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Admiralty Law/Workmen's Compensation—On the Waterfront: The Fourth Circuit Draws the Line at the Point of Rest in a Narrow Interpretation of the LHWCA Amendments of 1972

The primary objectives of workmen’s compensation systems are to provide certainty of employee benefits and to limit employer liability; however, past attempts to provide such a system for shore-based maritime employees have entirely failed. A leading cause of confusion has been the inability of both Congress and the courts to solve the jurisdictional problems of an industry in which the employees must engage in repeated crossings of the shoreline between land and navigable waters, the traditional boundary between federal and state workmen's compensation acts. The 1927 Longshoremen's and Harbor Workers' Compensation Act (LHWCA) contained a bright line test of coverage based on the admiralty law concept that federal jurisdiction stops at the shoreline. Subsequent attempts to provide federal remedies according to the site of claimant's injury, rather than by the nature of his duties, have often led to harsh and incongruous results.

Despite the apparent rigidity of this shoreline coverage test, courts have proved ingenious in blurring the lines among three possible avenues of recovery for injured harborworkers: the LHWCA, state workmen’s compensation statutes and the admiralty tort law cause of action for unseaworthiness. Uncertainty of coverage and competing remedies that offer significantly different levels of relief have resulted in an endless stream of litigation together with unacceptably high insurance costs for the industry.

In response to the inadequacies of the Longshoremen's and Harbor Workers' Compensation Act of 1927, Congress enacted extensive

1. See Griffith v. Wheeling Pittsburgh Steel Corp. 521 F.2d 31, 42 (3d Cir. 1975).
3. See Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). In this case, benefits were denied three longshoremen who were injured or killed when cargo hoisted by the ship's crane swung back and knocked them to the pier or crushed them against the side of a railroad car, while the widow of a fourth longshoreman whose decedent had a similar accident, but was knocked into the water, was able to recover.
amendments in 1972 in an effort to resurrect a viable compensation scheme for the industry. In *I.T.O. Corp. v. Benefits Review Board* the Fourth Circuit became the first appellate court to determine the extent to which the 1972 amendments extend benefits under the Act to persons engaged in necessary steps in the overall process of loading and unloading a vessel, but who under prior law could only claim benefits for accidental injury or death under state law. The court concluded that coverage was limited to "those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship.

*I.T.O.* and its two companion cases arose on appeal from three Benefits Review Board decisions which awarded relief under the Act to shore-based workers involved in various tasks in the overall process of loading and unloading ships. Plaintiffs Adkins, Brown and Harris were forklift operators who were injured while transporting cargo, each working at a different stage of the loading process. The Benefits Review Board concluded that each of these workers was a maritime employee covered by the 1972 amendments.

Coverage under the 1927 Act was based solely on the place of injury; recovery was granted if the injury occurred over navigable waters. The present Act, as a result of the 1972 amendments, establishes a dual test for coverage. The situs test, the requirement that the injury occur over navigable waters, remains, but the definition of navigable waters has been expanded by amendment to include adjoining land areas that are customarily used in loading, unloading, repairing or

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7. 529 F.2d at 1081.
9. "Compensation shall be payable . . . 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). . . ." Act of Mar. 4, 1927, ch. 509, § 3(a), 44 Stat. 1426 (codified at 33 U.S.C. § 903(a) (1970)).
building a vessel. The second part of the coverage test under the amendments is the requirement that the injured employee be engaged in maritime employment.

In light of the new definition of navigable waters, the Benefits Review Board held in *I.T.O.* and its companion cases that each of these employees, having been injured over navigable waters, satisfied the situs test. As to whether these employees were engaged in maritime employment (the status test), the Board held that any task that is an integral part of the total process of loading or unloading cargo satisfies the status requirements that the employee be engaged in maritime employment. According to the Board, the fact that the cargo does not move directly between the ship and the storage area is of no consequence in determining whether claimants qualify as employees under the Act.

The Fourth Circuit concurred in the Board's resolution of the situs issue, but rejected the administrative board's facile resolution of the status question. The court noted that Congress did not define what constituted maritime employment although it did include "any longshoreman or other person engaged in longshoring operations." Since none of these terms have fixed meanings, the court refused to accept them as reliable guides in ascertaining which tasks or functions are of a sufficiently maritime nature to be covered by the Act. The case law dealing with these terms is, according to the court, not particularly helpful since the former test of coverage contained no requirement that injured employees be engaged in maritime employment. The amend-

10. 33 U.S.C.A. § 903(a) (Supp. 1976) provides:
   Compensation shall be payable . . . 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). . . .

11. 33 U.S.C.A. § 902(3) (Supp. 1976) 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.

12. 1 BRBS at 305; 1 BRBS at 214; 1 BRBS at 203.
13. 1 BRBS at 304; 1 BRBS at 214; 1 BRBS at 202.
14. 1 BRBS at 202.
15. 529 F.2d at 1083-84.
16. *Id.* at 1084.
17. *Id.*
19. 529 F.2d at 1084.
20. *Id.*
ments utterly change the significance of the terms "maritime employment," "longshoreman," and "longshoring operations." These terms have become determinative of coverage for the first time.

Unable meaningfully to interpret the Act on its face, the I.T.O. court considered the legislative history of the Act to ascertain congressional intent. Prior to 1972 coverage under the Act stopped at the water's edge. The congressional committees felt that this coverage provision was conducive to anomalies since "[t]he result is a disparity in benefits . . . for the same type of injury depending on which side of the water's edge and in which state the accident occurs." The House Committee noted that this disparity in benefits was becoming a greater problem because of advances in technology that have enabled many longshoring operations traditionally performed on ship to be transferred to shore. The Committee indicated that compensation for longshoremen should no longer "depend upon the fortuitous circumstance of whether the injury occurred on land or over water." Although the committee expressed an intention to create a uniform compensation system, its illustration of this scheme established that Congress did not intend to cover all employees engaged in any activity on the waterfront. Thus, employees involved in unloading the ship and those immediately transporting the cargo to its storage area on land are covered by the Act for any injuries sustained during these tasks. However, the committee emphasized that it did not intend to cover employees who are not engaged in loading or unloading vessels. Mere injury on navigable waters and adjoining land area was not sufficient in itself to come within the coverage of the Act. Thus, the reports contain the caveat that "employees whose responsibility is only to pick up stored

21. Id.
22. The prior Act read: "Compensation shall be payable . . . 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. . . ." 33 U.S.C. § 903(a) (1970).
24. See, e.g., note 3 supra.
26. Id.
27. Id.
28. Id. at 10-11.
29. Id. at 11.
30. Id.
cargo for further transshipment would not be covered, nor would purely
clerical employees whose jobs do not require them to participate in the
loading or unloading of cargo.\textsuperscript{31}

The court considered the committee reports to be explicit in deline-
ating which portions of the overall loading and unloading process were
covered by the Act.\textsuperscript{32} Those employees who transport cargo immediately
from the ship are covered, according to the committee reports; however, those employees engaged in transshipment activities are explicit-
lly excluded. The court interpreted transshipment to mean any inter-
mediate movement of cargo after it reaches its initial storage point.\textsuperscript{33}
Checkers directly involved in the loading and unloading functions would
be eligible for benefits but clerical employees not intimately involved
with these functions would be excluded under the court's interpreta-
tion.\textsuperscript{34} The court concluded that Congress intended to cover only those
employees involved in unloading cargo to the first "point of rest" as the
term is generally understood in the industry.\textsuperscript{35} The court inferred that
this limitation would apply when workers are loading vessels, so that
employees moving cargo from the last point of rest to the vessel are
provided protection by the Act.\textsuperscript{36} Applying this interpretation of the
coverage provisions, the court found that at the time of injury all three
claimants were performing duties landward of the last point of rest.\textsuperscript{37}
The court's resolution of what constitutes maritime employment has

\begin{itemize}
\item \textsuperscript{31} Id.
\item \textsuperscript{32} 529 F.2d at 1087.
\item \textsuperscript{33} Id. at 1087-88.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Id. The "point of rest" is defined by the Federal Maritime Commission
in its regulations governing terminal operators: "['P]oint of rest' shall be defined as that
area on the terminal facility which is assigned for the receipt of inbound cargo
from the ship and from which inbound cargo may be delivered to the consignee,
and that area which is assigned for the receipt of outbound cargo from shippers for vessel
loading." 46 C.F.R. § 533.6(c) (1975). See American President Lines, Ltd. v. Federal
Maritime Bd., 317 F.2d 887, 888 (D.C. Cir. 1962); DiPaola v. International Terminal
Operating Co., 311 F. Supp. 685, 687 (S.D.N.Y. 1970). But see the proposed guidelines
for coverage under the LHWCA which the Department of Labor has issued:
Based on procedures normally utilized in the maritime industry, the loading
process may include certain terminal activities which are incidental to the
placement of cargo on the vessel. Conversely, the unloading process may also
include certain terminal activities. Terminal activities to be included in cov-
erage under the amended Act are employees engaged in loading or unloading
breakbulk, containerized or Lash ships and lighters, or passenger ships. Activ-
ities which may be covered include employees engaged in stuffing and stripping
of containers, employees working in and about marine railways, and other em-
ployees engaged in processing water-borne cargo.
\item \textsuperscript{36} 529 F.2d at 1087.
\item \textsuperscript{37} Id. at 1087-88.
\end{itemize}
been termed the "point of rest" doctrine.\footnote{Id. at 1096 (dissenting opinion).} \footnote{Id. at 1095.} It is based on the presumption that waterborne cargo leaves the chain of maritime commerce when it is taken off the ship and brought to its first point of rest. Likewise, maritime employment commences when cargo is picked up from its last "point of rest" and loaded onto the ship.\footnote{Id. at 1090.} \footnote{Id. at 1094.} \footnote{Judge Craven points out that the greatly expanded definition of "navigable waters" can be used to ascertain the meaning of "maritime employment." \textit{Id.} at 1090 (dissenting opinion). As one commentator states: "$[T]here can be nothing more maritime than the sea, every employment on the sea or other navigable waters should be considered as maritime employment . . . . [T]he would be well to adopt a criterion which takes into account the undoubted jurisdiction of admiralty in matters of all injuries on navigable waters." 1A \textsc{Benedict, Admiralty} \S 17 (7th ed. 1973, Supp. 1975) (emphasis added); similarly, Judge Craven suggests that longshoremen can properly be considered a sub-category of harbor workers. 529 F.2d at 1090 n.4 (dissenting opinion). Another leading commentator has stated: First in the catalogue of harbor workers is the longshoreman. The longshoreman, as the name implies, is a shoreside worker whose principle activity is the loading and unloading of ship's cargo. . . .

\footnote{529 F.2d at 1097 (dissenting opinion).} Outside of the cargo work area in the holds, longshoremen are engaged in various tasks in connection with voyage preparation or termination. The work may consist of carrying ship's stores or passenger's baggage aboard ship. \textit{Or the work may be performed entirely on the pier in the handling of mechanical equipment, or the storing, moving, or loading of goods on the dock.}}

The dissent in \textit{I.T.O.} disagreed with fundamental aspects of the majority's holding and with the analysis employed by the court in reaching its decision. Judge Craven objected to the ready use of the committee reports in the face of statutory language amenable to interpretation.\footnote{Id. at 1090.} \footnote{Id. at 1094.} He argued that the key terms "maritime employment" and "longshoremen" have established meanings which preclude reliance on the legislative history to achieve a contrary interpretation.\footnote{Id. at 1094.} According to the dissent, both "maritime employment" and "harbor workers" are generic terms that include, but are not limited to, longshoremen,\footnote{Id. at 1094.} while "loading and unloading" is an extremely narrow term and indisputably maritime. Thus, a demonstration that these claimants were engaged in loading or unloading operations, as these terms were understood at the time the amendments were enacted, constituted sufficient proof to the dissent that the status prerequisite had been met.\footnote{529 F.2d at 1097 (dissenting opinion).}
er for injuries sustained in ship's service. Thus, the courts had numerous opportunities to explore the dimensions of the term and, Judge Craven asserts, "loading and unloading" had acquired a settled meaning at the time Congress considered the amendments. The majority of courts construed "loading and unloading" in a pragmatic, realistic sense. Rejecting mechanistic, hypertechnical approaches akin to the point of rest theory, the prevailing construction used by courts included all employees engaged in the total operation of moving cargo from the waterfront to the ship or vice versa. The dissent emphasized that recently the Fourth Circuit had adopted this approach.

Accepting arguendo that the plain language of the statute is ambiguous, Judge Craven suggested that four considerations taken together require affirmation. First, as a remedial statute, the language should be interpreted liberally to achieve its avowed purpose of eliminating the disparity of benefits received, depending on the side of the water's edge on which employees sustained an injury. Given this goal of uniformity, those employees engaged in similar tasks and exposed to the same risks would be afforded the same remedy when injury occurs. Second, Judge Craven argued that all doubt should be resolved in favor of coverage. The Act incorporates this presumption in section 920 by directing that in the absence of substantial evidence to the contrary, a

44. Id.
47. Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974). The court noted:

The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, i.e., when the bales were deposited on the pier and discharged from the ship's gear. . . . [W]e believe that the case law rejects such a narrow definition of "unloading."

. . . In view of the obvious trend to fully develop the humanitarian purposes of the warranty of seaworthiness we find no reason to apply a hypertechnical definition to the terms loading and unloading.

Id. at 234-35.
48. 529 F.2d at 1094 (dissenting opinion).
49. See, e.g., Reed v. The Yaka, 373 U.S. 410 (1963); Voris v. Eikel, 346 U.S. 328 (1953); Pillsbury v. United Eng'r Co., 342 U.S. 197 (1951); 529 F.2d at 1091 (dissenting opinion).
claimant shall be considered to fall within the provisions of the Act.51

Third, "[a] consistent and contemporaneous construction of a statute by
the agency charged with its enforcement is entitled to great deference
by the courts."52 The Benefits Review Board has consistently held that
coverage can reasonably be extended to all those employees who are
engaged in integral and essential steps in the overall loading and un-
loading process. Moreover, the Board has considered and rejected the
contention of employers and carriers that a point of rest doctrine is feas-
able or permissible.53 The majority decision, in effect, overruled the
Board's conception of "shoreward coverage," as set forth in thirty-two
administrative decisions.54 Finally, the dissent argued that the scope of
review for these cases is a narrow and restricted one.55 Thus, the dissent
would have held that the Board's rulings are conclusive except in cases
in which the record does not warrant the opinion reached or a reason-
able basis in law does not exist.56

The dissent admitted that the majority's reliance on legislative
history might have been more palatable if it contained clear and unam-
biguous language concerning the issue.57 Instead, Judge Craven con-
sidered the committee reports to be inconclusive, and therefore, useless
as an interpretive tool.58

The critical passage relied on by the majority is interpreted differ-
ently by the dissent. Transshipment, Judge Craven argued, does not

52. 529 F.2d at 1091 (dissenting opinion), quoting NLRB v. Boeing, 412 U.S. 67,
75 (1973).
53. E.g., Richardson v. Great Lakes Storage & Contracting Co., 2 BRBS 31
(1975); Ford v. P.C. Pfeiffer Co., 1 BRBS 367 (1975); Avvento v. Hellenic Lines,
54. The Board had indicated subsequent to the I.T.O. decision that it is "well
aware of the restrictive interpretation given the status requirement by the Fourth Circuit
Court of Appeals. . . . However, we are of the opinion that our interpretation with
regard to coverage is more in keeping with the amended statute and the legislative
history, and we will continue to follow the line of reasoning developed in previous
55. 529 F.2d at 1093-94 (dissenting opinion). Prior to the 1972 amendments, the
review of compensation orders was assigned the federal district courts, 33 U.S.C. § 921
(b) (1970), where a very narrow scope of review was adopted. On appeal, the circuit
court of appeals adhered to a similarly restricted scope of review. The amendments di-
rect the Benefits Review Board to review the Administrative Law Judge's findings with
appeal to the court of appeals for the circuit where the injury occurred. The amendments
1976), and remain silent concerning the court's scope of review. Judge Craven construes
this language to mean that the same narrow review exercised by the district courts prior
to the amendments remains the proper standard. 529 F.2d at 1093 (dissenting opinion).
56. See, e.g., O'Loughlin v. Parker, 163 F.2d 1011 (4th Cir. 1947).
57. 529 F.2d at 1095 (dissenting opinion).
58. Id.
refer to intermediate handling of goods once they are placed on the terminal. Rather, the term refers to teamsters who normally are not involved in the loading process at all and whose function is to transport goods away from the shoreside terminal.  

More importantly, the point of rest theory is found in neither the legislative history nor the statute. This concept, which in effect defines which employees are to be covered, is conspicuous by its absence. Such a doctrine, unsupported by the weight of prior case law or administrative precedent, is unfairly imputed to Congress in the absence of a clear indication of such intent.

Understanding the origins and interpretations of the first Longshoremen's Act is prerequisite to understanding the purpose of the amendments. One of the first questions to arise when workmen's compensation laws were promulgated in the various states was whether these laws encompassed those harbor workers who regularly boarded ships to unload cargo. Since these workers were engaged in an extremely hazardous occupation it seemed equitable that they at least not be left to the not-so-tender mercy of traditional negligence doctrines in case of injury. This search for equity was stymied by the Supreme Court's insistence in Southern Pacific Co. v. Jensen that all things maritime must be uniform. The effect of the Court's ruling was to thrust on Congress the responsibility of providing coverage for those employees who passed over the shoreline, the Jensen line, as courts labeled it, onto navigable waters. Enacted in 1927, the Longshoremen's

59. Id. Accord, Gilmore & Black, supra note 5, § 6-51, at 430, where it is stated: "The line which the Committee Reports evidently sought to draw was between workers who participate directly, or physically, in the specified activities and workers whose jobs require them to be in the same area but who (like clerical workers) do not physically 'participate' or who (like truckers) can be thought of as only indirectly involved in the strictly maritime phase of the activity."

60. 529 F.2d at 1095 (dissenting opinion).
61. Id. at 1096.
62. See Gilmore & Black, supra note 5, § 6-45, at 404-05.
63. There is no doubt that the occupation was (and is) a dangerous one. See Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 130 (1972) (union spokesman citing National Safety Council reports describing the longshore accident rate as more than ten times the national average). See also appendix to Justice Douglas' dissent in Victory Carriers, Inc. v. Law, 404 U.S. 202, 218-25 (1971).
64. See W. Prosser, Handbook of the Law of Torts § 80, at 531 (4th ed. 1971), in which the author refers to "[t]he three wicked sister of common law—contributory negligence, assumption of risk and the fellow servant rule."
65. 244 U.S. 205 (1917).
and Harbor Workers' Compensation Act was designed to provide coverage to those workers who crossed the Jensen line into admiralty jurisdiction. Judicial interpretation of the Act proved a difficult task. Jurisdictional problems have plagued the courts from the beginning.

Prior to the Act, courts sought to soften the harshness of the Jensen line by extending state jurisdiction to its constitutional limits. The so-called "maritime but local" exception that followed was intended to cover those harbor workers injured seaward of the Jensen line, but engaged in activities of such local character that the Supreme Court's insistence upon admiralty law uniformity would not be offended by permitting such workers coverage under local compensation acts.

Considerable confusion arose concerning whether these cases were still viable after the Act became law. Initially, the courts proceeded on the assumption that the "maritime but local" exception was within the intention of Congress, with the result that certain claimants had no idea in advance whether they were covered by the state or the federal compensation schemes. Instead of swift compensation, these claimants were faced with uncertain court battles. A wrong guess meant, at best, a loss of time and money for the injured employee, and at worst, a total preclusion due to the statute of limitations.

The practical consequences of the doctrine that state and federal jurisdictions were mutually exclusive was obviously intolerable. Finally, the court in *Davis v. Department of Labor and Industries* suggested that rather than mutual exclusivity, there existed an area of overlapping jurisdiction, which Justice Black characterized as "a twilight zone in which the employees must have their rights determined case by case."

The effect of *Davis* was to give those employees in the "maritime but local" category the option of proceeding under either the state's workmen's compensation statute or the federal Act. This concurrent

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69. "The 'may not validly be provided by state law' limitation in LHWCA § 903(a) was generally—indeed, universally—taken to have built the Garcia-Rohde 'maritime, but local' category into the Act's coverage." GILMORE & BLACK, supra note 5, § 6-49, at 419.
70. 317 U.S. 249 (1942).
71. Id. at 256.
state and federal jurisdiction that existed for certain injuries allowed employee freedom to elect the preferred remedy.\textsuperscript{73}

At the time the Act was passed it was viewed as a substitute for state workmen's compensation acts and accordingly contained the standard language of such legislation that the employer's liability was to be "exclusive and in place of all other liability."\textsuperscript{74} Despite this language, the Supreme Court in 1946 allowed a harbor worker who was injured aboard ship to bring a suit in admiralty against the shipowner based on an unseaworthiness claim.\textsuperscript{75} An unseaworthiness cause of action was originally devised for seamen and included elements of no fault and unlimited liability. Longshoremen were granted this cause of action against shipowners on the theory that since they performed tasks traditionally engaged in by seamen, they should be afforded the remedies that all seamen had in the event of injury.\textsuperscript{76} Third party indemnification was allowed in \textit{Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.},\textsuperscript{77} whereby shipowners collected from stevedores. Thus, circular suits akin to three-party donnybrooks became a standard feature of longshoremen's unseaworthiness claims.\textsuperscript{78}

In 1948 the Admiralty Extension Act\textsuperscript{79} was enacted to alleviate some of the inequity created by the \textit{Jensen} doctrine. This Act granted admiralty jurisdiction to those injuries to persons or property on land that were caused by vessels. In this fashion, the unseaworthiness doctrine as well as the Longshoremen's Act marched ashore though only in a limited fashion.\textsuperscript{80} After some wavering, the Supreme Court took a narrow approach to the interpretation of the Admiralty Extension Act; it demanded a clearer congressional mandate before the doctrine could be liberally applied to all longshoremen injured while engaged in the

\begin{footnotes}
\item[73.] See Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962). See also 529 F.2d at 1085 n.2.
\item[74.] 33 U.S.C. § 905(a) (1970).
\item[75.] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).
\item[76.] Id. at 96.
\item[77.] 350 U.S. 124 (1956).
\item[78.] "By the late 1960's further elaborations of the Sieracki-Ryan sequence had led to the result that the longshoreman's employer had become, despite the exclusive liability provision of LHCA § 905 (or the corresponding provision of a state compensation act), ultimately liable for full damages in connection with injuries to his employees." GILMORE & BLACK, 6-53 supra note 5, § 6-53, at 437.
\item[79.] 46 U.S.C. § 740 (1970). The Act provides: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to persons or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."
\end{footnotes}
loading process.\textsuperscript{81}

Congressional inertia in increasing benefits under the Act and liberal awards in unseaworthiness claims encouraged litigants to sue in admiralty rather than go the compensation route. The resulting spiral in costs caused employers in the industry to clamor for relief.\textsuperscript{82} The rush to the courthouse also caused at least one federal district court to complain that unseaworthiness suits were becoming a serious problem because of their number.\textsuperscript{83}

The short, sad history of the pre-amendment case law indicates the problems that overwhelmed the courts in applying the original Longshoremen's and Harbor Workers' Compensation Act. The amendments can be seen as a direct response to this history.\textsuperscript{84} Thus, the most important change is a modernization in benefits and an elimination of unseaworthiness claims for injured longshoremen.\textsuperscript{85} The other significant innovation is the extension of coverage shoreward.

The majority in \textit{I.T.O.} professed to do neither more nor less than the committee reports would allow\textsuperscript{86} and concluded that Congress intended to extend coverage for employees engaged in loading (or unloading) from last (or first) point of rest.\textsuperscript{87} The dissent relied on an interpretation of the Act itself,\textsuperscript{88} but even after examining the reports it concluded that an expansive theory of coverage was required by the statute.\textsuperscript{89}

As the first appellate interpretation of the Act's coverage provisions as applied to shoreside employees, the decision is one of great importance. Virtually every circuit is considering appeals to Benefits Review Board decisions.\textsuperscript{90} The \textit{I.T.O.} decision presents two approaches to the question and differing answers to the problem.

\textsuperscript{82} Thus, an employer representative stated: "When insurance costs amount to 40\% of a company's payroll, it is elementary that something is radically wrong and that corrective action is mandatory." \textit{Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 86 (1972).}
\textsuperscript{84} See House Report, \textit{supra} note 23, at 1.
\textsuperscript{86} 529 F.2d at 1088.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} at 1094 (dissenting opinion).
\textsuperscript{89} \textit{Id.} at 1095.
\textsuperscript{90} \textit{Stockman v. John T. Clark & Son}, 2 BRBS 99 (July 30, 1975), \textit{appeal
Those who subscribe to a risk distribution theory might applaud the majority result since the nearer to the water the employees are working the more they are exposed to peculiarly "maritime" risks, which historically are protected under federal law. Conversely, further inland, the risks appear to be similar to those faced by any other warehouse employee, and accordingly should fall under typical state workmen's compensation statutes. Undoubtedly, this risk analysis would offer small solace to an injured employee, for injury or death is equally tragic on either side of the point of rest.

Employers will undoubtedly be relieved to discover that under I.T.O. the number of employees covered by the Act will be far fewer than that reached by the Benefits Review Board’s interpretation of the Act. The effect of this holding will be to lessen the amount of employee-employer contribution necessary to sustain workmen's compensation protection since state workmen's compensation statutes offer lower benefits than the Longshoremen's Act.

The Fourth Circuit's interpretation of coverage will also avoid some issues that a more liberal construction would encounter. Specifically:

- Johns v. Sea-Land Service, Inc., No. 75-1360 (1st Cir., filed Sept. 24, 1975);
- Richardson v. Great Lakes Storage & Contracting Co., No. 75-2039 (3d Cir., filed Aug. 25, 1975);
- Skipper v. Jacksonville Shipyards, Inc., No. 75-2833 (5th Cir., filed July 11, 1975);
- Powell v. Cargill, Inc., No. 75-503 (May 30, 1975);
- Richardson v. Great Lakes Storage & Contracting Co., No. 75-2565 (9th Cir., filed July 28, 1975);
- Nulty v. Halter Marine Fabricators, Inc., No. 75-437 (May 2, 1975);
- Ford v. P.C. Pfeiffer Co., No. 75-367 (March 21, 1975);
- Kelley v. Handcor, Inc., No. 75-319 (Feb. 28, 1975);
- Perdue v. Jacksonville Shipyards, Inc., No. 75-297 (Jan. 31, 1975);
- Herron v. Brady-Hamilton Stevedore Co., No. 75-273 (Jan. 23, 1974); Gilmore v. Weyerhaeuser Co., No. 75-1538 (9th Cir., filed Mar. 7, 1975);

In Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), Justice Douglas argues in his dissent that "because loading and unloading of vessels are abnormally dangerous such risks ought to be placed . . . upon the shipowners . . . ." Id. at 218. He later states: "Statistical evidence suggests that the great bulk of high-risk maritime activity occurs on the ship and the adjoining pier." Id. at 225. See generally Comment, Risk Distribution and Seaworthiness, 75 YALE L.J. 1174 (1966).

The Chairperson of the Benefits Review Board has stated that "[t]he 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act had such far reaching implications in the areas of increased jurisdiction or coverage, benefits and procedure that, even today, we have not been able to assess their full effects." R. Washington, The Benefits Review Board and Its Role in the New Appellate Process Under the Longshoremen's and Harbor Workers' Compensation Act and Its 1972 Amendments, 5 BRBS 29, 34 (Rel. 30, March 1976).
ic ally, when is an employee's relationship with the overall loading and unloading process so tenuous as to preclude coverage?

On the whole, however, the point of rest doctrine used in I.T.O. creates more problems than it solves. Automation has dramatically changed the workplace at the waterfront: \(93\) "[w]ith the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore."\(^{94}\) The Court's point of rest doctrine will have the effect of excluding from coverage under the Longshoremen's Act large numbers of employees who perform necessary and integral tasks in the overall loading and unloading process. Thus, the following employees will be precluded from obtaining relief under the Act: "some checkers, some hustler drivers, some tractor drivers, all members of container stuffing and stripping gangs, and other terminal labor all of whom are longshoremen and all of whom are hired through the union hiring hall to participate together in the integrated process of the movement of cargo across the water-front terminal."\(^{95}\) This result appears to clash with the stated congressional policy that compensation should "not depend on the fortuitous circumstance of whether the injury occurred on land or over the water."\(^{96}\)

One of the most difficult problems with the majority's point of rest theory is that there is no particular place where cargo is immediately put at rest. Wherever it touches the ground it "rests" though only for an instant. The point of rest will vary from day to day and from port to port, depending on the type of cargo, the sophistication of available cargo-handling facilities and even the whim of the employer.\(^{97}\) Employees have cause for suspicion when the limits of their federal coverage, determined by the point of rest, are a matter of managerial discretion. Ever shifting and amorphous in character, the exact point of rest is bound to be a serious source of dispute. Rather than a guide for administration of the Act it will be a starting point for litigation since no

\(^{93}\) Containerization saw the historical locus of longshore work moved further inland on the waterfront in order to provide for huge equipment and parking areas to accommodate containers. . . . It is through the use of containers that the complete turnaround time for a ship in port has been reduced from 8 days to 36-48 hours." Brief for International Longshoremen's Association as Amicus Curiae at 11, I.T.O. Corp. v. Adkins, 529 F.2d 1080 (4th Cir. 1975).

\(^{94}\) House Report, supra note 23, at 10.

\(^{95}\) Brief for Director, Office of Workers' Compensation Programs at 60-61, I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975).

\(^{96}\) House Report, supra note 23, at 10.

\(^{97}\) 529 F.2d at 1096 (dissenting opinion).
one can be certain of the dividing line between coverage and noncoverage. The Jensen line was undoubtedly too rigid and mechanical, but the point of rest doctrine suffers from being so flexible, uncertain and elusive that it borders on fiction. 98

Additionally, the point of rest theory is inadequate in that it has the effect of erecting another “situs” requirement for coverage. 99 The status of maritime employment is ascertained by determining the location of the employee’s work, not the nature of his duties. The point of rest doctrine “means that workers performing the same function, handling the same cargo, will be treated differently depending on where they work, even though they are all working on the premises of a terminal conceded to be within the Act’s definition of ‘navigable waters’.” 100 Under this anomalous result there will be times when employees moving the same cargo will be treated differently, though both were injured in the same manner and in similar stages of the loading and unloading process. 101

Courts faced with the task of interpreting the 1972 amendments would do well to keep in mind the jurisdictional problems that bedeviled the Act in earlier years. A modern compensation system loses its efficacy to the extent that coverage is uncertain and conducive to costly and time-consuming litigation. The court’s resolution of the status issue creates in effect a second situs requirement for coverage. The point of rest theory advanced by the court draws an arbitrary line around some longshoremen while excluding others on the basis that the cargo movement past this line is not sufficiently maritime in nature. This is a fiction that can not be fairly found in either the statute or the committee reports. The report so heavily relied on by the majority is singularly

98. Judge Craven argues that “[t]he legislative history standing alone cannot support the majority position. At best, the House Report matches its own ambiguity against that of the statute. The majority opinion makes sense only when the legislative history is paired with the ‘point of rest’ theory, a concept which appears nowhere in the legislative history or the statute, and one which, I predict, will confound and perplex this court for years to come.” 529 F.2d at 1095 (dissenting opinion).
99. Id. at 1096.
100. Id. at 1097.
101. To illustrate this anomaly, imagine a longshoreman operating a forklift transporting cargo from one point on the terminal to make room for recently arriving cargo which is being placed at its immediate point of rest after being unloaded from a ship. If he loses his brakes and collides with another forklift operator, the two employees would receive differing benefits by virtue of their being covered by different compensation schemes. Despite the fact that they were engaged in the same work (forklift operation) and exposed to similar risks (in this case, collision), they would not be treated equally because at the time of injury they were assigned to tasks on different sides of the “point of rest.”
unimpressive as a guidepost to statutory meaning. The crucial language cited by the court is capable of differing interpretations. A leading commentator, in rejecting the committee reports, explains that "as essays in statutory construction, they do not commend themselves." In contrast to its indulgent attitude towards the ambiguities that abound in the committee report, the court exhibited an unnecessarily rigid approach to the statutory language itself. Maritime employment includes those tasks that take place over navigable waters. The coverage provisions can be fairly read to encompass all employment-related injuries that occur within the Act’s territorial limits. At the very least, maritime employment must include all employees engaged in the overall process of loading and unloading vessels. An affirmation of the Benefits Review Board in these three cases would come closer to accomplishing the congressional intention of creating a modern, fair and workable longshoremen's compensation scheme.

Brian A. Powers

Civil Procedure—Cutts v. Casey Extended to Summary Judgment

[PROLOGUE

As this Note went to press, the Supreme Court of North Carolina held in Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976), that summary judgment may be granted for the party with the trial burden of proof even when he carries that burden, at least in part, with his own affidavits. Cutts v. Casey was expressly rejected as not controlling since it involved a directed verdict motion upon conflicting evidence on a strenuously contested issue of fact.

In an excellent analysis that appears to adopt the federal construction, Chief Justice Sharp concluded that a movant with the trial burden of proof is entitled to summary judgment on the basis of his own affidavits when: (1) there are only latent doubts concerning the credibility of his affidavits; (2) the non-movant has failed to introduce any materials which support his opposition to the motion or which point to specific areas of contradiction or impeachment in the movant's materials and the non-movant has failed to utilize rule 56(f); and (3) summary judgment is otherwise appropriate—

102. Gilmore & Black, supra note 5, § 6-51, at 450.