court precedent construing the 1972 amendments.<sup>130</sup> "Congress did not seek to cover all those who breathe salt air,"<sup>131</sup> but only those within the newly created status line of demarcation.

The Court referred to *Northeast Marine Terminal v. Caputo*,<sup>132</sup> a Supreme Court decision purporting to define the scope of maritime status. In *Caputo*, one claimant fell and was injured while employed as a checker on a cargo dock with a vessel alongside,<sup>133</sup> and the other claimant was injured while work-

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125. *Herb's Welding*, 105 S. Ct. at 1423 (1985).

126. *Id.* at 1429. The majority's declaration as to the non-reaching of situs is dubious. For the suggestion that the Court mistakenly blurred the two separate provisions, exaggerating the impact of Gray's situs in its determination that he was not engaged in maritime employment, see *infra* notes 175-89 and accompanying text.

127. *Herb's Welding*, 105 S. Ct. at 1425-26.

128. *Id.*

129. *Id.* The majority was specifically referring to the legislative history providing that:

[t]he Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo.

H.R. REP. NO. 1441, 92d Cong. 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4708. For more detailed analysis of the legislative history of the 1972 amendments, see *supra* note 59.

130. *Herb's Welding*, 105 S. Ct. at 1421-27 (citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)).

131. *Herb's Welding*, 105 S. Ct. at 1427.

132. 432 U.S. 249 (1977).

133. *Id.* at 253. A checker is responsible for checking and recording cargo as it is loaded or unloaded from vessels, barges, or containers. *Id.* at 252-53.

ing a dolly loaded with cargo into a pierside truck.<sup>134</sup> In *Caputo*, the Court held that both claimants had maritime status. The Court noted that the status question was difficult due to congressional failure to define the relevant terms — maritime employment, longshoremen, longshoring operations — in either the LHWCA or its legislative history.<sup>135</sup> The Court recognized that the purpose of the LHWCA was to protect those workers on the situs who are involved in the essential elements of loading and unloading a vessel.<sup>136</sup> It is “clear that persons who are on the situs but not engaged in the overall process of loading and unloading vessels are not covered.”<sup>137</sup> Since the claimants in *Caputo* were involved in activities that were “clearly an integral part of the unloading process,”<sup>138</sup> they were within LHWCA status. Since claimant Gray was not involved in the overall loading and unloading process of vessels, the majority ruled that he could not be engaged in maritime employment for purposes of the LHWCA.<sup>139</sup>

Third, any alleged “checkered coverage”<sup>140</sup> arising from the exclusion of fixed rig workers in state waters from LHWCA coverage was due to Congress’ explicit geographical limitation of the Lands Act.<sup>141</sup> If Gray was employed on the Outer Continental Shelf, he would be entitled to compensation under the LHWCA

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134. *Id.* at 253. *Caputo* focused on the status issue. The situs requirement was fulfilled because claimants were working on a dock, a covered situs under the amended LHWCA. 33 U.S.C. § 903(a) (1982).

135. *Caputo*, 432 U.S. at 265.

136. *Id.* at 266-67.

137. *Id.* at 267.

138. *Id.* at 271. The Court was specifically impressed with the House Committee Report’s detailed use of checkers as an example of those involved in the loading and unloading functions covered by the 1972 amendments. H.R. REP. NO. 1441, 92d Cong. 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4708.

139. *Herb’s Welding*, 105 S. Ct. at 1427-28. “We have never read ‘maritime employment’ to extend so far beyond those actually involved in moving cargo between ship and land transportation.” *Id.* at 1428. For suggestions that Gray’s work was more intimately related to the movement of cargo than the *Herb’s Welding* Court presumed, see *infra* notes 199-213 and accompanying text.

140. *Herb’s Welding*, 105 S.Ct. at 1429. Respondents argued that denying coverage to someone in Gray’s position results in the inconsistent checkered coverage that Congress sought to eliminate in 1972. *Id.*

141. *Id.* “[T]hat statute draws a clear geographical boundary that will predictably result in workers moving in and out of coverage.” *Id.*

by virtue of the Lands Act.<sup>142</sup> However, he would still not technically be deemed a maritime employee for purposes of the LHWCA.<sup>143</sup> Any discrepancies or gaps in coverage were for the legislature to fill.<sup>144</sup>

Lastly, the Court reasoned that the *Rodrigue*<sup>145</sup> decision, coupled with the legislative history of the Lands Act, supported the non-maritime nature of fixed oil drilling platforms.<sup>146</sup> In *Rodrigue*, the Court limited the worker's remedy to the Lands Act and to borrowed state law, not admiralty law, indicating that drilling platforms were not even suggestive of traditional maritime activity.<sup>147</sup> Likewise, the legislative history of the Lands Act would be entirely inconsistent with a holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for purposes of LHWCA.<sup>148</sup> Congress interpreted the Lands Act to mean that maritime law could not be applied to fixed platforms, and considered this when formulating the 1972 status requirement.<sup>149</sup> Consequently, fixed rig workers, like Gray, are foreclosed from asserting maritime status.

## 2. *The Dissent*

The dissent concluded that Gray's employment satisfied the status test.<sup>150</sup> The status issue was first addressed in light of the legislative history of the 1972 amendments. The minority argued that the amendments were designed to eliminate those aspects of the prior system that made coverage "depend upon 'fortuitous circumstances' of whether the injury occurred on land or over water."<sup>151</sup> Because workers injured on board floating drill rigs

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142. *Id.* 33 U.S.C. § 1333(b) extends LHWCA coverage to all workers on the Outer Shelf. See *supra* note 63.

143. *Herb's Welding*, 105 S. Ct. at 1429.

144. *Id.*

145. 395 U.S. 352 (1969). See *supra* notes 69-85 and accompanying text.

146. *Herb's Welding*, 105 S. Ct. at 1426-27.

147. *Rodrigue*, 395 U.S. at 360-61.

148. *Herb's Welding*, 105 S. Ct. at 1426.

149. *Id.* at 1426-27.

150. *Herb's Welding*, 105 S. Ct. at 1441. The dissent also determined that Gray was injured on a covered situs, an issue the majority did not address. *Id.* See also *supra* note 126 and accompanying text.

151. *Herb's Welding*, 105 S. Ct. at 1431. The dissent was referring to the following

were covered by the LHWCA,<sup>152</sup> there was no reason for Congress to leave a gap in coverage when the work performed aboard fixed platforms is substantially the same as work performed aboard floating drill rigs.<sup>153</sup> The dissent reasoned that Congress intended to rationalize coverage through an occupational test and would not have wanted to treat these workers as belonging to two different occupations, one maritime, and the other non-maritime.<sup>154</sup>

The dissent also argued that the majority's interpretation of *Caputo* should be analyzed as defining occupational status as it applies to aspects of longshoring only.<sup>155</sup> The dissent argued that *Caputo* should be limited to its facts, because its doctrine was never meant to reach the type of employment in *Herb's Welding*.<sup>156</sup> Thus, *Caputo* "did not purport to limit the [LHWCA's] coverage to that particular setting, nor did [it] try to define any precise limits for the occupational status test outside that setting."<sup>157</sup>

The dissent was influenced by *Director, Office of Worker's Compensation Program v. Perini North River Associates*,<sup>158</sup> a 1983 Supreme Court decision, in which the Court held that a construction worker injured while working on a barge during the construction of a riverside sewage treatment plant was engaged in maritime employment.<sup>159</sup> The dissent viewed the *Perini* analysis of the status test as highly relevant.<sup>160</sup> First, the Court in *Perini* refused to rest its holding on any application of a "direct" or "substantial relation" test to navigation or traditional notions of commerce.<sup>161</sup> The *Perini* Court held that the 1972 Congress

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legislative history: "The Committee believes that the compensation payable to a longshoreman or ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." H.R. REP. NO. 1441, 92d Cong. 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4708.

152. See *supra* notes 86-88 and accompanying text.

153. *Herb's Welding*, 105 S. Ct. at 1430.

154. *Id.* at 1438.

155. *Id.* at 1436-37. For a discussion on the majority's interpretation of *Caputo*, see *supra* notes 132-39 and accompanying text.

156. *Herb's Welding*, 105 S. Ct. at 1437.

157. *Id.*

158. 459 U.S. 297 (1983).

159. *Id.* at 299-300.

160. *Herb's Welding*, 105 S. Ct. at 1437.

161. *Perini*, 459 U.S. at 318-19. The Director of the Office of Workers' Compensa-

did not mean to incorporate such an inquiry into the analysis of occupational status.<sup>162</sup> The dissent in *Herb's Welding* did not utilize this test to determine status. However, it deemed *Perini* significant in that the *Perini* Court saw location as an important factor in defining status.<sup>163</sup> In *Perini*, the fact that a worker was required to work over the actual navigable waters was weighty evidence of his or her status.<sup>164</sup> Location is significant principally because an occupation's location is an aspect of the occupation's status.<sup>165</sup> Because Gray's employment involved ocean travel and extended periods of time over and adjacent to the water, the inclusion of fixed rig workers within the maritime employment classification is appropriate.<sup>166</sup> This was especially true in light of a rig worker's overwhelmingly maritime situs compared to a longshoreman's virtual shoreside workplace.<sup>167</sup> The dissent would therefore permit an inquiry into the substantial situs underpinnings of a claimant's status. The fact that Gray's work was sea-based could not be trivialized in making a determination of his employment status.<sup>168</sup>

Lastly, the dissent was disconcerted with the majority's reliance on *Rodrigue* and expressed a viewpoint consistent with that of the Fifth Circuit in *Herb's Welding*.<sup>169</sup> *Rodrigue* was a pre-amendment approach perceiving oil platforms as having "no more connection with the ordinary stuff of admiralty than do accidents on piers."<sup>170</sup> This was acceptable under pre-1972 jurisprudence; however, extension of the LHWCA to piers and

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tion, as petitioner, argued that *Perini* could not have LHWCA status if his work did not have a "substantial relation" to navigation or commerce. The Court ruled that in the case of an employee injured while working on navigable waters, no such relation is required. *Id.* See *infra* notes 218-222 and accompanying text.

The "substantial relation" test was used by the Fifth Circuit in determining that Gray was engaged in maritime employment. *Herb's Welding*, 703 F.2d at 179.

162. *Perini*, 459 U.S. at 318-19.

163. *Herb's Welding*, 105 S. Ct. at 1437.

164. *Id.* at 1439 (citing *Perini*, 459 U.S. at 323-24).

165. *Herb's Welding*, 105 S. Ct. at 1437.

166. *Id.* at 1439.

167. "Unlike typical land based workers, they would spend virtually their entire work lives within the statutes covered maritime situs — that is, either on or immediately adjacent to the actual navigable waters." *Id.*

168. *Id.*

169. *Id.* at 1432-33. See *supra* notes 112-17 and accompanying text.

170. *Herb's Welding*, 105 S. Ct. at 1432 (citing *Rodrigue*, 395 U.S. at 360).



wharves through 33 U.S.C. § 903(a)<sup>171</sup> makes platforms the stuff of admiralty that *Rodrigue* excluded.<sup>172</sup>

Concluding, the dissent determined that Gray satisfied the status and situs requirements of the LHWCA.<sup>173</sup>

#### IV. Analysis

The first section of this analysis criticizes the majority opinion because it exaggerated the impact of the "artificial island" situs in its determination that Gray was not engaged in maritime employment. Consequently, the majority summarily addressed other characteristics of Gray's employment. This has important ramifications. First, it provides minimal guidance for lower tribunals charged with administering LHWCA claims. Second, it is in derogation of evolving maritime law.

The second section of this analysis criticizes the majority opinion because its interpretation of the legislative intent of 33 U.S.C. § 902(3) is unduly restrictive.

The third section of this analysis suggests that the Supreme Court should have adopted in part the "realistically significant relationship to traditional maritime activities"<sup>174</sup> test as a method of determining whether an employee injured on real or artificial land is engaged in maritime employment for purposes of the LHWCA.

##### A. Statutory Blur — *Confused Seas and the Return of Locality*

The LHWCA as amended requires separate assessments of a claimant's status and situs.<sup>175</sup> However, the majority opinion exaggerates the impact of Gray's "artificial island" situs in its determination that Gray was not engaged in maritime employment.<sup>176</sup>

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171. See statutes cited *supra* note 6.

172. *Herb's Welding*, 105 S. Ct. at 1433.

173. *Id.* at 1441.

174. *Herb's Welding v. Gray*, 703 F.2d 176, 179 (5th Cir. 1983). See *supra* text accompanying notes 120-21.

175. See statutes cited *supra* note 6 and accompanying text.

176. Gray's claim for compensation was denied because he failed to satisfy the status requirement of 33 U.S.C. § 902(3) (1982). See *supra* notes 125-49 and accompanying text. The majority did not reach the issue of whether Gray was injured on a covered

For example, the majority overemphasizes the importance of the *Rodrigue v. Aetna Casualty & Surety Co.* decision.<sup>177</sup> *Rodrigue* was a pre-amendment decision that precluded an action from being heard in admiralty due to the "artificial island" concept, clearly pre-1972 amendment law that directed its primary inquiry into the *situs* of an injury.<sup>178</sup>

The majority's concern that, according to *Rodrigue*, "drilling platforms were not even suggestive of traditional maritime affairs"<sup>179</sup> is ironic because the Court using the *Rodrigue* reasoning could have denied Gray's claim by virtue of 33 U.S.C. § 903(a), without referring to attributes of Gray's employment.<sup>180</sup> *Rodrigue* speaks primarily to *situs*, not *status*. *Rodrigue* as applied to 33 U.S.C. § 902(3) merely begs the issue.

Similarly, the majority's interpretation of the Lands Act is not dispositive of whether Gray was engaged in maritime employment.<sup>181</sup> The Lands Act is a 1953 statute that merely carved

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*situs*. *Herb's Welding*, 105 S. Ct. 1421, 1429 (1985).

177. See *supra* notes 145-47 and accompanying text. The majority reasoned that since Gray was injured on an artificial island, he could not have been engaged in maritime employment. *Herb's Welding*, 105 S. Ct. at 1426-27.

178. *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969). See *supra* notes 69-85 and accompanying text. *Rodrigue* was decided when only location upon "navigable waters" was required for LHWCA coverage. See *supra* notes 43-46 and accompanying text.

179. *Herb's Welding*, 105 S. Ct. at 1426 (1985).

180. See *Rodrigue*, 395 U.S. 352 (discussed *supra* notes 69-85 and accompanying text). Whether the 1972 amendments to the LHWCA extended coverage to fixed platforms within state territorial waters is arguable. The Fifth Circuit in *Herb's Welding* held that the 1972 amendments extended coverage to these platforms because they can be analogized to piers and wharves, covered *situs* under the amended LHWCA. *Herb's Welding v. Gray*, 703 F.2d 176, 177-78 (5th Cir. 1983). See *supra* text accompanying notes 115-17.

The dissent in *Herb's Welding* agreed with the Fifth Circuit. *Herb's Welding*, 105 S. Ct. at 1441. See *supra* text accompanying notes 169-73.

Robison cites post-1972 administrative decisions holding that work on fixed platforms meets the new *situs* requirement of the amended LHWCA. Robison, *supra* note 3, at 994 n.146.

Why the majority chose to deny Gray's claim because of his occupational status is unclear. Perhaps it indicates that the traditional treatment of platforms as artificial islands outside the scope of maritime law is changing.

181. 33 U.S.C. § 1333(b) (1982). See *supra* note 63. The majority believed that offshore exploration on fixed platforms was not even suggestive of maritime commerce because Congress was of the opinion that maritime law would not apply to fixed platforms unless a statute expressly so provided. The statute provided was the Lands Act. See *supra* text accompanying notes 148-49.

out an exception for those workers employed on artificial islands that were outside the "navigable waters" requirement of the original LHWCA.<sup>182</sup> The fact that under the original LHWCA offshore drilling was not suggestive of maritime activity,<sup>183</sup> either at the time of the enactment of the Lands Act or at the time of the *Rodrigue* decision, is not dispositive of whether it is maritime activity under the 1972 amendments.<sup>184</sup>

The majority summarily addressed the characteristics of Gray's employment, dismissing them as "nothing inherently maritime."<sup>185</sup> Consequently, the majority did not adequately discuss employment characteristics that are maritime within the meaning of 33 U.S.C. § 902(3).

This approach is consistent with LHWCA jurisprudence that pre-dates the 1972 amendments because at that time there was little litigation concerning whether an employee was engaged in maritime employment for purposes of the LHWCA.<sup>186</sup> This was because the situs of the injury was almost always conclusive of coverage.<sup>187</sup> Thus, prior to 1972, there was no well-defined occupational status concept of maritime employment within LHWCA jurisprudence.<sup>188</sup> Unfortunately, the majority has offered little toward defining maritime employment, and has

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182. See *supra* note 63 and accompanying text. The Lands Act changed the situation for workers on fixed platforms outside of state territorial waters. The Lands Act made the LHWCA applicable to injuries occurring as the result of the exploration and recovery of oil on the Outer Continental Shelf, notwithstanding the absence of "navigable waters" situs required by the original LHWCA.

183. *Herb's Welding*, 105 S. Ct. at 1426.

184. *Id.* at 1433-35 (Marshall, J., dissenting).

185. *Id.* at 1428.

Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks.

*Id.*

186. *Id.* "The problem of which classes of workers were within the coverage of [LHWCA] (apart from the classes expressly excluded) never, before the 1972 amendments, accounted for any litigation." GILMORE & BLACK, *supra* note 5, at 428.

187. *Herb's Welding*, 105 S. Ct. at 1435. This was because before 1972 workers who were not seamen were considered maritime employees for purposes of the LHWCA if they worked upon the navigable waters of the United States. For a discussion on pre-amendment jurisprudence, see *supra* notes 23-49 and accompanying text.

188. *Herb's Welding*, 105 S. Ct. at 1435.

provided no guidance for lower tribunals charged with the determination of whether an employee is engaged in maritime employment for purposes of 33 U.S.C. § 902(3).<sup>189</sup>

The majority's approach is particularly anomalous when viewed in light of other recent Supreme Court decisions.<sup>190</sup> Although these cases do not involve LHWCA claims, they are highly relevant because they have changed admiralty's traditional approach of exclusively defining the substance of an act by its location. Specifically, these cases changed admiralty's traditional reliance upon a tort's situs in determination of whether admiralty subject matter jurisdiction exists.<sup>191</sup> The majority opinion in *Herb's Welding* harks back to this era of substantive locality.

Traditionally, determination of whether a tort was maritime and thus falling within the admiralty subject matter jurisdiction

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189. The majority's failure to adequately define the scope of § 902(3) maintains undesirable circumstances. For example, § 913 of the LHWCA provides a one year statute of limitations for workers seeking recovery. 33 U.S.C. § 913 (1982). It is highly feasible that a LHWCA claimant will be precluded from obtaining any remedy, if after filing his action in accordance with state law, a determination is made that he is a LHWCA employee. This harks back to the anomalies and privations of the "maritime but local" era. See *supra* notes 26-28 and accompanying text. The statute of limitations for workmen's compensation in Louisiana is one year. LA. REV. STAT. ANN. § 23:1209 (West 1985).

The employer is placed in no less invidious position. First, failure to comply with the LHWCA requirement of securing compensation constitutes a misdemeanor punishable by a fine of not more than \$1000 or imprisonment for not more than one year or both. 33 U.S.C. § 938(a) (1982). Second, the injured employee of an employer who failed to secure compensation has two remedies. He may still claim compensation which will be payable out of a special fund if the uninsured employer fails to pay, 33 U.S.C. §§ 918, 944 (1982); or he can sue directly for damages on account of the injury. 33 U.S.C. § 905(a) (1982).

Therefore, an employer whose operations were arguably only within state waters can find himself liable criminally and civilly if a court determines that his employee was a LHWCA employee.

Gilmore and Black criticized § 902(3) because of the difficulties in determining its scope. "The line between direct, physical 'participation' and indirect, non-physical 'participation' will not be a whit easier to draw than the line between Jensen and 'maritime but local'. . . . [I]f the Deputy Commissioners faithfully try to carry out the policy suggested by the Committee Reports, they will have their work cut out for them." GILMORE & BLACK, *supra* note 5, at 430.

The *Herb's Welding* Court has maintained this ambiguity.

190. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972).

191. "[T]he discussion seemed to establish that some definite maritime flavor was henceforward to be a prerequisite for all admiralty tort jurisdiction." GILMORE & BLACK, *supra* note 5, at 31 n.98.

of the federal court depended upon the locality of the wrong.<sup>192</sup> If the wrong occurred on water, the action was within admiralty jurisdiction; if the wrong occurred on land, it was not.<sup>193</sup> The end results of this system in an era of increasingly sophisticated marine commerce were unsuitable to the needs of a uniform maritime law.<sup>194</sup> The matter finally reached the Supreme Court in 1972 in *Executive Jet Aviation v. City of Cleveland*.<sup>195</sup>

The *Executive Jet Aviation* Court forever changed the method of determining admiralty subject matter jurisdiction in tort opining that: "It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity."<sup>196</sup> Traditional notions of subject matter jurisdiction were altered because an examination of the status of the tort within the framework of marine activity was also required.

It is not suggested that the test for invoking admiralty subject matter jurisdiction in tort should be equated with the test triggering LHWCA status. In fact, the Supreme Court has spe-

192. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865).

193. *Executive Jet Aviation*, 409 U.S. at 253.

194. Justice Stewart points out the historical shortcomings of locality in *Executive Jet Aviation*, 409 U.S. at 253-67. "This locality test, of course, was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel." *Id.* at 254.

195. 409 U.S. 249 (1972).

196. *Executive Jet Aviation*, 409 U.S. at 268. In *Executive Jet Aviation*, the Court was asked to determine whether admiralty jurisdiction existed when an aircraft, subsequent to take-off, crashed into nearby Lake Erie. The crash was due to the ingestion into the engine of birds flying over the runway. *Id.* at 250. Plaintiffs brought a tort action against the airport for failure to take reasonable care in assuring take-offs. Within this unusual factual setting the tort could have arguably occurred upon ingestion (over land), or at the navigable water crash site. The case demonstrates the difficulties involved in strict application of locality.

The Court denied subject matter jurisdiction because the tort did not have a significant relationship to traditional maritime activity. *Id.* at 274.

In *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982), the Court was asked to determine if admiralty jurisdiction exists for tortious conduct between two pleasure vessels. Notwithstanding arguments that limited the *Executive Jet Aviation* rationale to commercial activities only, the Court held that all torts were maritime if they had a significant relation to maritime activity. *Id.* at 677.

*Foremost* can be interpreted as the Court's attempt to make the scope of marine activities governed by federal law as broad as possible.

cifically refused to do so.<sup>197</sup> However, *Executive Jet Aviation* is highly relevant because, within the sphere of admiralty jurisprudence, the focal inquiry has shifted from strict locality to a more substantive approach at defining whether or not something is within admiralty. This is an inquiry that the majority in *Herb's Welding* failed to undertake because it analyzed the substance of Gray's employment almost exclusively in terms of its locality. Thus, the majority's analysis disregards the impact of *Executive Jet Aviation* and its progeny and is therefore in derogation of evolving maritime law.<sup>198</sup>

B. *Interpretation of the Legislative Intent of Section 902(3)*

The majority's interpretation of the legislative intent of 33 U.S.C. § 902(3) focused on only those activities of longshoring that have always been regarded as traditional, that is, the loading and discharging of conventional dry cargo vessels.<sup>199</sup> While its analysis of those possessing the requisite status within this traditional scenario was correct,<sup>200</sup> it failed to recognize that Congress amended the LHWCA to accommodate the rapidly changing maritime industry.<sup>201</sup> For example, changes in long-

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197. In *Director, Office of Workers' Compensation Programs v. Perini N. River Assocs.*, 459 U.S. 297 (1983), respondent argued that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. *Id.* The Court disagreed, opining that the LHWCA and the statute defining admiralty subject matter jurisdiction (28 U.S.C. § 1331(1)) are two different statutes "each with different legislative histories and jurisprudential interpretations over the decade." *Id.* at 320, n.29 [citing *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1050 (5th Cir. 1982) (for effect of Fifth Circuit Court of Appeals Reorganization Act of 1980 on *Boudreaux*, see Pub. L. No. 96-452, § 9 (1980))].

198. The dissent looked at other attributes of Gray's employment, irrespective of its situs, that might be indicative of maritime status. For example, the dissent argued that workers on platforms were exposed on a daily basis to hazards associated with maritime employment, *Herb's Welding*, 105 S. Ct. at 1432; that the occupation was regulated in part by the Coast Guard, an agency traditionally charged with regulation of maritime activities. *Id.* at 1435; and that there is little to distinguish the job of a worker on a fixed rig from his floating rig counterpart. *Id.* at 1438. See *supra* notes 150-73 and accompanying text.

199. These vessels are traditional carriers of cargos in diverse packaging arrangements. While extant, these vessels are few in number compared to more sophisticated modes of sea transportation. See generally R. MUNRO-SMITH, *MERCHANT SHIP TYPES* 64-100 (1975). See *infra* notes 202-03.

200. See *supra* text accompanying notes 127-39.

201. "It is also to be noted that with the advent of modern cargo-handling tech-

shoring activities have been brought about by the advent of LASH<sup>202</sup> transport and containerization.<sup>203</sup> These changes, among others, have permanently altered traditional longshoring activities. Much of the longshoring previously done aboard vessels is now performed elsewhere.<sup>204</sup> Congress understood the limitation of statutory language and was unwilling to define explicitly all of the new marine workers covered by 33 U.S.C. § 902(3).<sup>205</sup> Congress' recognition of the rapidly changing marine industry implies that it never meant for 33 U.S.C. § 902(3) to be narrowly construed and analyzed in the light of traditional longshoring only.<sup>206</sup>

The rapid change in traditional longshoring activities is nowhere more apparent than in the loading and discharging of oil tankers. Due mostly to economies of scale, large tank ships designed to carry petroleum products are built so large that they are unable to dock within the relative safety of a port.<sup>207</sup> Instead, the tankers load and discharge their multi-million gallon cargos through Single Point Mooring Buoys [hereinafter cited as SPM] located offshore, in the deep water necessary to accommodate these superships.<sup>208</sup> The oil cargo is frequently pumped to

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niques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore." H.R. REP. NO. 1441, 92d Cong. 2d Sess. 4698, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4698, 4707-08.

A LASH vessel (Lighter Aboard Ship) is a barge carrying ship that normally does not dock in order to load or discharge cargo. Barges are towed to the LASH located outside of the port where they are loaded aboard the vessel for sea transportation. C. SAUERBIER & R. MEURN, MARINE CARGO OPERATIONS 627-29 (2d ed. 1985).

Container ships carry the trailers normally associated with trucks. The vessel will load several thousand containers for sea transportation. *Id.* at 20-24.

The type of work done by today's longshoreman is a far cry from his traditional dry cargo ship counterpart. *Id.*

202. See *supra* note 201.

203. *Id.*

204. *Id.*

205. "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . ." 33 U.S.C. § 902(3) (1982).

It is arguable that notwithstanding Gray's artificial island situs, under the canon of *ejusdem generis*, Gray's occupation is similar to those explicitly mentioned in 33 U.S.C. § 902(3). See *infra* notes 210-13 and accompanying text.

206. See *supra* note 201.

207. See generally A. MARKS, ELEMENTS OF OIL-TANKER TRANSPORTATION (1982).

208. The L.O.O.P. (Louisiana Offshore Oil Port) system is an example of a SPM. The buoy is located in 114 feet of water, accommodating tankers carrying up to 700,000

the SPM for loading aboard or discharging from ships via a series of pipes and valves controlled and maintained from the fixed platform. Additionally, large fleets of supply vessels service the platforms by discharging their cargos of drilling mud, cement, machinery, and supplies onto the platforms, so that the platforms can continue their marine operations. The drilling mud is pumped onto the platform through a pipe maintained by platform workers.<sup>209</sup>

These activities represent a part of the new era in longshoring. Maintenance of these platforms is no less connected to maritime commerce than those activities traditionally covered. The status of these employees is no different from that of a checker,<sup>210</sup> a sewage plant construction worker,<sup>211</sup> or a pierside carpenter,<sup>212</sup> all of whom were held covered under 33 U.S.C. § 902(3). It is arguable that a platform welder's employment has a more intimate connection to maritime commerce because the flow of petroleum-based cargo stops if these pipelines are not maintained. Congress recognized the fact that the marine industry is rapidly changing and therefore Congress established 33 U.S.C. § 902(3) to accommodate those workers not explicitly covered within the text of the LHWCA.<sup>213</sup> The majority's interpretation of the history of 33 U.S.C. § 902(3) limits LHWCA coverage to include longshoring activities which pre-date these changes. Therefore, the majority's reading of 33 U.S.C. § 902(3) is unduly restrictive.

### C. *The Realistically Significant Relationship Test*

The Court should have adjudged Gray's status within the framework of the Fifth Circuit's "realistically significant relationship to traditional maritime activities"<sup>214</sup> test used in a long

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tons of oil and up to 1400 feet in length. *Id.* at 168.

209. The drilling mud discharged onto the platforms is essential for oil exploration. The mud is forced down through the drill bit and acts as a lubricant. P. SWAN, OCEAN OIL AND GAS DRILLING AND THE LAW 11 (1979).

210. *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977).

211. *Perini*, 459 U.S. 297 (1983).

212. *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980). For additional cases see *infra* note 215.

213. See 33 U.S.C. § 902(3). See statutes cited *supra* note 6.

214. *Herb's Welding v. Gray*, 703 F.2d 173, 179 (5th Cir. 1983).



series of LHWCA cases which determined employee status under 33 U.S.C. § 902(3).<sup>215</sup> The majority did not apply this test because it relied on *Director, Office of Worker's Compensation Programs v. Perini North River Associates* which had rejected this test as a means of determining LHWCA status.<sup>216</sup> However, *Perini* involved a worker injured upon the water. The Court determined that it was never intended that an employee injured upon the navigable waters in the course of his employment possess a direct or substantial relation to navigation or commerce in order to be covered.<sup>217</sup>

*Perini's* analysis must be evaluated within its factual setting. In *Perini*, claimant's employment upon the navigable waters made him one of a group of workers who were granted almost automatic coverage under the pre-amendment LHWCA.<sup>218</sup> "Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered and would remain covered."<sup>219</sup> Therefore, the *Perini* Court rejected the proposition that workers injured upon the water had to possess a 33 U.S.C. § 902(3) status that included a significant relationship to traditional maritime activity.<sup>220</sup> The Court concluded that all those employees covered before the 1972 amendments (which included all employees on navigable waters) would be automatically covered under the amended LHWCA.<sup>221</sup>

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215. The Fifth Circuit has used this test in: *Jenkins v. McDermott*, 734 F.2d 229, 233 (5th Cir. 1984) (worker injured while constructing an offshore drilling platform is engaged in maritime employment); *Thornton v. Brown & Root*, 707 F.2d 149, 152 (5th Cir. 1983) (workers injured while constructing offshore platform on land engaged in maritime employment); *Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981) (carpenter injured while working on a 30 foot pleasure boat engaged in maritime employment); *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (carpenter building a pier engaged in maritime employment); *Odom Constr. v. U.S. Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980) (workers injured while moving concrete blocks for mooring barges are engaged in maritime employment).

The Ninth Circuit used this test in denying status to a "pondman" injured while sorting and feeding logs into a lumber mill. *Weyerhaeuser v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975).

216. 459 U.S. 297 (1983).

217. *Id.*

218. *Id.*

219. *Id.* at 319.

220. *Id.* at 325.

221. *Id.* The specific question in *Perini* was whether a worker who was injured while performing his job upon navigable waters, and who would have been covered by the

However, *Perini* does not prohibit the use of the "significant relationship" test for a worker employed on real or artificial land. Therefore, notwithstanding *Perini*, this test is suggested for analyzing the substantive characteristics of occupations on these situs and its continued rejection for water-based workers.<sup>222</sup>

This test is appropriate for several reasons. First, it provides flexible perimeters around which an effective body of LHWCA jurisprudence can develop. Water-based workers would enjoy a presumption that their employment is maritime.<sup>223</sup> This conforms to the realization that the "nature of a particular job is defined in part by its location."<sup>224</sup> An employee on real or artificial land would have to establish that his employment had a significant relationship to maritime activities to be considered engaged in maritime employment. Lower tribunals charged with the administration of LHWCA claims can look to the developing jurisprudence for the guidance that is presently missing.<sup>225</sup>

This will also facilitate the legislature's intention to accommodate new types of workers engaged in a changing maritime environment.<sup>226</sup> Whether employment is maritime requires an inquiry into the substantive characteristics of the employment including, *but not limited to*, whether it occurred on a covered situs.

Finally, this test is consistent with evolving maritime law evidenced by *Executive Jet Aviation* because it recognizes the

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LHWCA before 1972, had to demonstrate a relation to navigation or commerce under the 1972 amendments. The Court found no such requirement. *Id.* at 315. The requirement of a relationship to navigation or commerce would have eliminated many workers from coverage who prior to 1972 were covered because of their locality alone. "[W]e are unable to find [any congressional intent] to withdraw coverage [of the LHWCA] from employees injured on navigable waters in the course of their employment, as that coverage existed before the 1972 amendments." *Id.*

222. An employee working on a water-based situs would not have to demonstrate a relationship that was significant. His occupation would be presumed to be maritime employment, subject to rebuttal. "[A] major factor in the determination of 'maritime employment' is whether the members of an occupation are 'required to perform their employment duties upon navigable waters'." *Herb's Welding*, 105 S. Ct. at 143 (Marshall, J., dissenting) (citing *Perini*, 459 U.S. at 323-24).

223. See *supra* note 222 and accompanying text.

224. *Herb's Welding*, 105 S. Ct. at 1428.

225. See *supra* notes 185-89 and accompanying text.

226. See *supra* notes 201-06 and accompanying text.

existing, but reduced, role of situs within the law of admiralty.<sup>227</sup> It considers location upon water as only one attribute of marine status. However, under this approach the impact of situs upon maritime status does not preclude an analysis of other occupational characteristics determinative of whether an employee is engaged in maritime employment. This is an analysis the majority in *Herb's Welding* failed to undertake.<sup>228</sup>

## V. Conclusion

Although location partially defines the substance of an occupation, § 902(3) of the LHWCA and *Executive Jet Aviation*<sup>229</sup> evidence a departure from occupational analysis in terms of strict locality.<sup>230</sup> Today, whether an activity is within admiralty law requires a more substantive analysis.<sup>231</sup>

The majority in *Herb's Welding* did not recognize this departure. Instead, it overemphasized the impact of the situs of Gray's injury in determining that he was not engaged in maritime employment,<sup>232</sup> an analysis similar to pre-amendment jurisprudence that interpreted situs as being virtually conclusive of LHWCA coverage.<sup>233</sup> Consequently, the Court has failed to provide guidance for lower tribunals charged with the determination of who is a maritime employee for purposes of 33 U.S.C. § 902(3).<sup>234</sup>

The majority's interpretation of the legislative intent of 33 U.S.C. § 902(3) is unduly restrictive because it does not recognize Congress' desire to accommodate the rapidly changing maritime industry.<sup>235</sup> Under a less restrictive analysis, a platform

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227. See *supra* notes 190-98 and accompanying text.

228. No suggestion is made here that the Court should have affirmed the Fifth Circuit's determination that Gray was engaged in maritime employment. *Herb's Welding v. Gray*, 703 F.2d 176, 180 (5th Cir. 1983). However, the majority should have concentrated its inquiry into the substance of Gray's employment. The "significant relationship" test is an appropriate means of analyzing its substance. See *supra* notes 222-27 and accompanying text.

229. *Executive Jet Aviation v. Cleveland*, 409 U.S. 249 (1972).

230. See *supra* notes 190-98 and accompanying text.

231. *Id.*

232. See *supra* notes 175-89 and accompanying text.

233. See *supra* notes 186-89 and accompanying text.

234. See *supra* note 189 and accompanying text.

235. See *supra* notes 199-206 and accompanying text.

welder's duties are more connected to longshoring activities than are the duties of some shoreside employees who are traditionally covered under the LHWCA, as amended.<sup>236</sup>

The "significant relationship to traditional maritime activities" test is suggested for determining the scope of 33 U.S.C. § 902(3) for workers employed on real or artificial land.<sup>237</sup> A water-based employee will enjoy the presumption that his employment is maritime.<sup>238</sup> Therefore, a water-based employee will not have to demonstrate a relationship that is significant. However, his employment must still be substantively maritime.<sup>239</sup>

This test is advantageous because it recognizes the extant, but depreciated role of situs in accordance with evolving maritime jurisprudence.<sup>240</sup> The test also conforms to Congress' desire to have the LHWCA accommodate the rapidly changing maritime industry.<sup>241</sup> The test facilitates this accommodation because it will establish within flexible perimeters the LHWCA jurisprudence that is necessary to guide lower tribunals charged with the administration of LHWCA claims.<sup>242</sup>

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236. See text accompanying *supra* notes 207-13.

237. See *supra* notes 214-22 and accompanying text.

238. See *supra* note 223-24 and accompanying text.

239. See *supra* note 198 and accompanying text.

240. See *supra* notes 190-98 and accompanying text.

241. See *supra* notes 199-213 and accompanying text.

242. See *supra* notes 223-25 and accompanying text.