CASENOTES

AN UNNECESSARY NARROWING, *NEW ORLEANS DEPOT SERVICES, INC. V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS*: THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS' CONTRACTION OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT'S GEOGRAPHIC SITUS REQUIREMENT

I. INTRODUCTION

On April 29, 2013, the United States Fifth Circuit Court of Appeals, in an en banc rehearing, denied Longshore and Harbor Workers' Compensation Act (LHWCA) coverage to Juan Zepeda because the site at which he was injured did not meet the geographic situs requirement of the LHWCA.[1] Reversing the decision of the Benefits Review Board, the court redefined the term "adjoin" found in § 903(a) of the LHWCA to mean "contiguous with" or to "border on" navigable waters.[2] This holding overruled *Texports Stevedore Co. v. Winchester*,[3] a 1980 Fifth Circuit decision that defined "adjoin" as "to be near" or "neighboring" navigable water, which implied that contiguity was not necessarily required.[4]

New Orleans Depot Services' narrower interpretation of the term "adjoin" found in § 903(a) of the LHWCA derogates from the Act's underlying policy considerations and creates a harsh standard that punishes longshoremen, whom the Act was created to protect. Section II of this Note sets forth the facts and holding of the Fifth Circuit's decision. Section III provides a brief, general introduction to the LHWCA and a narrow survey of relevant interpretations and policy considerations concerning the Act's geographic situs requirement. Section IV reviews the

1. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 394 (5th Cir. 2013).

2. *Id.* at 393-94; *see* 33 U.S.C § 903(a) (1996) ("Except as otherwise provided in this section, 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, dismantling, or building a vessel).").

3. 632 F.2d 504, 513 (5th Cir. 1980).

4. *Id.* at 514.

United States Fifth Circuit Court of Appeals' en banc decision and rationale. Finally, Section V provides a critical analysis of the court's decision and the consequences and complications the decision may cause in dealing with future claims brought under the LHWCA.

II. FACTS AND HOLDING

Juan Zepeda, the claimant in *New Orleans Depot Services*, brought a claim against one of his former employers (who in turn brought in his current employer as the responsible party) for partial-permanent disability benefits[5] pursuant to the LHWCA after he suffered a hearing injury, which led to a binaural hearing impairment.[6] Following employment at New Orleans Marine Company (NOMC) for a period five months, Zepeda worked at New Orleans Depot Services Incorporated (NODSI) for seven years (1996–2002).[7] Zepeda attributed the injury to continuous noise that occurred while he worked for both employers as a container and chassis repair mechanic.[8] However, because NODSI was his last employer, it could be held liable for the full extent of his damages.[9]

NODSI was created in 1996 as a container and chassis repair company that exclusively serviced Evergreen Shipping Corporation America until 2002 when it contracted with Mitsui O.S.K.[10] Some of these containers were used to transport marine

5. 33 U.S.C. § 908 discusses the standard of benefits that a longshoreman is eligible to receive pursuant to a valid claim being filed under the LHWCA.

6. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 386-87 (5th Cir. 2013); Brief for the Federal Respondent at 4, *New Orleans Depot Servs.*, 718 F.3d 384 (5th Cir. 2013) (No. 11-60057), 2010 WL 7156295, at *4. Binaural hearing refers to "[t]he use of both ears in order to locate the direction of sound sources. . . . The use of the two ears is important for understanding speech where there is an echo, as there is even in a normal room, the echo being suppressed by some unknown mechanism depending on binaural signals." RICHARD LANGTON GREGORY, THE OXFORD COMPANION TO THE MIND 104 (2d ed. 2004).

7. Brief for the Federal Respondent, *supra* note 6, at 5.

8. *Id.* at 5-6. A chassis is what most lay people call the "trailer portion" of a tractor/trailer rig where shipping containers are loaded. *New Orleans Depot Servs.*, 718 F.3d at 386 n.3.

9. *See* FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL 291 (6th ed. 2010) (citing Avondale Indus., Inc. v. Dir., Office of Workers' Comp. Programs, 977 F.2d 186 (5th Cir. 1992)) ("When the disability arises from an 'occupational injury' incurred while working for different employers, the last employer who exposes the claimant to the injury-causing condition may be responsible for all of the benefits.").

10. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs,

cargo, although it could not be precisely determined which containers came into New Orleans via ship.[11] The claimant did the majority of his work at NODSI's Chef Menteur Highway (Chef Yard) location in New Orleans, Louisiana,[12] which is located approximately 300 yards from an intracoastal canal known as the Industrial Canal.[13] The Chef Yard is surrounded by a variety of businesses, including car washes, coffee roasting facilities, an automobile repair shop, and a radiator shop.[14] The Yard has no access to the Industrial Canal and therefore receives and delivers containers via truck and rail.[15]

After conducting a hearing, the Administrative Law Judge (ALJ)[16] determined that NODSI's service and repair of containers was "a process which was a significant maritime activity."[17] Thus, the ALJ concluded that NODSI was Juan Zepeda's last maritime employer and ordered it to pay him benefits as required under the LHWCA.[18] After the ALJ denied a motion for reconsideration, NODSI timely appealed to the Benefits Review Board (the Board)[19] which affirmed the decision, finding no

689 F.3d 400, 404 (5th Cir. 2012).

11. *Id.*

12. NODSI has a second location on Terminal Road (Terminal Yard) but the administrative law judge's determination that Terminal Yard is not a qualified maritime situs is final and not under dispute in the case. En Banc Supplemental Brief of Petitioner at 3-4, New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (No. 11-60057), 2012 WL 6641319, at *3-4.

13. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 386 (5th Cir. 2013); En Banc Supplemental Brief of Petitioner, *supra* note 12, at 17.

14. *New Orleans Depot Servs.*, 718 F.3d at 386-87.

15. *Id.* at 387.

16. *See* 20 C.F.R. § 702.332 (2012) (providing that administrative law judges conduct formal hearings under the LHWCA); *see also* Hullinghorst Indus. Inc. v. Carroll, 650 F.2d 750,753 (5th Cir. Unit A July 1981) (discussing how "the findings of fact by the ALJ are 'conclusive if supported by substantial evidence'"); GREGORY LOIS, LONGSHORE AND HARBOR WORKERS' COMPENSATION LAW 69-81 (Createspace 2013) (2011) (discussing how Workers' Compensation claims have specific and modified procedural rules).

17. *New Orleans Depot Servs.*, 718 F.3d at 387.

18. En Banc Supplemental Brief of Petitioner, *supra* note 12, at 2.

19. The standard of review set forth by the LHWCA in 33 U.S.C § 921(b)(3) restrains the Benefits Review Board to "accept the factual findings of the ALJ unless they are irrational or are unsupported by substantial evidence in the record as a whole." *Hullinghorst Indus., Inc.*, 650 F.2d at 753 (citing Alford v. Am. Bridge Div., U.S. Steel Corp., 642 F.2d 807, 809 (5th Cir. 1981)), *vacated in part*, 655 F.2d 86 (5th Cir. 1981), *and* Presley v. Tinsley Maint. Serv., 529 F.2d 433, 436 (5th Cir. 1976)).

manifest error of fact based on the undisputed facts and no error in the application of law.[20] On January 31, 2011, NODSI filed a petition for review[21] in the United States Fifth Circuit Court of Appeals, naming the Director of the Office of Workers Compensation Programs (OWCP), NOMC, and Signal Mutual Indemnity Association, Ltd. as respondents.[22] On July 25, 2012, the Fifth Circuit denied the petition in a 2–1 decision.[23] The court concluded that there was substantial evidence in the record to support the ALJ's initial determination and the Board's affirmance.[24] NODSI then filed a petition for rehearing en banc which, following a vote of the circuit judges,[25] was granted.[26] Because there were no facts at issue on rehearing, the en banc panel reviewed the LHWCA coverage issues of "statutory construction and legislative intent" de novo as "pure question[s] of law."[27]

On rehearing, NODSI sought relief from the Fifth Circuit's denial of petition for review regarding the Board's decision

20. *See* Juan Zepeda v. New Orleans Depot Servs., Inc., No. 10-0221, 2010 WL 5509967 (DOL Ben. Rev. Bd. Dec. 3, 2010).

21. 33 U.S.C § 921(c) (2012) ("Any 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 . . . .").

22. En Banc Supplemental Brief of Petitioner, *supra* note 12, at 2. NOMC and Signal Mutual Indemnity Association, Lmtd. are parties who have interested rights in the decision of the Fifth Circuit, so they joined as respondents in the case. *See id.*

23. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 689 F.3d 400, 410 (5th Cir. 2012); *see also* En Banc Supplemental Brief of Petitioner, *supra* note 12, at 2-3.

24. *New Orleans Depot Servs.*, 689 F.3d at 410. The appellate standard of review in reviewing determinations of the ALJ and BRB is

> [L]imited to considering errors of law and ensuring that the [BRB] adhered to its statutory standard of review, that is, whether the ALJ's findings of fact are supported by substantial evidence and are consistent with the law. Substantial evidence is that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact finding.

Id. at 405 (quoting Sisson v. Davis & Sons, Inc., 131 F.3d 555, 557 (5th Cir. 1998) and Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 430 (5th Cir. 2009)) (internal quotation marks omitted).

25. *See* FED. R. APP. P. 35(f) ("A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.").

26. *See* New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 387 (5th Cir. 2013); En Banc Supplemental Brief of Petitioner, *supra* note 12, at 3.

27. *New Orleans Depot Servs.*, 718 F.3d at 387-88; *see* Lampton v. Diaz, 639 F.3d 223, 227 n.14 (5th Cir. 2011) (discussing the "waiver rule" which exists to prevent appellate courts from adjudicating the case on the facts without a full record from the courts below).

ordering it to pay Juan Zepeda's disability benefits pursuant to the LHWCA.[28] Most specifically, NODSI contested the ALJ's determination that Juan Zepeda was injured in "an area adjoining navigable waters[29] so as to satisfy the LHWCA [geographic] situs requirement."[30] However, because the court's review was bound to a "purely legal question," the focus of the rehearing was the interpretation of the term "adjoining" as found in § 903(a) of the LHWCA.[31] NODSI argued for a more limited definition of the term. In effect, because a claimant must meet this required part, the more limited definition would also mean a more limited class of plaintiffs.[32] Conversely, the OWCP and other respondents argued that longstanding Fifth Circuit precedent interpreting the term "adjoining"[33] required affirmance of the Fifth Circuit's original denial of NODSI's petition for review.[34] The Fifth Circuit held that the definition of "adjoining" found in § 903(a) of the LHWCA means "border[ing] on" or to "be contiguous with" navigable waters, effectively overruling the court's previous interpretation set forth in *Textports Stevedore, Inc. v. Winchester* and its progeny, which defined "adjoin" as "to be near" or "neighboring" navigable waters.[35]

III. BACKGROUND INFORMATION

This Section provides the legal foundations for this case and the jurisprudence that the Fifth Circuit relied upon to reach its decision. "The Longshore and Harbor Workers' Compensation Act

28. *New Orleans Depot Servs.*, 718 F.3d at 386-87.

29. 33 U.S.C. § 903(a) (1996).

30. *See* New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 388 (5th Cir. 2013).

31. *Id.* at 388-89.

32. *See* En Banc Supplemental Brief of Petitioner, *supra* note 12, at 11-16. On a broader level, LHWCA coverage requires a showing of both situs and status. Briefly explained *infra* Section II(A). Fifth Circuit cases break "other adjoining area" interpretation questions into two separate inquiries: (1) whether the situs is sufficiently close to the waterfront (geographic nexus) and (2) whether it has a functional nexus to maritime activity. *See, e.g.*, Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 432 (5th Cir. 2009).

33. *See, e.g.*, Texports Stevedore Co. v. Winchester, 632 F.2d 504, 514 (5th Cir. 1980) (en banc).

34. *See* Supplemental Brief of the Federal Respondent for Rehearing En Banc at 33-36, New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (No.11-60057), 2013 WL 178092, at *33-36. OWCP argued that "as a compensation rule, the LHWCA should be construed liberally in favor of coverage." *New Orleans Depot Servs.*, 718 F.3d at 393.

35. *New Orleans Depot Servs.*, 718 F.3d at 393; *see Winchester*, 632 F.2d at 514.

(LHWCA) was enacted in 1927 to provide no fault workers' compensation benefits to longshoremen injured in the navigable waters of the United States."[36] The LHWCA provides coverage to an "employee," which is defined as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship breaker."[37] In maritime settings, LHWCA and Jones Act claims are the most prominent federal enactments under which claims for maritime personal injuries are filed.[38] Yet, the LHWCA and Jones Act serve distinct classes of employees based on maritime employment, the former deals with land based injuries, while the latter deals with sea-based injuries or injuries that occur over navigable waters.[39] Furthermore, the Jones Act and LHWCA have distinct coverage requirements, scope of coverage, and benefits, with the most notable difference being an injured party's right to sue his employer under the Jones Act.[40] Nonetheless, it was the relationship between the Jones Act and state based workers' compensation programs that led Congress to create the LHWCA.

Prior to the LHWCA's inception, "longshoremen injured on the seaward side of a pier" were left without a compensation remedy,[41] but those "injured on the pier were protected by state

36. LOIS, *supra* note 16, at 1.

37. 33 U.S.C. § 902(3) (2009).

38. U.S. DEP'T OF LABOR, OFFICE OF ADMIN. LAW JUDGES, JUDGES' BENCHBOOK: LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT 1-5 (Kerry John Anzalone ed., 2002), *available at* http://www.oalj.dol.gov/PUBLIC/LONGSHORE/REFERENCES/REFERENCE_WORKS/USDOL_OALJ_LHWCA_BENCHBOOK_TOPIC_1_(2002).PDF. *See generally* Calbeck v. Traveler's Ins. Co., 370 U.S. 114 (1962) (examining the federal coverage of the LHWCA in light of a maritime injury), *superseded by statute* Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901-950), *as stated in* Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991).

39. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 347 (1991) (discussing the inherently different purposes of the Jones Act and Longshore and Harbor Workers' Compensation Act).

40. *See* 46 U.S.C.A. § 30104 (West 2008); *see also McDermott Int'l, Inc.*, 498 U.S. at 347-48, 351.

41. The Jones Act provides seamen a right to recover damages against their employer, which is very similar to a workers' compensation scheme. The rights and remedies afforded by the Jones Act are available to those maritime workers who are deemed "seamen," which has distinct requirements from the LHWCA's status requirement. *See* Shailendra U. Kulkarni, Comment, *The Seaman Status Situation: Historical Perspectives and Modern Movements in the U.S. Remedial Regime*, 31 TUL.

compensation programs."[42] Thus, the amphibious nature of longshore work—walking on and off ships via a gangplank—created a "gap in coverage."[43] This incongruity led Congress to pass the LHWCA to compensate injuries suffered by longshoremen that arose out of the course of employment.[44] But, for forty-five years after the LHWCA's enactment, courts struggled to understand the relationship between state and federal compensation programs, which led to a "lack of uniformity in coverage" because coverage was solely contingent on where a longshoreman sustained injuries.[45]

In 1969, the Supreme Court of the United States' decision in *Nacirema Operating Co. v. Johnson* illustrated the issue of "lack in uniformity of coverage" when cargo lifted by a crane on a pier killed a longshoreman when it crushed him against a railroad car on the pier.[46] The Court refused to extend coverage beyond the "*Jensen* Line," a line formed by the edge of a navigable waterway beyond which LHWCA coverage could not extend[47] because the LHWCA strictly covers injuries that occur over "navigable waters."[48] Although the Court refused to extend coverage to a longshoreman killed on a pier or railway adjacent to navigable waters based on a strict interpretation of the LHWCA, the Court invited Congress to move the line of coverage shoreward.[49]

A. THE 1972 CONGRESSIONAL AMENDMENTS TO THE LHWCA

As a result of the *Nacirema* decision, Congress revised the LHWCA in 1972 in order to remedy the "lack of uniformity" and

MAR. L.J. 121, 122-25 (2006) (discussing the differences between the Jones Act and LHWCA).

42. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 257 (1977).

43. *Id.*

44. *Id.* at 257-58.

45. *Id.* at 259-60 (discussing the majority and dissenting opinions in Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223-24 (1969), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1927, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901-950)).

46. *Nacirema Operating Co.*, 396 U.S. at 213-14.

47. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (holding that states could not provide compensation for maritime workers who were injured on a gangway between a ship and a pier), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U. S. C. §§ 901-950), *as recognized in* Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 316 (1983).

48. *Nacirema Operating Co.*, 396 U.S. at 215, 220-22.

49. *See id.* at 223-24.

concerns of interested parties.[50] Under § 903(a) of the Act, Congress expanded coverage shoreward and took into consideration modern cargo handling techniques that had moved much of a longshore worker's duties off of vessels and onto land.[51] The revised law included an illustrative list of shoreward locations deemed covered under the LHWCA:

> Disability or death; injuries occurring upon navigable waters of United States except as otherwise provided in this section, 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, dismantling, or building a vessel*).[52]

This illustrative list represented the expansion of the geographic area known as the maritime "situs."[53] The 1972 Amendments sought, in particular, to address the issue of longshoremen walking "in and out" of coverage.[54] Thus, unlike the "*Jensen* Line," which produced harsh results as illustrated in *Nacirema*, the congressional revision extended coverage shoreward but limited it by specifying the class of workers entitled to the coverage.[55] Consequently, the 1972 revision

50. The Amendments to the original LHWCA were created with three groups in mind: (1) ship owners who paid full coverage to maritime workers regardless of fault; (2) employers of longshoremen who, by statute, could be required to indemnify ship owners for coverage paid to longshoremen, thus negating the value of an exclusive compensation act; and (3) the longshoremen who wanted better benefits compared to the inadequate coverage offered by state compensation systems. *See* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 261 (1977).

51. *Id.* at 262; *see also* Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 316-17 (1983) (discussing Congress's extension of coverage under the LHWCA shoreward).

52. 33 U.S.C. § 903(a) (1996) (emphasis added).

53. *See Ne. Marine Terminal Co.*, 432 U.S. at 263-64.

54. *See, e.g.*, Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423-24 (1985) (discussing the expansion of "situs" under the amendments and bringing focus to the characteristics of longshore employment).

55. In order to constrain the expanded coverage created by the 1972 amendments, Congress added a "status" requirement, which required claimants to prove that their employment fit the characteristics of longshore work. This employment requirement is known as "maritime status." Donald S. Morton, Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments*, 55

expanded the geographic situs of the LHWCA but also added an employment "status" requirement in order to determine eligibility under the Act.[56]

B. SUPREME COURT DECISIONS INTERPRETING THE AMENDED LHWCA

After the congressional Amendments of 1972, the Supreme Court of the United States dealt with various scenarios in which LHWCA coverage was at issue; however, the majority of decisions involved issues of maritime "status" and not "situs."[57] Nonetheless, the Court still provided interpretations and established important considerations relevant to an analysis of the "situs" requirement under § 903(a) of the LHWCA. Generally, the Court has supported a liberal interpretation of the situs requirement because the congressional intent behind the Act's expansion was to eliminate "the 'fortuitous circumstance of whether the injury (to the longshoremen) occurred over land or water'" and "provide continuous coverage throughout [a longshoreman's] employment."[58]

In light of the congressional Amendments made in 1972, the Court's expansive view of coverage was grounded in the reality that "'the advent of modern cargo-handling techniques' had moved much of the longshoremen's work off the vessel and onto land."[59] Most specifically, the Court noted the advent of "containerization" stating:

> Unlike traditional break-bulk cargo handling, in which each item of cargo must be handled separately and stored individually in the hold of the ship as it waits in port, containerization permits the time-consuming work of stowage and un-stowage to be performed on land in the absence of the

TEX. L. REV. 99, 103-04 (1976).

56. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 264-65 (1977).

57. *See, e.g.*, Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 45-48 (1989) (focusing on issues related to status); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) (focusing the majority of its analysis on the establishment of maritime status); P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 78-83 (1979) (focusing on issues related to status); *Ne. Marine Terminal*, 432 U.S. at 265-79 (focusing on the determination of status).

58. *Ne. Marine Terminal Co.*, 432 U.S. at 272-73 (citations omitted); *see also* Voris v. Eikel, 346 U.S. 328, 333 (1953) (discussing that the LHWCA (pre-amendment) should be construed liberally in favor of coverage).

59. *See Ne. Marine Terminal Co.*, 432 U.S. at 269-70 (citations omitted).

vessel.[60]

The Court's decision in *P.C. Pfeiffer Co., Inc. v. Ford* discussed the "shift shoreward" by explaining the typical duties performed by longshoremen on land.[61] The Court pointed to Senate Subcommittee on Labor hearings that suggested that many maritime employers also consented to the extension of coverage based on the advent of these maritime industry advancements because the advancements reduced both the costs and the amount of manpower needed to get cargo onto vessels.[62] Thus, the 1972 Amendments intended to encompass activities that had moved shoreward because of technological advancements, unfettered by traditional notions of shipboard longshoring activities.[63]

The Court also refused to consider theories of coverage that perpetuated concepts of "checkered" or broken coverage. For instance, in *Northeast Marine Terminal Co. v. Caputo*, the petitioners supported a functional concept of situs called the "point of rest."[64] This term describes "the point where [a longshoring] operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading)."[65] However, the Court rejected the concept, citing the text of the LHWCA, and specifically noted that Congress had an "obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a 'longshoring operation.'"[66] Furthermore, the Court suggested that conceptions like the "point of rest" perpetuated the "evil" of the bifurcated system of coverage seen under the pre-amendment LHWCA.[67]

60. *Id.* at 270.

61. P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 81 (1979).

62. *Id.* at 80 n.12.

63. *See* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 271 & n.32 (1977) ("The work of the longshoreman, the loading and the unloading of cargo, remains the same; only the procedure and the place of performance (have) changed. It seems unlikely that Congress would acknowledge that longshoring today involves more shore-based activity than formerly and then extend coverage only to those longshoremen working closest to the ship." (quoting Case Comment, 10 SUFFOLK U. L. REV. 1179, 1188 (1976))).

64. *Id.* at 274-75.

65. *Id.*

66. *Id.* at 276.

67. *Id.* The Court referred to a "bifurcated system" which can be analogized to the system the Court had reviewed under *Nacirema*, when the "*Jensen* Line" was still in effect. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 276 (1977); *see*

The Court's review of the LHWCA's legislative foundations has also described the limitations placed on the geographic situs requirement. For example, the Court has described the limitations of geographic situs via the maritime "status" requirement by examining whether the employee was "engaged in the overall process of loading and unloading."[68] Similarly, some members of the Court have shown an interest in a narrow interpretation of situs itself. In *Herb's Welding, Inc. v. Gray*, the dissenting opinion—in considering a hypothetical scenario on a platform covered under the Act—stated that the statutorily covered geographic situs was "either on or immediately adjacent to the actual navigable waters."[69]

Finally, in *Ne. Marine Terminal Co., Inc. v. Caputo*, however, the Court addressed issues related to maritime status but in a manner that might provide some guidance about how to interpret the situs requirement.[70] The Court stated, "it is not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other [adjoining] area.'"[71] Hence, the Court provided insight into the interpretive relationship between the phrases of § 903(a), and how to characterize "other adjoining areas."

Although the foregoing demonstrate how the Court has interpreted congressional intent relating to the situs requirement, the cases shed little light on how the Court might interpret the actual language of § 903(a) relating to geographic situs. Because the Court has not specifically defined the various terms related to establishing maritime situs under the LHWCA, the task of defining situs has largely been left to the lower courts.[72]

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1927, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901-950).

68. Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 267 (1977).

69. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 446 (1985) (Marshall, J., dissenting).

70. *See Ne. Marine Terminal Co.*, 432 U.S. at 280-81.

71. *Id.* at 280.

72. The focus of this Note is primarily on the interpretation of the Fifth Circuit, and to a lesser extent on some of the other circuits, especially those to which the Fifth Circuit has referred.

C. UNITED STATES FIFTH CIRCUIT COURT OF APPEALS' DECISIONS CONCERNING LHWCA SITUS

Unlike the Supreme Court, the Fifth Circuit has directly addressed the situs requirement and established a standard for determining situs following the 1972 congressional Amendments to the LHWCA.[73] Initially, the Fifth Circuit's decision in *Jacksonville Shipyards v. Perdue* stated that a court should "look past an area's formal nomenclature and examine the facts to see if the situs is one 'customarily used by an employer in loading, unloading, repairing or building a vessel.'"[74] Furthermore, the court disregarded the employer's previous and future uses of the area in question and focused their analysis of situs on the use of the area at the time of the injury.[75] The Fifth Circuit has also considered other factors. For instance, in *Alabama Dry Dock and Shipbuilding Co. v. Kininess*, the court stated that the physical distance of the injury from navigable waters was not determinative in establishing the geographic situs requirement; rather, the proper test was whether the situs was within the contiguous area adjoining the water.[76] Furthermore, adhering to the Court's approach to technological advancements in *P.C. Pfeiffer Co.*, discussed supra, the court recognized that "[a]dmiralty jurisdiction has, in the past, changed as 'new conditions give rise to new conceptions of maritime concerns.'"[77]

Ultimately, it was the Fifth Circuit's 1980 decision in *Textports Stevedore Co. v. Winchester* that established the interpretive standard for situs that survived for over thirty years.[78] That case specifically tackled questions surrounding the term "adjoining" found in § 903(a) of the LHWCA.[79] In *Winchester*, a longshoreman employed as a "gear man" by a stevedoring company was injured in one of three "gear rooms" in the vicinity of the Houston Shipping Channel Docks.[80] Of the

73. *See, e.g.*, Ala. Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977); Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976); *see also* Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980) (en banc).

74. *Jacksonville Shipyards, Inc.*, 539 F.2d at 541.

75. *Id.*

76. *Ala. Dry Dock & Shipbuilding Co.*, 554 F.2d at 178.

77. *Id.* at 179 (citing Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 52 (1934)).

78. *See Winchester*, 632 F.2d at 514.

79. *Id.* at 514-15.

80. *Id.* at 506-07 (stating that Winchester's "duties as a gear man included

three gear rooms, two were located on the docks, while the third—where the longshoreman's injury took place—was located five blocks from the gate to the nearest dock.[81] The case's central issue was determining whether the third gear room fit the geographic situs requirement of § 903(a) of the LHWCA.[82]

The Fifth Circuit determined that "[t]he best way to effectuate the congressional purpose[] is to determine the situs . . . [based on] all the circumstances."[83] With that in mind, the court did not require the site of the injury to be absolutely contiguous with the water because it would reinstitute the "hard lines" that caused longshoremen to move in and out of coverage: a problem that the 1972 Amendments sought to eliminate.[84] But the outer limits of the maritime area would not be extended to extremes; therefore, the court required the situs to have some nexus to the water.[85] Furthermore, the Fifth Circuit refused to give credence to "fencelines" and other designations manipulated by employers, minimizing the value of formations (fences and boundaries) and focusing on substance (the role of the location) in determining whether the area was "customarily used" for maritime purposes.[86]

The court reviewed various definitions of the term adjoin, such as "contiguous to" or "to border upon," but determined that the definitions "to be near" or "neighboring" were more faithful to congressional intent.[87] The court cited scholarly work that stated:

> It may be assumed that the intent of the Congressional draftsmen was to cover all employment-related injuries suffered by workers engaged in the specified activities [described in § 903(a)]. If that assumption is correct, 'adjoin' should be broadly, not narrowly construed; the essential test should be whether the injury occurred in the course of

supplying and repairing the tools and machinery used by stevedores in loading and unloading ships").

81. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 507 (5th Cir. 1980) (en banc).

82. *See id.* at 508.

83. *Id.* at 513.

84. *Id.* at 514-15.

85. *Id.*

86. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 515 (5th Cir. 1980) (en banc).

87. *Id.* at 514-15.

> maritime employment and not on how close the situs of the injury was to the water's edge.[88]

The court also focused on the term "area"—acknowledging that it was a broad term, but that it was the task of courts to construe it in such a manner as to avoid absurd results.[89] The Fifth Circuit turned to the Supreme Court decisions in *Ne. Marine Terminal Co.* and *Pfeiffer* and concluded that the "area" must be "customarily used by an employer in loading, unloading, repairing, or building [of] a vessel."[90] Therefore, the court, in establishing an expansive interpretation of "adjoining," held that the third gear room, in which the longshoreman was injured, fit the geographic situs requirement of the LHWCA because it was used for the ongoing and overall purpose of loading a vessel—even though the room itself was five blocks from the waterfront.[91]

Winchester was used as the foundation for Fifth Circuit LHWCA situs determinations until 2013.[92] In the interim, however, the court decided certain cases clarifying the parameters of the concept.[93] The most notable decision came in

88. *Id.* at 514 n.19 (citing GRANT GILMORE & CHARLES LUND BLACK, JR., THE LAW OF ADMIRALTY § 6-50, at 424 (2d ed. 1975)).

89. Texports Stevedore Co. v. Winchester, 632 F.2d 504, 515 (5th Cir. 1980) (en banc).

90. *Id.*

91. *Id.* at 515-16.

92. *See* cases cited *infra* note 93.

93. *E.g.*, Thibodeaux v. Grasso Prod. Mgmt. Inc., 370 F.3d 486, 493 (5th Cir. 2004) (referring to the interpretation of § 903(a) in *Winchester* to hold that a fixed oil platform does not constitute a pier or "other adjoining area" to satisfy the LHWCA's situs requirement); E.J. Fields Machine Works Inc. v. Guidry, 54 F. App'x 793 (5th Cir. 2002) (per curiam) (discussing and applying the definition of "other adjoining area" in § 903(a) of the LHWCA as established in *Winchester* to grant LHWCA situs coverage to a welder injured during the course of employment at a "shop" along the Atchafalaya River); Boomtown Belle Casino v. Bazor, 313 F.3d 300, 304 (5th Cir. 2002) (distinguishing *Winchester,* which addresses geographic situs requirements, by establishing that LHWCA situs has a temporal aspect); Mobil Mining & Minerals v. Nixson, 209 F.3d 719 (5th Cir. 2000) (per curiam) (holding that the rail facilities on Mobil's property was contiguous to water pursuant to *Winchester* and thus a maritime situs for the purposes of the LHWCA); Sisson v. Davis & Sons, Inc., 131 F.3d 555, 557 (5th Cir. 1998) (per curiam) (discussing the standard established by *Winchester* and finding that a parking lot constructed at a heliport, although located about a mile from the Gulf dock and fifty yards from navigable waters, was not a covered situs because the lot was not "customarily used in loading, unloading, repairing or building a vessel"); Reynolds v. Ingalls Shipbuilding Div., Litton Sys., Inc., 788 F.2d 264, 272 (5th Cir. 1986) (discussing the situs standard set forth in *Winchester*).

Coastal Productions Services Inc. v. Hudson, which provided language that allowed courts to liberally construe the Act's situs requirement.[94] In determining that a platform connected to oil and gas ventures fit the situs requirement, the court in Hudson stated that "simply because a vessel cannot dock for loading and unloading at a particular area does not mean that the area is not a covered situs." [95] The court also added that "if a particular area is associated with items used as a part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading."[96]

IV. THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS' DECISION

The Fifth Circuit, sitting en banc, reversed the initial panel decision and went further to overrule the interpretation of situs established in *Winchester*, holding instead that the term "adjoin" means to "border on" or "be contiguous with" navigable waters.[97] The court justified its conclusion on two bases. First, the court concluded that "the vague definition of 'adjoining' adopted thirty years ago . . . provides litigants . . . with little guidance in determining whether coverage is provided by the Act."[98] Second, the court was motivated by a desire to make the LHWCA situs requirement clear and unequivocal, and thus "geared toward a nonlitigious, speedy, sure resolution of the compensation claims of injured workers."[99] Therefore, because the Chef Yard, the site at which Juan Zepeda was injured, was not contiguous with navigable waters, it was not covered under the LHWCA's geographic situs requirement.[100]

Of the fifteen judges who sat in the en banc rehearing, a majority reached the decision, which was concurred with by eight judges (two of whom filed opinions) and three judges dissented.[101]

94. 555 F.3d 426 (5th Cir. 2009).

95. Coastal Productions Servs Inc. v. Hudson, 555 F.3d 426, 434 (5th Cir. 2009).

96. *Id.*

97. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 393-94 (5th Cir. 2013).

98. *Id.* at 394.

99. *Id.* (citing Texports Stevedore Co. v. Winchester, 632 F.2d 504, 518 (5th Cir. 1980) (en banc) (Tjoflat, J., dissenting)).

100. *Id.*

101. *Id.* at 384.

A. THE COURT OVERRULES THE SITUS STANDARD SET FORTH IN *WINCHESTER*

The court opened its analysis of the term "adjoining area" by providing an overview of the history of the LHWCA and then moving to its earlier decision in *Textports Stevedore v. Winchester*.[102] The court criticized the 1980 en banc decision as "vague" because it provided "little guidance to other courts or future litigants on how to determine from 'the circumstances' whether a claimant satisfies the situs [requirement]."[103] The court cited language from the Winchester decision, like the "[o]uter limits of the maritime area will not be extended to extremes" and "[w]e would not extend coverage . . . to downtown Houston," to illustrate the decision's vague nature.[104]

B. SURVEY OF EXTRA-CIRCUIT INTERPRETATIONS OF THE LHWCA'S GEOGRAPHIC SITUS REQUIREMENT AND NEW DEFINITION OF "ADJOIN"

In surveying the decisions of other circuits related to LHWCA's geographic situs requirement, the court began with those circuits that have adopted broad interpretations of situs.[105] For example, the Ninth Circuit, in *Brady-Hamilton Stevedore Co. v. Herron*, established a four-factor test[106] to determine that a party injured over 2,600 feet from the closest navigable waters met the situs requirement and was covered under the LHWCA.[107] Similarly, the Third Circuit in *Sea-Land Service, Inc. v. DOWCP*

102. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 388-90 (5th Cir. 2013).

103. *Id.* at 389-90.

104. *Id.* at 390. The court supported its conclusion that *Winchester* did not provide guidance to litigants and other courts by referring to the respondents' inability to establish situs in a modified hypothetical based on the language set forth in *Winchester*. *Id.* at 390 & n.12.

105. *Id.* at 390-91.

106. "[T]he phrase 'adjoining area' should be read to describe a functional relationship that does not in all cases depend upon physical contiguity. Consideration should be given to the following factors, among others, in determining whether or not a site is an 'adjoining area' under section 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case." Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 141 (9th Cir. 1978).

107. *New Orleans Depot Servs.*, 718 F.3d at 389-90 (citing *Herron*, 568 F.3d at 139, 141).

found situs when a truck driver was injured on a public street in an area outside the terminal where the employer's business was located.[108] The Third Circuit decision stated "[t]he key is the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing."[109]

Conversely, the court next noted the much different and more faithful interpretation of § 903(a) taken by the Fourth Circuit.[110] In *Sidwell v. Express Container Services, Inc.*, the Fourth Circuit applied a "plain meaning" interpretation of the statute to a factual scenario similar to the one faced by the court in *New Orleans Depot Services*: "The plaintiff was a shipping container mechanic who sought to recover benefits under the Act after he was injured while repairing a container."[111] In *Sidwell*, the facility, described as non-maritime, where the employee suffered his injury was roughly 0.8 miles from the nearest ship terminal, which was strikingly similar to the scenario before the Fifth Circuit.[112] The court in *Sidwell* determined that the Supreme Court had not yet defined the term "adjoin," but that other circuits had adopted expansive definitions.[113] The Fourth Circuit declined to follow any of the other circuits' definitions because they "openly disavow[ed] the statutory text" of the LHWCA.[114] Furthermore, because Congress had not specified "a more technical definition of the word," the court concluded that the term should be interpreted according to its "ordinary meaning."[115] The Fourth Circuit determined that the ordinary meaning of "adjoins," established by reference to its ordinary definition, was "'to lie next to,'" to 'be in contact with,' to 'abut

108. *Id.* at 390-91 (citing Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs, 540 F.2d 629, 632, 638 (3d Cir. 1976)).

109. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 391 (5th Cir. 2013) (alteration in original) (quoting Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs, 540 F.2d 629, 638 (3d Cir. 1976)).

110. See *id.* at 391-92 (referring to Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1135 (4th Cir. 1995)).

111. *Id.* at 391 (citing *Sidwell*, 71 F.3d at 1135); *see Sidwell*, 71 F.3d at 1138.

112. The location of the facility in the case was approximately 300 yards from the navigable waterway. *New Orleans Depot Servs.*, 718 F.3d at 391 (citing *Sidwell*, 71 F.3d at 1135).

113. *Id.* (citing *Sidwell*, 71 F.3d at 1136-37).

114. *Id.* (citing *Sidwell*, 71 F.3d at 1138).

115. *Id.* (quoting *Sidwell*, 71 F.3d at 1138).

upon,' or to be 'touching or bounding at some point.'"[116] The Fourth Circuit found support for this definition in the 1972 congressional reports, which stated that the LHWCA was "to cover injuries occurring in the *contiguous* dock area."[117]

The Fifth Circuit also agreed with *Sidwell*'s response to concerns about workers moving "in and out" of coverage, which was consistent with Supreme Court precedent and "ensure[d] coverage for all maritime employees injured in the waterfront areas where the loading, unloading and repair of vessels occur[ed]."[118] Furthermore, the court agreed with the Fourth Circuit's conclusion that the term "area" in conjunction with "adjoining" was used to expand geographic situs, but that the term "area" was to be construed in light of the enumerated list in § 903(a) of the LHWCA that describes structures used in connection with navigable waters.[119] The court also pointed to the Fourth Circuit's reliance on Fifth Circuit precedent; namely, *Alabama Dry Dock & Shipbuilding v. Kininess*, which indicated that "it is the parcel of land underlying the employer's facility that must adjoin navigable waters, not the particular part of the parcel upon which a claimant is injured."[120] Finally, the court agreed with the Fourth Circuit's criticism of other circuits' situs interpretations.[121]

After discussing the *Sidwell* decision and its rationale, the court addressed two contentions proffered by the Office of

116. *Id.* (quoting *Sidwell*, 71 F.3d at 1138).

117. *New Orleans Depot Servs.*, 718 F.3d at 391 & n.16 (citing *Sidwell*, 71 F.3d at 1138 and S. REP. 92–1125 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698).

118. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 392 (5th Cir. 2013) (quoting Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1140 (4th Cir. 1995)). The court in *Sidwell* pointed to the Supreme Court and Congress's intent to expand coverage beyond the "first step" off the gangplank and extend coverage to the location where the "overall loading and unloading process occurs." *Sidwell*, 71 F.3d at 1140 (quoting Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 257 (1977)).

119. *New Orleans Depot Servs.*, 718 F.3d at 392-94.

120. *Id.* at 392.

121. *Id.* at 393-94. The court further discusses how other circuits (such as the Third) have allowed the "functional nexus" portion of the situs test to be dispositive of establishing situs. *Id.* at 390-91. The court agreed that just because an "area [is] customarily used for designated maritime purposes" does not mean it has achieved the situs requirement. *Id.* at 392-93. The court added this type of analysis would "collapse[] the separate status and situs requirements into a single inquiry into 'status.'" New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 393 (5th Cir. 2013) (quoting *Sidwell*, 71 F.3d at 1139 n.10).

Workers' Compensation Programs against the adoption of the Fourth Circuit's definition of "adjoin."[122] First, the Office of Workers' Compensation Programs argued that a broad interpretation of "adjoin" promotes the congressional goal of preventing longshoremen from walking "in and out" of coverage.[123] The court responded that the *Sidwell* decision had adequately addressed the realm of longshoremen both on the ship and while on the dock.[124] It then cited the Supreme Court decision in *Herb's Welding Co.* to support its distinction between maritime situs and status.[125]

Second, the OWCP argued that based on Supreme Court precedent, "the LHWCA should be construed liberally in favor of coverage," as set forth in *Northeast Marine Terminals Co.*[126] But the court responded by citing the rules of statutory interpretation as set forth by its decision in *Matter of Appletree Markets, Inc.*, which supported the plain language interpretation of § 903(a) of the LHWCA.[127] In its conclusion, the court stated that the new definition of "adjoin" from *Sidwell* would aid "non-litigious, speedy, sure resolution[s] of the compensation claims of injured workers."[128]

C. A CONCURRENCE IN JUDGMENT HIGHLIGHTING THE COURT'S OWN INFIDELITY[129]

Judge Higginson's concurrence approached the decision

122. *New Orleans Depot Servs.*, 718 F.3d at 393.

123. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 393 (5th Cir. 2013).

124. *See id.*

125. *Id.* ("[T]here will always be a boundary to coverage, and there will always be people who cross it during their employment. If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues that it does or should." (alteration in original) (quoting Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426-27 (1985)).

126. *Id.* at 393; *see* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977).

127. Per the decision in *In re Appletree Markets*, the Fifth Circuit looks first to a "plain meaning" interpretation of the statute, rather than imposing their own interpretation of congressional intent. *New Orleans Depot Servs.*, 718 F.3d at 393 (citing *In re* Appletree Markets, Inc., 19 F.3d 969, 974 (5th Cir. 1994)).

128. *Id.* at 394 (quoting Texports Stevedore Co. v. Winchester, 632 F.2d 504, 518 (5th Cir. 1980) (en banc) (Tjoflat, J., dissenting)).

129. *Id.* at 394-98 (Clement, J., concurring). The first concurrence, by Judge Clement, which six other judges joined, provides an analysis and clarification of the "status" requirement set forth by § 903(a) of the LHWCA. *Id.* This Note will not go into this concurrence as it focuses on status.

differently by discussing how the court should have reversed the decision on factual grounds, clarified a poor geographic situs interpretation, kept sound precedent, and considered etymological issues surrounding redefining the term "adjoin."[130]

Judge Higginson began with analysis of the factual scenario presented in the case before the court and determined that the Board erred in its decision because the "Chef Yard" area was not used to load or unload vessels, and therefore, did not meet the "customarily used" requirement set forth in § 903(a) of the LHWCA.[131] He agreed with the majority's conclusion that the court's previous interpretations—including, in particular, the decision in *Hudson*—provided the framework for lower courts to expand situs coverage beyond the bounds intended by Congress.[132] Yet, Judge Higginson believed that clarifying, and not redefining, the geographic situs interpretation set forth in *Hudson* would have better served the court.[133] With regard to the definition chosen by the majority, the concurrence stated that the court was not in the position to make a definite determination of what "adjoin" meant because of the variety of plausible interpretations that were available and the fear of not being conscious of practical issues surrounding the maritime industry.[134]

Furthermore, Judge Higginson disagreed with overruling *Winchester* because the judges who made the 1980 decision were contemporaries of the statute they were interpreting and provided a layered approach which proved workable even in the face of technological advancements and modified longshoremen work.[135] Finally, he noted two practical issues left unresolved by the new decision, which had been previously considered by *Winchester*. First, the majority failed to consider the high price of

130. *See id.* at 398-99 (Higginson, J., concurring).

131. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 398 (5th Cir. 2013).

132. *Id.* (Higginson, J., concurring).

133. *See id.* at 398-99 ("Consequently, I would reverse the [BRB] decision and clarify that the clause 'associated with items used as part of the loading process' in *Hudson* cannot be understood to expand [LHWCA] coverage beyond areas that operate to load and repair vessels to areas that operate to store and repair the cargo containers that go onto vessels and trains and trucks.").

134. *See id.* (stating that the decision in *Winchester* is "time-settled" and citing *Dickerson v. United States*, 538 U.S. 428 (2000) to support his disagreement with overruling the decision).

135. *Id.* at 398.

land contiguous to the water because of the growing size of total shipping volume, which moved more longshoreman work landward.[136] And secondly, the court failed to consider that businesses would relocate longshoreman's work "across a property break," which would rehash the strict abutment issues Congress sought to solve.[137]

D. THE DISSENT'S LAST STAND

Judge Stewart, the author of the Fifth Circuit's decision denying NODSI's petition for review, dissented from the en banc decision and was joined by two other judges. [138] The dissent addressed both arguments the majority used to overrule the *Winchester* test.[139] First, Judge Stewart challenged the majority's suggestion that Winchester had given "vague instructions [and] provided little guidance to other courts or future litigants" and stated that the standard was so clear that only nine cases, in the span of thirty-three years, had challenged the decision's definition of "adjoin."[140] Furthermore, the dissent believed that respect for the principle of stare decisis compelled against adopting the majority's new statutory interpretation.[141]

Next, Judge Stewart addressed the "plain meaning" of the term "adjoins" as established by the majority.[142] Referring to conflicting definitions from various sources, the dissent found that the majority ignored other valid definitions of the term "adjoin" and stressed that the majority's definitions, chosen for their presumed clarity, were themselves ambiguous and could potentially cause further interpretive issues.[143] Judge Stewart buttressed his plain language analysis by using a hypothetical based on the fact scenario seen in *Winchester*.[144] This

136. *See id.*

137. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 399 (5th Cir. 2013) (Higginson, J., concurring).

138. *Id.* (Stewart, C.J., dissenting).

139. *Id.* at 399-02.

140. *Id.* at 400.

141. *Id.* at 401.

142. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 401-02 (5th Cir. 2013) (Stewart, C.J., dissenting).

143. *Id.* at 401.

144. *Id.* at 402. The hypothetical used described two gear rooms along the navigable waterway, and a third, which was a few blocks from the waterway. *Id.*; *see* Texports Stevedore Co. v. Winchester, 632 F.2d 504, 507 (5th Cir. 1980) (en banc). The third gear room was placed five blocks away because there was no other

hypothetical was designed to illustrate the majority's failure to consider the modern maritime setting and how the new definition would lead to "'harsh and incongruous' result[s]."[145] Finally, the dissent provided that the *Sidwell* decision was the outlier in interpreting geographic situs comparing it to the liberal constructions offered by the Third, Ninth, and Eleventh Circuits.[146]

V. A CRITICAL ANALYSIS OF THE FIFTH CIRCUIT'S DECISION

The Fifth Circuit's decision in *New Orleans Depot Services* presents four issues. First, the Fifth Circuit's decision to overrule thirty-plus years of law was detached from the realities of the maritime industry. By fixating on efficiency, the court sacrificed efficacy. Second, the court's decision in light of statutory rules regarding standard of review appears aimed at a singular purpose: changing the law. Third, the *Sidwell* plain language interpretation appears to be flawed not only theoretically because of its overly restrictive effects, but also practically because of modern maritime settings and technological trends. Finally, the Fifth Circuit's new definition of "adjoin" fails to provide the consistent and "streamlined" results that the court intended; this result is highlighted in a hypothetical maritime scenario.

A. A SHALLOW ANALYSIS WITH POTENTIALLY HARSH CONSEQUENCES

The Fifth Circuit's rationale was an imitation of the Fourth Circuit's decision in *Sidwell* that provides little analytical justification for its interpretation outside of statutory interpretation rules and judicial efficiency. Besides redefining the term "adjoin," the court's analysis fails to guide future litigants and courts for two reasons. First, it performs a shallow review of the Ninth Circuit's decision in *Brady-Hamilton Stevedore Co. v. Herron* by placing an inordinate amount of focus on the facts and holding rather than an analysis of the court's

waterfront property. *New Orleans Depot Servs.*, 718 F.3d at 402; *see Winchester*, 632 F.2d at 507. A worker suffers an injury in the third gear room. *New Orleans Depot Servs.*, 718 F.3d at 402; *see Winchester*, 632 F.2d at 507.

145. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 402 (5th Cir. 2013) (quoting Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977)).

146. *Id.*

geographic "situs" test.[147] Second, the court's decision is contrary to the strong concern of giving greater weight to the "functional nexus prong" of the coverage test, which gives added importance to the use of the area at issue. After quickly dismissing the court's previous decision in Winchester, the Fifth Circuit began a survey of other circuit court decisions, but with an eye toward substantive results at the expense of procedure and rationale. At the outset, the court criticized the decision in Winchester as "provid[ing] little guidance to other courts or future litigants on how to determine from 'the circumstances' whether a claimant satisfies the situs test."[148] Despite stating that its interest was to promote efficiency and clarity, the court dismissed the geographic situs test established in *Herron* because the Ninth Circuit granted coverage to "an employee [who] was injured while unloading steel plates from a truck parked at the employer's gear locker . . . 2,600 feet north of the Columbia river."[149] Rather than examining the rationale and elements underlying the *Herron* test, the court only quoted the Ninth Circuit's definition of "adjoining" and then provided a note displaying another circuit's adoption of the *Herron* test.[150]

The court failed to acknowledge the clearly stated rationale of the Ninth Circuit's four-prong test, which provided a balanced, fact-intensive analysis of each case while still achieving efficient results. The four-factor test[151] was created in light of the prevailing Supreme Court decision, *Northeast Marine Terminal Co.*, and relied on two major congressional policies to support its underlying rationale.[152] The underlying policy considerations were: (1) an understanding of the changes to modern maritime handling techniques and (2) the conception of uniformity in coverage—the two driving forces behind the 1972 Amendment to

147. *See* Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978) (holding that a "gear lockerman," whose activities sometimes included longshoreman work, injured at a "gear locker" some 2,600 feet away from the pier was within geographic situs of the LHWCA and granted him coverage); *see also supra* Section IV(B).

148. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 490 (5th Cir. 2013).

149. *Id.* at 390; Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 139-41 (9th Cir. 1978).

150. *New Orleans Depot Servs.*, 718 F.3d at 390 & n.14.

151. *See Herron*, 568 F.2d at 141.

152. *Herron*, 568 F.2d at 140-41.

§ 903(a) of the LHWCA.[153] The Ninth Circuit stated that the phrase "adjoining area" did not require "physical contiguity" to water but did so in light of these policy conceptions.[154] Moreover, the court in *Herron* remained conscious of the fact that "cases will often arise which present questions of coverage that are difficult to resolve."[155]

The four factors set out by the Ninth Circuit struck a balance that reflected Winchester's "consideration of all circumstances" while still achieving efficiency by requiring specific factors.[156] *Herron*'s required elements ((1) the particular suitability of the site for maritime uses referred to in the statute, (2) the role of surrounding property, (3) the proximity of the site to the waterway, and (4) whether the site is as close to the waterway as feasible under the circumstances) emphasize flexibility and enabled the court to modify the test based on circumstances at the time of the injury.[157] Via this test, the Ninth Circuit concluded that the site of the injury fell within the geographic situs because it was as close to the water's edge as physically possible based on the "limited number of warehouses and other docking facilities that must of necessity be located as close as possible to the ships being loaded and unloaded."[158] Instead of declining to examine and follow *Herron* on the facts and holding,[159] the Fifth Circuit should have adopted the four-factor *Herron* test.

The Ninth Circuit's four-factor test provides a balance of facts and policy, which would have allowed the Fifth Circuit to circumscribe the Act's situs requirement by considering the facts of Juan Zepeda's claim. After applying the *Herron* test, the court could have established that Juan Zepeda did not meet the situs requirement. The Fifth Circuit could have begun by examining

153. *Id.*

154. *Id.* at 141.

155. Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978).

156. *See id.* at 141.

157. *See id.*

158. *Id.* (quoting the administrative law judge's factual determination with approval).

159. Interestingly enough, the test to determine "adjoining area" set forth in *Herron* was supported and requested by NODSI, the petitioner in the case. En Banc Supplemental Brief of Petitioner, *supra* note 12, at 16 ("NODSI requested at every stage of these proceedings that consideration be given to the factors set forth by the Ninth Circuit in *Brady-Hamilton Stevedore v. Herron*.").

whether the site was particularly suitable for maritime uses as stipulated by the statute. NODSI's worksite was not particularly geared towards the "loading and unloading" of vessels, but rather serviced and repaired containers that may or may not have been used on vessels. Second, the court could have examined if the surrounding properties were primarily used for maritime work. The court's factual investigation into NODSI's surrounding properties would have proven that NODSI's site was not maritime oriented because the spectrum of work that occurred there (i.e. coffee roasting, car repair shop, and car washes) was not at all maritime related. Third, in assessing whether the site was as close to the water as feasible, the court could have determined that NODSI, which repaired chassis and containers that were delivered by truck, did not need to be close in proximity to the water because it was not a part of the loading and unloading process.

Lastly, the final factor the court would have had to consider is the proximity of the site to the waterway. This factor was the focal issue and reason the Fifth Circuit declined to follow *Herron*, because the Ninth Circuit granted coverage to a "lockerman" over 2,600 feet from the waterway. However, NODSI's facility—located approximately 300 yards away from the navigable waterway—could have been distinguished via a survey of LHWCA covered facilities from previous Fifth Circuit decisions. Thus, excluding *Hudson* as an outlier factually,[160] the court could have established that NODSI's facility was outside the bounds of coverage, as even its most liberal expansion of coverage was a facility five blocks from the waterway.[161] Using previous Fifth Circuit case decisions as a threshold for examining the final factor and having effectively eliminated the three other required factors, the court could have reached the same outcome and achieved the goal of clarity and efficiency by adopting the *Herron* four-factor test.

Interestingly, the Fifth Circuit was concerned, much like the court in *Sidwell*, that the LHWCA's separate "status" and "situs" would fold into one another and determine coverage based solely on one factor: a worker's role within the area covered by the

160. *See* Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 430 (5th Cir. 2009).

161. *But see* Texports Stevedore Co. v. Winchester, 632 F.2d 504, 513 (5th Cir. 1980) (en banc).

LHWCA.[162] Yet, the court's new definition of the term "adjoin," which now means that an employer's property must "border on" or "be contiguous with" navigable waters,[163] creates the same effect the court sought to prevent: a dispositive factor. Now, instead of the "functional nexus test"—which is based on § 903(a)'s language stating that the area where the party was injured must be "customarily used" for maritime purposes being dispositive of coverage—the location of the maritime facility is the decisive factor. Moreover, because the employer's maritime facility must "adjoin" or "be contiguous with" navigable waters, it places longshoremen at the mercy of their employer's facility location. As discussed in Judge Higginson's concurring opinion and Judge Stewart's dissent,[164] this definition fails to acknowledge the realities of the maritime industry, such as the high price of land abutting the waters and the landward shift of longshore work.[165]

Above all, the court's narrow determination of "geographic situs" also appears to be reminiscent of the exact concept Congress sought to eliminate: line drawing.[166] However, this line no longer depends upon the shoreline, as the "*Jensen* line" did, but rather the will of a maritime employer, because geographic situs determinations under the court's newest definition of "adjoin" turns on whether or not the company's property adjoins navigable water and not whether the longshoreman's work adjoins navigable waters.[167] Thus, an employer could place its facility close enough to the water to allow longshoremen to assist

162. *See* Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1139 n.10 (4th Cir. 1995). Indeed, the Fourth Circuit raised this issue in its criticism of those circuits in which "functional situs" had become dispositive of coverage issues. *See* New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 392-93 (5th Cir. 2013) (discussing *Sidwell*'s discussion of courts conflating "status" and "situs" inquiries to grant coverage under the LHWCA).

163. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 393-94 (5th Cir. 2013).

164. *Id.* at 398-01 (Higginson, J., concurring & Stewart, C.J., dissenting).

165. *Id.* at 399, 401-02; *see* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 271 & n.32 (1977).

166. *See* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 431 (1985) (discussing Congress's intent to eliminate the "serious demarcation line problem" that created "'checkered coverage' based on the fortuity of the exact location of a particular injury" (citations omitted)).

167. *New Orleans Depot Servs.*, 718 F.3d at 392-93 (discussing *Sidwell*'s approval of the Fifth Circuits previous decision in *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176 (5th Cir.1977)).

and service ships, but far enough to fall outside of the requirement of being "contiguous with" the water. Adding to this potential move landward movement is the high cost of LHWCA compensation payments.[168] In effect, longshoremen would fall outside of the LHWCA's coverage and be constrained to recovering state based worker's compensation benefits.[169]

Though seemingly focused on efficiency by providing a clear definition of the term "adjoin," the panel's rationale not only overlooked important discussion about the Ninth Circuit's situs test and its flexible and efficient rationale, but also created a contradictory twist to an issue it sought to alleviate by following *Sidwell*.

B. A QUESTION EMERGES FROM THE COURSE OF PROCEEDINGS

Two judges in two separate opinions—one concurring and one dissenting—indirectly addressed an issue: why did the Fifth Circuit, which could have overruled the Board's decision on "functional situs" (i.e. whether the site is traditionally used in the process of loading and unloading a vessel) and "maritime status" (i.e. whether the employee is engaged in maritime oriented work) grounds, decide instead to change the law regarding geographic situs?

Judge Clement's dissenting opinion to the original Fifth Circuit hearing, which denied the petition for review, performed a fact-based analysis—much like the *Herron* test—of the case and concluded that Juan Zepeda failed to establish both functional situs and maritime status.[170] Similarly, Judge Higginson's concurrence to the en banc decision delved into the factual

168. *Compare* U.S. Dep't of Labor, Div. of Longshore & Harbor Workers' Comp., *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))*, http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (last visited Jan. 6, 2013) (providing a maximum, minimum and national average of weekly wages that should be distributed to Longshoreman pursuant to the Act), *with* La. Work Force Comm'n, Office of Workers' Comp. Admin., *Average Weekly Wage Rate*, POTPOURRI (2013) (citing LA. REV. STAT. ANN. § 23:1202 (2013)), http://www.laworks.net/Downloads/OWC/AvgWage_MinMaxRates.pdf (providing minimum and maximum state compensation, as well as average weekly wages for Louisiana workers).

169. *See* H.R. REP. NO. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4698-01 (discussing the Amendments to the Act in 1972, most specifically the increase of compensation to longshoreman); *see supra* note 168.

170. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 689 F.3d 400, 410-15 (5th Cir. 2012) (Clement, J., dissenting).

scenario and concluded that he would have overturned the BRB because the site failed to fit the requirements of "functional situs."[171] However, the legislatively imposed standard of review in conjunction with Juan Zepeda's case proved to be the "straw that broke the 'panel's' back."

The standard of review, imposed by statute, on an appellate court's review of administrative law judges and Benefits Review Boards is highly deferential.[172] Thus, in acting as the "appellate court," the Benefits Review Board is limited to assessing the factual determinations of the administrative law judge and whether there were errors of law or substantially lacking factual support.[173] In this light, the appellate court steps into the shoes of the Benefits Review Board and is statutorily constrained in reviewing the decision regarding benefits. However, the Fifth Circuit sitting en banc bypassed this standard of review.

The en banc decision of the court side-stepped the legislatively imposed standard of review by characterizing the issue as "a pure a question of law" and thereby reviewing the decision *de novo*.[174] The court proceeded to focus its attention squarely on the issue of geographic situs after it exercised the "waiver rule," which restricted the court from adjudicating the claim on the merits because they did not have the benefit of a full record.[175] Yet, this seems curious because two other opinions (Judge Clement's dissent to the original Fifth Circuit opinion and Judge Higginson's concurrence in the court's en banc decision) dealing with the same factual scenario denied LHWCA coverage to Juan Zepeda, but without changing the geographic situs law. Furthermore, the court in a self-granted yet self-constrained de novo review of the case only concerned itself with geographic situs, even though it was never raised as an issue in the prior proceedings.[176]

171. *See id.* at 398 (Higginson, J., concurring).

172. *See* 33 U.S.C. § 921 (b)(3) (2012); *see also* 20 C.F.R. § 802.301 (2012); 20 C.F.R. § 801.104 (2012); Charles V. Gerkin, Jr., *Administrative Law*, 42 MERCER L. REV. 1185, 1190-91 (1991).

173. *See* 33 U.S.C. § 921 (b)(3); *see also* 20 C.F.R. § 802.301; 20 C.F.R. § 801.104.

174. *See* New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 387-88 (5th Cir. 2013) (citing Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs., 459 U.S. 297, 300, 305 (1983)).

175. *Id.* at 387-88 (citing Lampton v. Diaz, 639 F.3d 223, 227 n.4 (5th Cir. 2011)).

176. *Id.* at 387-88.

Additionally, Judge Higginson criticized the BRB because it relied on dicta from *Coastal Productions Services v. Hudson* to reach its decision, which the court stated was inconsistent with prior decisions.[177] The language in *Hudson* plainly stated "coverage would extend beyond vessel work to more general work 'associated with items used as part of the loading process.'"[178] Thus, the BRB's decision was not founded upon the definition of "adjoin" seen in *Winchester*, but rather liberal language that extended the reach of situs far beyond what Congress intended.[179] Therefore, even having had the opportunity to overrule the BRB based on a misreading of geographic situs law based on *Hudson*, as described above, or overruling the decision based on the inability to fulfill the other required elements of maritime "status" and functional "situs" for recovery under the LHWCA, the court chose to overrule thirty-three years of case-law concerning geographic situs.

C. PLAIN LANGUAGE INTERPRETATION OF § 903(A) OF LHWCA EXAMINED

The dissent in the Fifth Circuit's en banc decision discussed that the Fourth Circuit's decision in *Sidwell* was an "outlier" in defining and interpreting the "geographic nexus."[180] The dissent correctly pointed out that the *Sidwell* court is an outlier, but failed to discuss how the interpretation of the statute by the *Sidwell* court is overly-restrictive. The Fourth Circuit's interpretation of the term "other," which was not explicitly discussed by the Fifth Circuit, yet still adopted, specifically states:

> The use of the word 'other' following the enumerated adjoining areas confirms that the scope and nature of the 'other adjoining area[s]' are to be defined by reference to the enumerated areas; in other words, the additional unenumerated covered areas are to be understood as of the same type as those enumerated. Even if the statute had not used the word 'other,' we would, under the familiar canon of statutory interpretation *noscitur a sociis*, still look to the

177. *Id.* at 398-99 (Higginson, J., concurring).

178. New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs, 718 F.3d 384, 398 (5th Cir. 2013) (citing Coastal Prod. Servs. Inc. v. Hudson, 555 F.3d 426, 434 (5th Cir. 2009)).

179. See *id.* at 398-99.

180. *Id.* at 402-03 (Stewart, C.J., dissenting).

> enumerated items in the series to determine which other 'adjoining areas' would satisfy the situs requirement.[181]

This statutory interpretation of the "catch all" phrase at the end of the statute presents some practical and theoretical issues. First, the term "other area" referring back to the enumerated list is overly restrictive and fails to acknowledge growth and change in the maritime industry. Additionally, it is too rigid as it fails to consider other areas or facilities that would potentially be present within a maritime setting that fail to fall under the enumerated list.

Sidwell's interpretation of § 903(a)'s "other area" is narrow and produces contrary results.[182] First, the *Sidwell* court used plain language to interpret the term "area" as referring back to the illustrative list.[183] This contradicts the plain meaning of "area" which is "a clear or open space of land."[184] This overly restrictive interpretation of the term not only inhibits the statute from adjusting to maritime technological developments, but also limits situs locations to the list already illustrated. Adding to the issues stemming from *Sidwell*'s statutory reading is the interpretation of the § 903(a) by a justice of the Supreme Court which interpreted "other area" as a separate entity.

A dissent by a justice of the Supreme Court in *Herb's Welding, Inc. v. Gray* suggested that the "other area" portion of the statute was created to allow for changes and growth in the maritime field, while still covering longshoremen.[185] In his analysis, based on the assumption of having fulfilled maritime situs, he considered whether a fixed offshore oil rig satisfies the situs requirement.[186] Justice Marshall highlights:

> Section 3(a) provides that coverage extends to any 'pier,

181. Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1139 (4th Cir. 1995) (alteration in original).

182. *See, e.g.*, Nelson v. Am. Dredging Co., 143 F.3d 789, 797-98 (3d Cir. 1998) (disagreeing with *Sidwell*'s interpretation of "other adjoining areas" and, instead, finding that by "giving the word 'area' its plain meaning . . . does not denote a building or structure as such, but rather an open space, indeed sometimes within a building or other structure").

183. Sidwell v. Express Container Servs., Inc., 71 F.3d 1134, 1139 (4th Cir. 1995).

184. *See Nelson*, 143 F.3d at 797 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 115 (1993))

185. *See* Herb's Welding, Inc. v. Gray, 470 U.S. 414, 446-47 & n.18 (1985) (Marshall, J., dissenting).

186. *Id.* at 447.

> wharf, dry dock, terminal, building way, marine railway, or other . . . area [adjoining the navigable waters] customarily used by an employer in loading, unloading, repairing, or building a vessel.[187]

After discussing the facts pertinent to the site in question, he concludes by saying: "The rig is thus an 'area [adjoining the navigable waters] customarily used by an employer in loading [or] unloading . . . a vessel."[188] Justice Marshall read the statute as having a "catch all" or separate phrasing for issues arising out of factual scenarios that were not contemplated or predicted by Congress in 1972.[189] Thus, the interpretation by a Justice of the Supreme Court, though the Court has not addressed this issue in several years, has provided insight into its interpretation of this statute—an interpretation that appears to be in direct contrast to *Sidwell* and now *New Orleans Depot Services*.

D. TWO HYPOTHETICAL SITUATIONS

Following the example of Judge Stewart's dissent in the most recent en banc decision, an application of the Fifth Circuit's new definition of "adjoin" fails to ameliorate the ambiguity set forth in *Winchester* and presents new ambiguities. Two hypotheticals allow for insight into the likely practical impact of the new state of the law. The first hypothetical echoes Judge Stewart's reference to *Winchester* but modifies it in order to discuss, in particular, one of the court's conclusions. In hypothetical "A," assume the maritime status and functional status of the injured longshoreman have been satisfied and that at issue is the geographic situs of the claimant.[190] Furthermore, for the purposes of the hypothetical, the property in question shall not be considered to have fallen under the illustrative list in § 903(a) of the LHWCA.

Under the scenario in hypothetical "A" and following the recent Fifth Circuit decision in *New Orleans Depot Services*, if injured on the grounds of facility 'X' then the claimant would be entitled to full recovery under the LHWCA because the property would fulfill the geographic situs for a "any other adjoining area"

187. *Id.* at 446 (alteration in original) (quoting 33 U.S.C. § 903(a) (1996)).

188. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 446-47 (1985) (Marshall, J., dissenting) (alteration in original).

189. *Herb's Welding, Inc.*, 470 U.S. at 433-34.

190. *See* Appendix, Hypothetical A.

as it is contiguous with or borders on the navigable waterway. However, if the claimant were to suffer injuries at facility 'Y,' it is unclear whether the claimant would recover under the LHWCA because the property is not contiguous with and does not border on the navigable waterway. Moreover, it is plausible under the decision by the Fifth Circuit that a longshoreman, having fulfilled all other requirements but geographic situs, could recover under the new definition of adjoin even if the injury were to occur at the far end of property 'X.' But an injury of the same distance from the navigable waterway occurring at property 'Y' remains unclear even if the injured party is in the facility, because the property is not "contiguous" with and does not "border on" navigable water.

Adding to this lack of clarity in coverage, the hypothetical "B" elaborates upon similar circumstances but with a few added factors.[191] Under all the same circumstances listed above in the hypothetical "A," the only issue remaining for the claimant to receive benefits is establishing geographic situs. Under the hypothetical "B," if a claimant were to be injured at facility 'Y,' it is probable, if not guaranteed, that the injured party would recover based on the new definition of "adjoin" set forth by the court in *New Orleans Depot Services*. Similarly, if the claimant were to suffer injuries at 'X1,' it is likely that the claimant would recover benefits because the facility, like 'Y' is contiguous with the water. However, if the party were to be injured at 'X2,' a facility owned and operated by the same employer as 'X1,' it is not clear, based on the new definition, that the claimant would recover benefits. It may be argued that 'X2' is owned by the same owner and operator as 'X1' but the court's definition requires that any facility not listed in the illustrative list adjoin or 'border upon' the navigable waterway, and construing the term narrowly as in *New Orleans Depot Services*, a claimant injured in 'X2' may have no remedy under the LHWCA, even though 'X1' and 'X2' are owned and operated by the same entity.

The purpose of these hypotheticals is not merely to suggest that there is an issue with the definition of "adjoins" as decided by the Fifth Circuit in *New Orleans Depot Services*, but also to suggest that the court's attempt to ameliorate the ambiguity set forth in *Winchester* is not clearly decipherable. Thus, borrowing the same language used by the Fifth Circuit in critiquing *Winchester*, "[t]he majority's interpretation of the situs

191. *See* Appendix, Hypothetical B.

requirement solves only [Zepeda's] case . . . . The majority does not clearly resolve [the situs] issue here."[192]

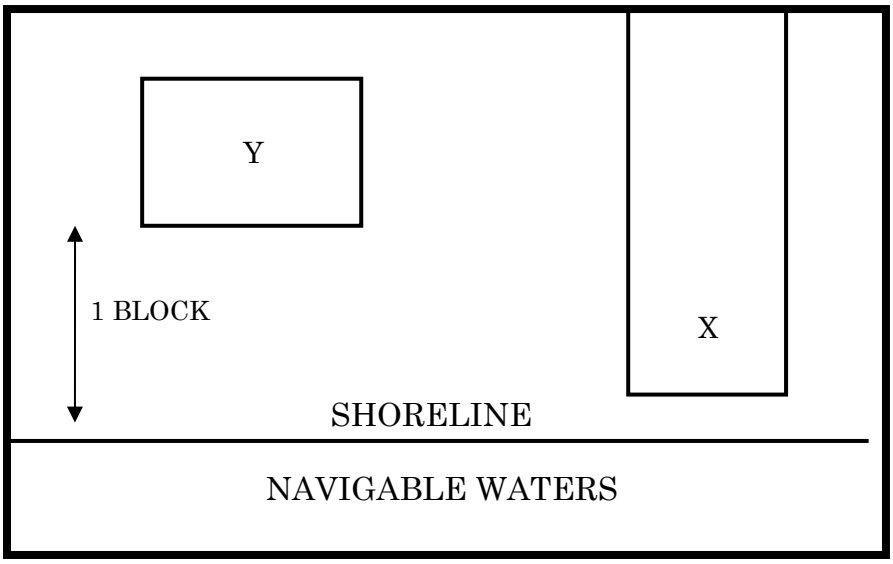
VI. CONCLUSION

The Fifth Circuit's recent decision in *New Orleans Depot Servs., Inc. v. Dir., Office of Workers' Comp. Programs* solved the issues surrounding Juan Zepeda's LHWCA claim, but left future claimants in a place of uncertainty. The majority's refusal to consider and adopt the balanced rationale of the Ninth Circuit's four-factor *Herron* test and their adoption of an overly-restrictive statutory interpretation is only outweighed by having made the "geographic situs" component of § 903(a) the dispositive factor is assessing LHWCA coverage. Finally, beyond having derogated from a statutorily imposed standard of review, and foundational congressional policy that stressed adaptation to maritime advancements and uniformity in coverage, the court's new definition of "adjoin" achieved what it specifically sought to alleviate: an indecipherable new standard for determining geographic situs.

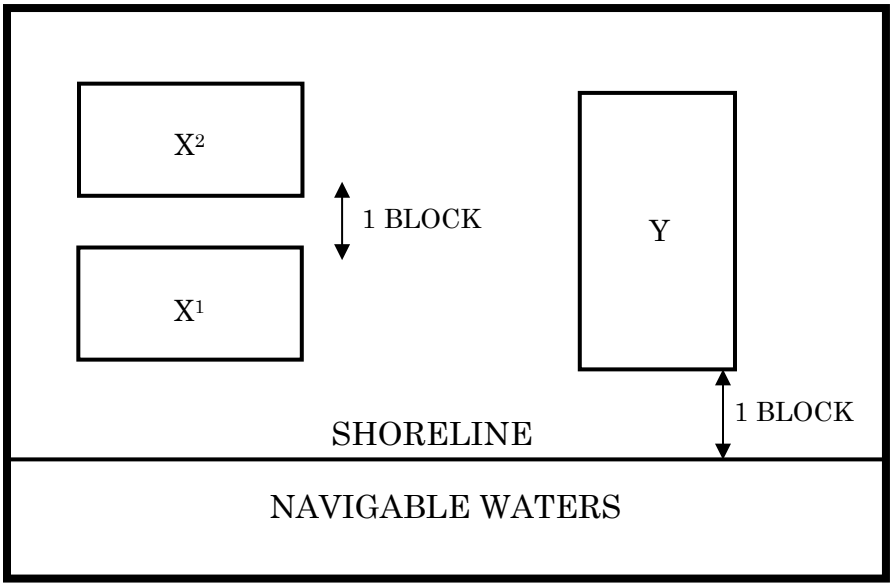
Carlos A. Benach

192. *See* Texports Stevedore Co. v. Winchester, 632 F.2d 504, 519 (5th Cir. 1980) (en banc) (Tjoflat, J., dissenting)).

APPENDIX



Hypothetical "A"



Hypothetical "B"