

REVERSE the district court's grant of summary judgment for the tugboat operator and
REMAND the case with instructions to enter partial summary judgment for the seaman.

REVERSED AND REMANDED.

Dennis M. O'Bryan, O'Bryan Baun Karamanian, Birmingham, MI, *for*
Plaintiff-Appellant.

John J. Walsh, Freehill Hogan & Mahar LLP, New York, NY, *for*
Defendant-Appellee.

HALL, *Circuit Judge:*

Plaintiff-Appellant Richard Messier, a seaman, contracted lymphoma and sued his former employer, Defendant-Appellee Bouchard Transportation Co., Inc. ("Bouchard"), seeking maintenance and cure.¹ Undisputed evidence establishes that Messier had lymphoma during his maritime service. But it is also undisputed the disease did not present any symptoms at all until *after* his service. After concluding Messier's lymphoma did not "manifest" itself during his service, the district court (McMahon, J.) granted summary judgment for Bouchard.

The first presentation of symptoms, however, is not the touchstone for maintenance and cure. If a seaman's injury or illness occurs during his service, he is entitled to maintenance and cure regardless of when he starts to show symptoms.

¹ He also asserted Jones Act and unseaworthiness claims but those claims are not before us on appeal.

Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment for Bouchard and remand the case with instructions to enter partial summary judgment for Messier.

I. Background

This case's facts are not materially in dispute.² Messier, a career tugboat seaman, was hired by Bouchard in March 2004. In September 2005, he was assigned to work on a Bouchard vessel called the tug Evening Mist. He served at least two three-week "hitches" between September and October 2005. Messier claims that on the evening of October 23, 2005, while in service, he fell climbing down a ladder, and suffered back pain. He sought medical care, and was diagnosed with a "probable back sprain."

Messier's back injury was apparently minor, and the pain associated with it quickly subsided. But the resulting medical examinations revealed a much more serious problem. During the course of Messier's examination, his doctor had ordered routine blood tests, which showed an elevated level of creatinine in Messier's blood. For a week Messier's creatinine levels rose dramatically, and his doctor sent him to the emergency

² Bouchard argues on appeal, as it did below, that Messier's doctor's testimony about when Messier contracted lymphoma "should not be considered" because the doctor "furnished no basis for the reliability of that opinion." However, as the district court properly held, Bouchard does not offer any contrary evidence, and merely makes the conclusory statement that the doctor's testimony is not reliable. For the purpose of summary judgment, therefore, the doctor's testimony that Messier's lymphoma "existed for at least several months prior to my January 13, 2006[,] report, which would include September/October 2005," is unrebutted and defines the facts of the case. All other facts are undisputed, and our description draws principally from the District Court's November 22, 2010, order granting summary judgment. See *Pilgrim v. Luther*, 571 F.3d 201, 203 (2d Cir. 2009).

room on November 4, 2005, to be treated for renal failure. The symptoms subsided and Messier was released, but doctors performed more tests, trying to discover why his kidneys had failed. In late December 2005, two months after his service on the Evening Mist ended, Messier was diagnosed with B-cell lymphoma. He underwent treatment, and did not return to work until October 2006.

Messier filed this complaint in federal district court in November 2008, asserting claims for negligence under the Jones Act, and for unseaworthiness and maintenance and cure under general maritime law. The parties cross-moved for summary judgment on maintenance and cure after Messier dropped his other claims. Although the district court concluded that, for the purposes of summary judgment, Messier's lymphoma existed while he was employed on the Evening Mist, it held that Messier was not entitled to maintenance and cure as a matter of law because his lymphoma did not "manifest" itself, i.e., did not present symptoms, while Messier was in service of the ship. Accordingly, the district court granted Bouchard's motion for summary judgment and dismissed the case.³

Messier timely appeals.

II. Discussion

A. Standard of Review

³ The district court rejected on factual grounds Messier's alternative theory—that he was entitled to maintenance and cure because the cancer manifested itself while he was otherwise receiving maintenance and cure.

We review an order granting summary judgment de novo, *Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir. 2011), applying the same standard as the district court, see *Breeden v. Kirkpatrick & Lockhart LLP (In re Bennett Funding Group, Inc.)*, 336 F.3d 94, 99 (2d Cir. 2003). Summary judgment is appropriate only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We “examin[e] the evidence in the light most favorable to, and draw[] all inferences in favor of, the non-movant.” *Sheppard v. Beerman*, 317 F.3d 351, 354 (2d Cir. 2003).

B. Maintenance and Cure

“A claim for maintenance and cure concerns the vessel owner’s obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.” *Lewis v. Lewis & Clark Marine, Inc.*, 531 US 438, 441 (2001). The doctrine entitles an injured seaman to three distinct remedies—maintenance, cure, and wages. See *Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 315-16 (2d Cir. 1990). “Maintenance” compensates the injured seaman for food and lodging expenses during his medical treatment. *Id.* at 316. “Cure” refers to the reasonable medical expenses incurred in the treatment of the seaman’s condition. See *Reardon v. Cal. Tanker Co.*, 260 F.2d 369, 371-72 (2d Cir. 1958). And lost wages are provided in addition to maintenance, on the rationale that “maintenance compensates the injured seaman for food and lodging, which the seaman otherwise receives free while on the ship.” *Rodriguez Alvarez*, 898 F.2d at 316.

"The obligation to provide maintenance and cure payments," however, "does not furnish the seaman with a source of lifetime or long-term disability income." Robert Force, Federal Judicial Center, *Admiralty and Maritime Law* 89 (2004). A seaman is entitled to maintenance and cure only "until he reaches maximum medical recovery." *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962). Put another way, "maintenance and cure continues until such time as the incapacity is declared to be permanent." *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975) (quotation marks omitted). "However, where a seaman has reached the point of maximum medical cure and maintenance and cure payments have been discontinued, the seaman may nonetheless reinstitute a demand for maintenance and cure where subsequent new curative medical treatments become available." Force, *supra*, at 90; *see also Farrell v. United States*, 336 U.S. 511, 519 (1949).

Maintenance and cure is an "ancient duty," *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 527 (1938), which traces its origin to medieval sea codes, "and is undoubtedly of earlier origin;" 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-28 (5th ed. 2011). *See generally* John B. Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 Tul. L. Rev. 1046, 1046 (1981) (describing how the doctrine was codified as early as 1338 in the Black Book of the Admiralty). The duty "arises from the contract of employment" and "does not rest upon negligence or culpability on the part of the owner or master." *Taylor*, 303 U.S. at 527. In that respect,

maintenance and cure has been called "a kind of nonstatutory workmen's compensation." *Weiss v. Cent. R.R. Co. of N.J.*, 235 F.2d 309, 311 (2d Cir. 1956).

The analogy to workers' compensation, however, can be misleading, because maintenance and cure is a far more expansive remedy. First, although it is limited to "the seaman who becomes ill or is injured *while in the service of the ship*," *Vella*, 421 U.S. at 3 (emphasis added), it is not "restricted to those cases where the seaman's employment is the cause of the injury or illness," *Taylor*, 303 U.S. at 527. "[T]he obligation can arise out of a medical condition such as a heart problem, a prior illness that recurs during the seaman's employment, or an injury suffered on shore." Schoenbaum, *supra*, at § 6-28. Second, the doctrine is "so broad" that "negligence or acts short of culpable misconduct on the seaman's part will not relieve the shipowner of the responsibility." *Vella*, 421 U.S. at 4 (alterations and quotation marks omitted). Third, the doctrine may apply even if a seaman is injured or falls ill off-duty—for example, while on shore leave, *see Warren v. United States*, 340 U.S. 523, 530 (1951)—so long as the seaman is "in the service of the ship," which means he is "generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders." *Farrell*, 336 U.S. at 516 (quotation marks omitted). Fourth, a seaman may be entitled to maintenance and cure even for a preexisting medical condition that recurs or becomes aggravated during his service. *See Sammon v. Cent. Gulf S.S. Corp.*, 442 F.2d 1028, 1029 (2d Cir. 1971); *compare Brahms v. Moore-McCormack Lines, Inc.*, 133 F. Supp. 283, 286 (S.D.N.Y. 1955) (denying maintenance and cure when seaman submitted evidence showing his injury preexisted his

service and recurred afterward, but did not submit any evidence showing that illness existed during his service).

The policy underlying a broad maintenance and cure doctrine is "the almost paternalistic duty" admiralty law imposes on a shipowner toward the crew. *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1530 (11th Cir. 1990). As Justice Story famously explained:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour [sic]. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour [sic] might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. . . . On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.

Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047). The Supreme Court relied on Justice Story's "classic passage" more than a hundred years later to lay out the three primary justifications for maintenance and cure: (1) "[t]he protection of seamen," (2) "the inducement to masters and owners to protect the safety and health of seamen while in service," and (3) "the maintenance of a merchant marine for the

commercial service and maritime defense of the nation by inducing [sea]men to accept employment in an arduous and perilous service.” *Taylor*, 303 U.S. at 528.

No matter how the doctrine is formulated, one thing is clear—the duty of maintenance and cure exists for the benefit of seamen. Accordingly, the Supreme Court instructs us to be “liberal in interpreting this duty for the benefit and protection of seamen who are [the admiralty courts’] wards.” *Vaughan*, 369 U.S. at 531-32 (quotation marks omitted). A “shipowner’s liability for maintenance and cure [is] among the most pervasive of all,” and is “not to be defeated by restrictive distinctions nor narrowly confined.” *Id.* at 532 (quotation marks omitted). Thus, “[w]hen there are ambiguities or doubts, they are resolved in favor of the seaman.” *Id.*; see also *Farrell*, 336 U.S. at 516 (“It has been the merit of the seaman’s right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations.”).

C. “Manifestation” of an Asymptomatic Illness

Keeping the foregoing principles in mind, this case’s major question is easy to frame: whether a seaman may obtain maintenance and cure for an injury that occurs during his service of the ship, but does not present symptoms until his service is over. And though this question appears to be a matter of first impression among the federal appeals courts, its answer is straightforward. The only evidence submitted by either party

establishes that Messier's illness occurred during his service. He therefore is entitled to maintenance and cure. The district court erred in concluding otherwise.

1. *The "Occurrence Rule"*

The rule of maintenance and cure is simple and broad: a seaman is entitled to maintenance and cure for *any* injury or illness that occurs or becomes aggravated while he is serving the ship. *Vaughan*, 369 U.S. at 531 ("Maintenance and cure is designed to provide a seaman with food and lodging when he *becomes sick or injured* in the ship's service." (emphasis added)); *Rodriguez Alvarez*, 898 F.2d at 314 ("A seaman is entitled to look to his ship operator for maintenance and cure following any injury *incurred* while in the ship operator's employ." (emphasis added)). It does not matter whether he is injured because of his own negligence. *Vella*, 421 F.3d at 4. It does not matter whether the injury or illness was related to the seaman's employment. *Taylor*, 303 U.S. at 527. It does not even matter, absent active concealment, if the illness or injury is merely an aggravation or recurrence of a preexisting condition. *See Sammon*, 442 F.2d at 1029. This well-established rule does not permit an exception for asymptomatic diseases—so long as the illness was present during the seaman's service, he is entitled to maintenance and cure. For the sake of convenience, we will call this rule the "occurrence rule."

Asymptomatic injuries have never been considered by any federal appeals court. The lone district court to have considered the matter applied the occurrence rule. In *Leonard v. United States (In re Petition of the United States)*, 303 F. Supp. 1282 (E.D.N.C. 1969), *aff'd per curiam*, 432 F.2d 1357 (4th Cir. 1970), a seaman suffered

minor injuries jumping overboard to escape a shipboard explosion. *Id.* at 1309-11. A few weeks later, “complaining of a cough, nervousness and insomnia,” he saw a doctor, and was diagnosed with lung cancer. *Id.* at 1309-10. He died from lung cancer nine weeks after the ship explosion. *Id.* at 1309. All the medical experts involved in the case agreed that the seaman had a malignant cancer in his left lung prior to the shipboard disaster. *Id.* at 1310. Because the seaman “[o]bviously . . . had the malignancy while aboard the [ship],” his estate’s claim for maintenance and cure was “[c]learly . . . valid even though the lung cancer may not have manifested itself while in the service of the ship.” *Id.* at 1311.

In the present case, the only evidence submitted at summary judgment establishes Messier had lymphoma during his maritime service. And the Supreme Court has instructed us to resolve “ambiguities or doubts . . . in favor of the seaman.” *Vaughan*, 369 U.S. at 532. Under the occurrence rule, Messier is therefore entitled to maintenance and cure as a matter of law.

2. *The District Court’s “Manifestation Rule”*

The district court in this case correctly recognized the general rule—in our nomenclature the occurrence rule—whereby a seaman is entitled to maintenance and cure for any injury or illness that “occur[s], become[s] aggravated, or manifest[s] itself while the seaman is in the service of the ship.” *Messier v. Bouchard Transp.*, 756 F. Supp. 2d 475, 481 (S.D.N.Y. 2010) (citing *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943) (quotation marks omitted)). But the court then proceeded to create an exception

to that general rule, holding that an injury must not only occur, but also “manifest,” i.e., show symptoms, during a seaman’s service.⁴ *Id.* at 489. Neither case law nor policy considerations support this formulation.

a. Case Law

The “manifestation” of symptoms has never been the touchstone for a seaman’s entitlement to maintenance and cure. The actual rule is much simpler—maintenance and cure covers any injury or illness that *occurs* while in the service of the ship. All that matters is when the injury occurred, not when it started to present symptoms.

In reaching a different conclusion, the district court was misled by imprecise language from this court. Several years ago, we stated that “[a] seaman whose illness or injury *manifests* after conclusion of his or her employment with the shipowner is generally not entitled to recover for maintenance and cure absent convincing proof of causal connection between the injury or illness and the seaman’s service.” *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 52 (2d Cir. 2004) (quotation marks omitted and emphasis added).

Our language notwithstanding, it is evident for two reasons that *Wills* did not create a new manifestation requirement. The district court appreciated the first one, acknowledging that the relevant passage from *Wills* is dicta. *See Messier*, 756 F. Supp.

⁴ In so holding, the district court effectively concluded maintenance and cure is available only for an injury that occurs or becomes aggravated *and* manifests itself while the seaman is in the service of the ship, implicitly contradicting its earlier statement that an injury or illness must occur *or* manifest itself during service, *see Messier*, 756 F. Supp. 2d at 481.

2d at 482. In *Wills*, a seaman died of cancer, which was not diagnosed until his maritime service had ended. 379 F.3d at 37-38. The only evidence the seaman's estate presented about the timing of the onset of his cancer was a fellow seaman's testimony that the decedent had, during his employment, "complained to me on several occasions of symptoms he was experiencing." *Id.* at 53 (quotation marks omitted). Repeating the familiar rule that "the no-fault obligation of shipowners to provide maintenance and cure extends only to a seaman who becomes ill or injured while 'in the service of the ship,'" the *Wills* panel held simply that this sole piece of evidence was not enough—the fellow seaman "lack[ed] the medical training or expertise necessary to conclude reliably that decedent's squamous cell carcinoma presented itself while decedent was employed by defendants or was caused by exposure to toxic emissions while in defendants' employ." *Id.* (quoting *Aguilar*, 318 U.S. at 731-32). Thus, given the clear holding pursuant to which the *Wills* claim was dismissed for lack of evidence the illness occurred or presented during the employment period at all, any additional discussion in *Wills* regarding the timing of an injury's manifestation is dicta.⁵

Second, it is clear from the *Wills* opinion itself that its discussion of maintenance and cure was describing the traditional occurrence rule and not, as the district court believed, creating a new manifestation rule. Because *Wills* turned on the fact that the seaman's estate failed to provide evidence that his cancer began during his service or was

⁵ Perhaps recognizing that fact, no court (other than the district court in this case) has ever relied on *Wills* to create a "manifestation" exception to the general occurrence rule.

caused by his service, *see* 379 F.3d at 52-53, the case is best read as a straightforward application of the traditional occurrence rule in which the word “manifests” was used as a synonym for the word “occurs.” Several factors lead us to this conclusion.

First, in the paragraph after its discussion of “manifestation,” the *Wills* opinion describes the test for maintenance and cure in a different way, holding that there was no evidence the seaman’s cancer “*presented* itself” during his service. 379 F.3d at 53 (emphasis added). The *Wills* panel apparently did not consider manifestation a new, different phase of a preexisting disease, but rather the same event that has always triggered a shipowner’s liability for maintenance and cure—the occurrence of the disease.

That is how one of the few district courts to interpret *Wills* has read the case. *See Lovos v. Ocean Fresh Sea Clam, Ltd.*, No. 08-cv-1167, 2010 WL 5665035, at *3 (E.D.N.Y. Dec. 21, 2010) (in a case with conflicting testimony regarding whether the seaman had been injured during his service by a falling hose, or after his service through some other cause, citing *Wills* to illustrate the difference between a seaman who “becomes ill or injured while in the service of the ship” with one, as in *Wills*, “whose illness manifests after conclusion of his or her employment” (emphasis and quotation marks omitted)).

Additionally supporting the idea that *Wills* did not announce a new rule are the three cases *Wills* relied on when discussing manifestation. 379 F.3d at 52-53 (citing *Brahms*, 133 F. Supp. at 286—which in turn cites *Miller v. Lykes Bros.-Ripley S.S. Co.*, 98 F.2d 185, 186 (5th Cir. 1938)—and *Capurro v. The All Am.*, 106 F. Supp. 693, 694 (E.D.N.Y. 1952)). None of the cases *Wills* cites involved an injury that occurred during a

seaman's service and became symptomatic later. In *Brahms*, a seaman was denied maintenance and cure for a "psychic trauma" that pre-existed his service, and reoccurred after his service, because there was "no proof" the trauma existed *during* his service. 133 F. Supp. at 286.⁶ In *Miller*, the Fifth Circuit held that a seaman's "claim for maintenance has no basis in the absence of a showing that the [complained-of illness] *began* while [the seaman] was in the service of the [ship]." 98 F.2d at 186 (emphasis added). And in *Capurro*, the district court denied maintenance and cure for an injury which "existed for many years prior to [the seaman's] employment aboard the vessel, and which did not arise out of, or become aggravated by his service aboard the vessel." 106 F. Supp. at 694. In sum, *Brahms*, *Miller*, and *Capurro* all dealt with the classic situation in which a seaman cannot prove his injury occurred or was aggravated during his service. Those cases did not create a new rule. By extension, in citing those cases, *Wills* too was describing the traditional rule. If *Wills* had wanted to create a new supplementary manifestation requirement, it would not have relied on *Brahms*, *Miller*, and *Capurro*.⁷

⁶ Importantly, the district court in *Brahms* contrasted the matter before it with cases in which "the pre-existing disease manifested itself and required treatment while plaintiff was still serving on defendant's vessel." 133 F. Supp. at 285.

⁷ The district court similarly misconstrued *Taylor* as "plainly articul[at]ing" that a disease must "manifest—i.e., must exhibit itself, or show symptoms—during the period of service to the ship." See *Messier*, 756 F. Supp. 2d at 489 (quotation marks omitted). That is a much too broad reading of *Taylor*, which did not impart a special meaning to "manifestation." See 303 U.S. at 530. As in *Wills*, see 379 F.3d at 53, *Taylor* was clearly using a disease's "manifestation" as a synonym for its first occurrence. 303 U.S. at 527 (discussing shipowners' duty to provide maintenance and cure "for seamen injured or falling ill while in service").

b. Purpose of Maintenance and Cure

The district court also thought that limiting maintenance and cure to injuries and illnesses showing symptoms during a seaman's service "has considerable force as a policy matter." *Messier*, 756 F. Supp. 2d at 486. The district court identified three problems as a matter of policy that would be occasioned by the occurrence rule that plaintiff would have us apply here. First, it suggested a historical-technological problem—maintenance and cure predates modern medicine, and "it strains the bounds of reason to conclude that a seaman who became ill during or after a voyage in 1492 could have recovered maintenance and cure from a prior shipowner on the ground that the disease was lurking in his bloodstream in 1489." *Id.* Second, the court concluded (without analysis) that the occurrence rule would "not further any of the policies behind maintenance and cure" the Supreme Court identified in *Taylor*. *Messier*, 756 F. Supp. 2d at 487; see *Taylor*, 303 U.S. at 528. Third, the district court worried about the practical effect of the occurrence rule—that it would "inevitably lead to exceedingly complicated litigation over when a seaman first contracted a particular slow-growing disease." *Messier*, 756 F. Supp. 2d at 487. According to the district court, such a result would run contrary to the Supreme Court's description of maintenance and cure as "so inclusive as to be relatively simple, and [able to] be understood and administered without technical considerations." See *Farrell*, 336 U.S. at 516. We appreciate the district court's caution, but we respectfully disagree.

First, there is no reason to limit maintenance and cure to the medical science of centuries ago. Even if “[t]he concept that a slow-growing, symptomless disease might lurk inside a human body for years or decades was undreamed of” in the Fifteenth Century, *Messier*, 756 F. Supp. 2d at 486, it is a well-known reality today. And rather than fixing the doctrine in medicine of ages past, admiralty courts have viewed maintenance and cure as a flexible doctrine, and have allowed it to evolve with new technology. See, e.g., *Haskell v. Socony Mobil Oil Co.*, 237 F.2d 707, 709 (1st Cir. 1956) (a seaman has right to cure “until medical science can do no more”); *Force*, *supra*, at 90 (a seaman who has reached the point of maximum medical cure “may nonetheless reinstitute a demand for maintenance and cure where subsequent new curative medical treatments become available”); see also *Williamson v. W.-Pac. Dredging Corp.*, 304 F. Supp. 509, 515 (D. Or. 1969) (admitting that granting maintenance and cure on the facts before the court “would be going somewhat outside the perimeter of established case law,” but recognizing “the flexibility of the ever[-]expanding field of admiralty to meet the standards and requirements of an ever advancing age of civilization”).

Second, the policies underlying maintenance and cure identified in *Taylor* support, rather than undercut, the occurrence rule. Clearly, a more liberal maintenance and cure rule gives more protection to seamen. See 303 U.S. at 528. The district court’s manifestation rule, on the other hand, would shift some of the burden of securing maintenance and cure to the seaman, who must be attuned to any and all physical symptoms, no matter how minor, and report them before the end of his service or else

risk forfeiting his right to maintenance and cure. By the same token, the manifestation rule would discourage, rather than induce “masters and owners to protect the safety and health of seamen while in service.” *See id.* All an owner would have to do to avoid liability is make sure a seaman was discharged before he presented symptoms. One would anticipate, for example, that a manifestation rule would reduce in-service employer-provided medical examinations, and might even induce owners to take active steps to prevent seamen from seeking medical attention to avoid creating a paper trail of symptoms. The third policy rationale recognized in *Taylor* is neutral—it is hard to imagine a seaman’s decision to “accept employment in an arduous and perilous service” turning on whether an asymptomatic injury or illness occurring during his service will be compensated. *See id.* Taken together, however, the *Taylor* policy considerations strongly suggest that applying the occurrence rule, rather than the manifestation rule, is the better way to further the policies behind maintenance and cure.

By contrast, there is merit to the district court’s third objection to the occurrence rule—that it might add complexity to many maintenance and cure actions by calling into question when, exactly, a disease first began. That is true without a doubt. But the Supreme Court has told us that a shipowner’s duty to provide maintenance and cure is “among the most pervasive of all,” and that we should not defeat it by “restrictive distinctions.” *Vaughan*, 369 U.S. at 532 (quotation marks omitted). Our sense that the rule might create “complexity” is not a reason to limit the doctrine of maintenance and cure, which the district court acknowledged is “far, far more liberal than any worker’s

compensation program.” *Messier*, 756 F. Supp. at 489. To support its view that “complexity” is something we might properly consider, the district court relied on the Supreme Court’s statement in *Farrell* that “[i]t has been the merit of the seaman’s right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations.” *Messier*, 756 F. Supp. at 487 (citing *Farrell*, 336 U.S. at 516). *Farrell* goes on to emphasize that maintenance and cure “has few exceptions or conditions to stir contentions, cause delays, and invite litigations,” and that a master “must maintain and care for even the erring and careless seaman, much as a parent would a child.” *Farrell*, 336 U.S. at 516. The most faithful application of *Farrell*, therefore, is to adopt a broad understanding of maintenance and cure, not to create “exceptions or conditions,” see *id.*, merely because of our fear of complicated litigation.

At bottom, the district court’s discomfort with the occurrence rule is, perhaps, understandable. After all, a rule imposing liability on an employer for an injury that was known neither to the employer nor the employee during the period of employment seems odd—at least outside the admiralty context. But admiralty is different, and maintenance and cure is a unique remedy. It is “broad.” *Vella*, 421 U.S. at 4. We are to be “liberal in interpreting” it “for the benefit and protection of seamen.” *Vaughan*, 369 U.S. at 531 (quotation marks omitted). We are instructed to resolve “ambiguities or doubts . . . in favor of the seaman.” *Id.* at 532. The general rule is that maintenance and cure is available for *any* injury or illness that occurs during a seaman’s service. The only way to

establish a manifestation exception is to construe the remedy narrowly rather than broadly, which the Supreme Court has explicitly told us not to do.

III. Conclusion

We reiterate the longstanding rule of maintenance and cure: a seaman is entitled to maintenance and cure for any injury or illness that occurs or becomes aggravated while he is serving the ship. Consequently, the district court's grant of summary judgment for Bouchard is **REVERSED** and the case is **REMANDED** with instructions to enter partial summary judgment for Messier as to his entitlement to maintenance and cure. The case may proceed to trial on the amount of maintenance and cure due. *See Incandela v. Am. Dredging Co.*, 659 F.2d 11, 13-14 (2d Cir. 1981).

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 29, 2013

Lyle W. Cayce
Clerk

No. 11-60057

NEW ORLEANS DEPOT SERVICES, INCORPORATED,

Petitioner

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U. S.
DEPARTMENT OF LABOR; NEW ORLEANS MARINE CONTRACTORS;
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED,

Respondents

Appeal from the Benefits Review Board
BRB No. 10-0221

Before STEWART, Chief Judge, and KING, JOLLY, DAVIS, JONES, SMITH,
DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES,
GRAVES, and HIGGINSON, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In this case, we review the determination of the Benefits Review Board ("BRB") that the claimant, Juan Zepeda, was entitled to compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), from Petitioner New Orleans Depot Services, Inc. ("NODSI").

In particular, the BRB found that the claimant's employment activities with NODSI took place in an area or location "adjoining" navigable waters

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“customarily used by an employer in loading [or] unloading . . . a vessel”¹ and therefore NODSI’s facility met the situs requirement of the Act. We conclude that because the NODSI facility where Mr. Zepeda worked did not border on navigable waters, it was not a covered situs and Mr. Zepeda is entitled to no benefits under the Act from Petitioner NODSI. We therefore vacate the award of the BRB as against NODSI and remand for further proceedings.

I. Facts

The claimant, Mr. Zepeda, filed a claim for LHWCA benefits against one of his prior employers, New Orleans Marine Contractors (“NOMC”), to recover benefits for his hearing loss due to continuous exposure to loud noises. As a defense, NOMC contended that NODSI was a subsequent maritime employer and that NODSI rather than NOMC was therefore the responsible party.² The issue then presented to the Administrative Law Judge (“ALJ”) and BRB was whether NODSI was responsible as a subsequent employer for benefits under the LHWCA. NOMC then, in effect, prosecuted Mr. Zepeda’s claim against NODSI so that NOMC would avoid its liability to him.

Following his employment with NOMC, Mr. Zepeda was employed by the Petitioner, NODSI, at its “Chef Yard” facility on the Chef Menteur Highway in New Orleans. NODSI and its employees were engaged in the repair,

¹ 33 U.S.C. § 903(a) provides:

[C]ompensation 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).

² “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.” FRANK L. MARAIST ET AL., *ADMIRALTY IN A NUTSHELL* 291 (6th ed. 2010) (citing *Avondale Indus., Inc. v. DOWCP*, 977 F.2d 186 (5th Cir. 1992)).

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maintenance, and storage of shipping containers and chassis.³ Some of the containers had been used to transport ocean cargo. NODSI had more than one facility, but the Chef Yard facility is the only facility relevant to this appeal. The Chef Yard, with access to the Chef Menteur Highway and rail transportation, can best be described as a small industrial park. The Chef Yard is located approximately 300 yards from the Intracoastal Canal and is surrounded by a carwash, a radiator shop, an automobile repair shop, a bottling company, and a company that manufactures boxes. The bottling company's facility is located between the Intracoastal Waterway and the Chef Yard.

NODSI employees worked only within NODSI's facility as they repaired or performed maintenance on containers and chassis. They had no access to the Intracoastal Canal and all of the equipment NODSI serviced was delivered to the Chef Yard by truck. Once NODSI completed repairs to the equipment, it was picked up by truck or rail, and no containers were loaded with cargo while in NODSI's custody.

II. Procedural Background

The ALJ, after conducting a hearing in this case, found that some of the containers repaired and maintained by NODSI employees had been used for marine transportation and off-loaded at the port of New Orleans. Representatives of Evergreen, NODSI's customer, also stated that at least some of the containers would be returned to service as marine containers. The ALJ concluded that the NODSI Chef Yard employees' work repairing ocean containers was "a process which was a significant maritime activity" necessary to loading and unloading cargo. In addition, the ALJ concluded that the location of the NODSI Chef Yard located some 300 yards from the Intracoastal Canal

³ A chassis is what we ordinarily consider the trailer portion of the 18-wheeler unit on which shipping containers are loaded and transported by truck.

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satisfied the situs requirement that the injury occur in an area “adjoining navigable waters.” Also, the ALJ found that the repair work and maintenance Mr. Zepeda performed on these containers was closely related to loading or unloading vessels and constituted “maritime employment” which satisfied the status test under the Act.

The BRB affirmed the ALJ’s order and a divided panel of this court affirmed the BRB. We then voted this case en banc, primarily to consider the BRB’s determination that Mr. Zepeda was injured in an area “adjoining navigable waters” so as to satisfy the Act’s situs test.

III. Standard of Review

Because the LHWCA situs inquiry requires the application of a statutory standard to case-specific facts, it is ordinarily a mixed question of law and fact. However, where, as in this case, the facts are not in dispute, “[LHWCA] coverage is an issue of statutory construction and legislative intent,” and should be reviewed as a pure question of law. See *DOWCP v. Perini North River Associates*, 459 U.S. 297, 300, 305 (1983). We therefore review the BRB’s determination of coverage under the LHWCA in this case *de novo*. *Equitable Equip. Co. v. DOWCP*, 191 F.3d 630, 631 (5th Cir. 1999) (citation omitted).

IV. Analysis

A.

Before turning to the merits of this appeal, we first consider a preliminary objection the Respondent raises. The Director argues that NODSI has waived the argument that Mr. Zepeda failed to establish that he met the situs requirement of the Act—*i.e.*, that his injury occurred in an area “adjoining navigable waters”—by failing to raise it before the BRB or the panel of this court that heard the appeal. Specifically, the Director argues that NODSI cannot

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argue that this en banc Court should adopt a new interpretation of “adjoining” when it failed to make the argument before two previous tribunals.

Generally, we do not consider issues on appeal that were not presented and argued before the lower court. *See Lampton v. Diaz*, 639 F.3d 223, 227 n.14 (5th Cir. 2011). “The waiver rule exists to prevent an appellate court from ‘[analyzing] the facts of a particular [issue] without the benefit of a full record or lower court determination.’” *Id.*⁴ In its opening brief to the panel of this court that initially heard the appeal, NODSI only challenged the functional component⁵ of the situs requirement and acknowledged that our caselaw foreclosed consideration of the geographic component.⁶ However, this is not a case in which a party has wholly ignored a major issue. The issue of LHWCA situs has been contested throughout the case’s history, with the proper application of “adjoining area” being squarely addressed by both the ALJ and the BRB. NODSI’s recognition of the fact that it was bound by this Court’s current interpretation of “adjoining” does not deprive us of the right to visit the issue.

Moreover, a well-settled discretionary exception to the waiver rule exists where a disputed issue concerns “a pure question of law.” *Texas v. United States*, 730 F.2d 339, 358 n.35 (5th Cir. 1984); *see also Atl. Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1293 (5th Cir. 1986). In this case, the ALJ, after a full hearing, resolved the factual disputes presented by the parties. At the hearing, witnesses testified about the nature of the industrial park where NODSI’s operations were conducted, the nature of NODSI’s work, and the relationship of

⁴ (Alterations in original) (quoting 19 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 205.05[1], at 205–57 (3d ed. 2011) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992))).

⁵ The injury must occur in an area “customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” *See* 33 U.S.C. § 903(a).

⁶ The injury must occur “upon the navigable waters of the United States . . . or other adjoining area.” *See* 33 U.S.C. § 903(a).

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the work to maritime activities. The evidence was undisputed that NODSI's Chef Yard is located about 300 yards from the Intracoastal Canal, and that a bottling plant is located on the tract of land between the Canal and NODSI's yard.

Because the legal issue of whether the location of the claimant's injury "adjoined" navigable waters was presented to the ALJ and the facts involving this issue were fully litigated before the ALJ, we are left with a pure question of law to decide. Moreover, every party was provided an adequate opportunity to brief and argue the issue before the en banc court. Therefore, notwithstanding NODSI's failure to challenge our governing precedent before the BRB or our panel, we exercise our discretion to decide this legal issue: whether, under these undisputed facts, claimant was injured in an area adjoining navigable waters so as to satisfy the LHWCA situs requirement. We now turn to the merits of the appeal.

B.

Before 1972, coverage under the LHWCA was provided only if the injury occurred on navigable waters. This "situs" requirement was strictly enforced.⁷ However, by its nature, loading and unloading a vessel required a longshoreman to continuously go from ship to wharf and back again, and a longshoreman might work part of the day aboard the ship and the rest of the day on the pier.⁸ Similar movement by workers from vessel to dock also occurred in vessel repair work. When Congress made extensive amendments to the Act in 1972, it expressed

⁷ See, e.g., *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971) (longshoreman injured on pier while operating cargo forklift not in covered situs); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223 (1969) (longshoremen injured on pier while attaching cargo to ship's cranes not in covered situs).

⁸ See *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272-74 (1977).

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concern about longshoremen walking in and out of coverage and, to meet this concern, broadened coverage by amending LHWCA § 903(a).⁹

Congress made another change in the 1972 amendments by adding a status requirement, thus limiting LHWCA coverage to traditional maritime occupations. This was accomplished by defining a covered “employee” 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.” 33 U.S.C. § 902(3).

The Supreme Court has made it clear that “situs” and “status” are separate, independent elements and that a claimant must establish both elements to recover benefits.¹⁰

C.

The LHWCA only extends coverage to “injur[ies] occurring upon the navigable waters of the United States (including any adjoining pier, wharf . . . or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a) (emphasis added).

Most courts addressing this issue understand that an “other adjoining area” must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be “customarily used by an employer in loading [or] unloading . . . a

⁹ Section 903 was amended, in part, to provide compensation “if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf . . . or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a) (emphasis added).

¹⁰ See *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 415–16 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73–74 (1979); see also *King v. Universal Elec. Constr.*, 799 F.2d 1073, 1073–74 (5th Cir. 1986); *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1140 (9th Cir. 2010); *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 220 (4th Cir. 1998).

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vessel").¹¹ We took this case en banc primarily to decide whether the claimant was injured in an area "adjoining" navigable waters.

In 1980, our en banc court interpreted the geographic component of situs in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc). In that case, Mr. Winchester was injured when he fell in his employer's gear room. He and others at that facility were engaged in repairing and maintaining gear used by longshoremen in loading and unloading vessels. The gear room in question was located five blocks from the gate of the nearest Houston port dock. In holding that the employee met the situs requirement and was entitled to benefits, the court stated:

Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near." "Adjoining" can mean "neighboring." To instill in the term its broader meanings is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWA. To require absolute contiguity would be to reenact the hard lines that caused longshoremen to move continually in and out of coverage.

Id. at 514 (footnotes omitted).

The *Winchester* court stressed the desirability of avoiding any hard line for defining what is "adjoining." Rather, "[t]he situs requirement compels a factual determination that cannot be hedged by the labels placed on an area." *Id.* at 513. "The best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances." *Id.* Other than these vague instructions, the court provided little guidance to other courts or future litigants on how to determine from "the circumstances" whether a claimant satisfies the

¹¹ See, e.g., *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 432 (5th Cir. 2009); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995); *Hurston v. DOWCP*, 989 F.2d 1547, 1549 (9th Cir. 1993).

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situs test. This is apparent from the court's statement: "[O]uter limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront."¹² *Id.* at 514. The court then concluded that the injured employee was within a situs protected by the LHWCA. *Id.* at 516. We have followed the *Winchester* analysis in a number of cases.¹³

Our sister circuits have taken varying positions on the interpretation of "other adjoining areas."

In *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 139 (9th Cir. 1978), an employee was injured while unloading steel plates from a truck parked at the employer's gear locker, located some 2,600 feet north of the Columbia River and outside the entrance gate of the port of Longview. The Ninth Circuit concluded:

[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.

¹² At oral argument, we learned that the port of Houston is approximately 5 miles from downtown Houston. Counsel for the Director was unable to tell us how the claimant or the employer would determine—short of trial—whether, in *Winchester*, if the injury had occurred 1 mile or 2 miles from the port of Houston, the claimant would have been injured in an area adjoining navigable waters.

¹³ See *Coastal Prod. Servs. Inc.*, 555 F.3d at 432–37; *Reynolds v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264, 272 (5th Cir. 1986), overruled on other grounds by *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 496 (2005); *Alford v. Am. Bridge Div. U.S. Steel Corp.*, 642 F.2d 807, 814 (5th Cir. 1981), vacated in part on reh'g, 655 F.2d 86.

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Id. at 141.¹⁴

In *Sea-Land Service, Inc. v. DOWCP*, 540 F.2d 629 (3d Cir. 1976), an employee was using a truck to move cargo that had been unloaded from a vessel to a building, so it could be further transported to a more permanent location. The employee was injured on a public street in an area outside the terminal that was not under the employer's control. *Id.* at 632. The court held that the restriction on coverage to an "other adjoining area" did not preclude coverage to this employee. The court found situs had been established and 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."¹⁵ *Id.* at 638.

In contrast, the Fourth Circuit has taken a much different approach—an approach that adheres more faithfully to the plain language of the statute. In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995), the facts were almost identical to the facts in the instant case. The plaintiff was a shipping container mechanic who sought to recover benefits under the Act after he was injured while repairing a container. *Id.* at 1135. His injury occurred at his employer's facility located approximately .8 miles from the closest ship terminal in an area with diverse, non-maritime commercial and residential facilities. *Id.*

¹⁴ In *Cunningham v. DOWCP*, 377 F.3d 98, 101 (1st Cir. 2004), the First Circuit considered coverage for an injury to a pipe fitter who worked at the manufacturing facility of his employer located some 3.5 miles from the employer's shipyards where pipe units were installed on ships. The court held that it had not determined a methodology for approaching the question of "adjoining area," but assumed the correctness of the Ninth Circuit's broad approach because it was clear that LHWCA coverage was foreclosed in any case. *Id.* at 105.

¹⁵ The Supreme Court, in *Northeast Marine*, criticized this opinion when it stated: "The [Third] Circuit appears to have essentially discarded the situs test, holding that only '(an) employment nexus (status) with marine activity is (necessary)' and that the situs of the maritime employee at the time of injury is irrelevant." 432 U.S. at 278 n.40 (quoting *Sea-Land Servs., Inc.*, 540 F.2d at 638) (citations omitted).

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In deciding whether the employer's container repair facility was an "adjoining area," the Fourth Circuit recognized that the Supreme Court had not defined the term, but that the Third, Fifth, and Ninth Circuits had each adopted expansive, yet differing approaches. *Id.* at 1136–37. After reviewing these cases, the *Sidwell* court stated, "Because none of these proffered tests even purports to follow the language of the statute—indeed, for the most part they all openly disavow the statutory text—we decline to adopt any of these tests." *Id.* at 1138. The court held:

The plain language of the LHWCA requires that covered situses actually "adjoin" navigable waters, not . . . that they merely be in "the general geographic proximity" of the waterfront. Because Congress did not specify a more technical definition of the word "adjoining" (if that is even possible), we must accord that word its ordinary meaning, as, incidentally, the legislative history confirms Congress intended. To be sure, dictionaries do include "neighboring" and "in the vicinity of" as possible definitions of "adjoining," but such is not the ordinary meaning of the word; rather, the ordinary meaning of "adjoin" is "to lie next to," to "be in contact with," to "abut upon," or to be "touching or bounding at some point."

Id. (footnotes omitted) (citations omitted).

The *Sidwell* court found support for its interpretation from the House Report on the 1972 amendments: "The bill also expands the coverage of this Act to cover injuries occurring in the *contiguous* dock area related to longshore and ship repair work."¹⁶

Responding to the argument that the word "adjoining" should be given a broad meaning so as to accommodate Congress's concerns about workers moving in and out of coverage, the *Sidwell* court stated:

The LHWCA was enacted to address a specific problem, and the actual language that Congress chose does just that. The problem, as we have explained, was that longshoremen loading and

¹⁶ S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 (1972) (emphasis added).

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unloading ships walked in and out of LHWCA coverage as they walked the gangplank from ship to shore. In response, Congress extended coverage to both navigable waters and "the adjoining land area," S. Rep. 92-1125, 92d Cong., 2d Sess. 13 (1972), so that the longshoremen at both ends of the gangplank would be covered equally by the LHWCA. As the Supreme Court has repeatedly stated, "Congress intended that a worker's eligibility for federal benefits would not depend upon whether he was injured while walking down a gangway or while taking his first step onto the land", *P.C. Pfeiffer*, 444 U.S. at 75; rather, coverage would extend to "the waterfront areas where the overall loading and unloading process occurs." *Northeast Marine*, 432 U.S. at 272; see also *Herb's Welding*, 470 U.S. at 423 (explaining that Congress expanded coverage to include "rather large *shoreside* areas" (emphasis added)). The definition we adopt today ensures coverage for all maritime employees injured in the waterfront areas where the loading, unloading, and repair of vessels occurs, as Congress plainly intended and as the Supreme Court has directed.

Id. at 1140.

The court made clear that its literal definition of adjoining could not be circumvented by a broad interpretation of "area."

Thus, an "other adjoining area" as to which coverage extends must be *like* a "pier," "wharf," "dry dock," "terminal," "building way," or "marine railway." Each of these enumerated "areas" is a discrete structure or facility, the very *raison d'être* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an "other area" under the statute, it must be a discrete shoreside structure or facility.

Id. at 1139 (emphasis in original) (footnote omitted).

The court also indicated that it is the parcel of land underlying the employer's facility that must adjoin navigable waters, not the particular part of that parcel upon which a claimant is injured. The court quoted our language in *Alabama Dry Dock & Shipbuilding Co. v. Kininess* to demonstrate this point:

[The back lot upon which a crane was located by which claimant was injured was somewhere] from 150 to 2,000 feet from the water's

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edge. In any event, the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding.

Id. at 1140 n.11 (alteration in original) (quoting *Ala. Dry Dock*, 554 F.2d 176, 178 (5th Cir. 1977)).

Finally, the *Sidwell* court determined that Congress further restricted the definition of "situs" by requiring the area to be: "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). An "other adjoining area" seeking coverage as an LHWCA-covered situs must therefore satisfy both a geographic and a functional component. The court criticized other circuit courts such as the Third Circuit *Sea-Land* court, which suggested that the functional component (an area customarily used for designated maritime purposes) should be dispositive of the situs inquiry. The court stated:

This language, however, is a *further* restriction upon "other adjoining areas"—implying that there are areas adjoining navigable waters that nonetheless do not meet the situs requirement because they are not customarily so used—not an implicit elimination of the requirement that the area first be adjoining navigable waters.^[17] In any event, reading the language in the manner proposed by the Director collapses the separate status and situs requirements into a single inquiry into status, in contravention of the Supreme Court's injunctions in *Herb's Welding* and *P.C. Pfeiffer* that we not read the status and situs requirements as one and the same.

Sidwell, 71 F.3d at 1139–40 n.10 (citations omitted).

¹⁷ We disagree with *Winchester's* holding that even an injury that occurred in a facility that did not border on navigable waters nevertheless satisfied the situs test if the "area" was customarily used for loading and unloading or some other designated maritime purpose. See *Winchester*, 632 F.2d at 515.

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In response to *Sidwell's* reasoning, the Director has advanced two primary arguments for avoiding the plain meaning of "adjoining." First, the Director argues that a broad definition of "adjoin" furthers the congressional goal of preventing longshoremen from walking in and out of coverage. By reading "adjoining" broadly, longshoremen would less frequently exit and enter the perimeters of LHWCA coverage. However, as the *Sidwell* court explained, Congress's primary concern was that longshoremen constantly walked the gangplank between the ship and the dock so that the worker injured on the dock was not covered under the LHWCA and his co-worker injured on the ship was covered. This loss of coverage when a longshoreman crossed the ship's gangplank was the inequity Congress sought to cure.¹⁸

Moreover, by adopting a situs requirement, Congress obviously recognized that a longshoreman could still leave and re-enter the geographic bounds of LHWCA coverage. As the Court in *Herb's Welding* stated: "[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." 470 U.S. at 426–27 (citation omitted).

The Director also argues that as a compensation statute, the LHWCA should be construed liberally in favor of coverage. See *Ne. Marine*, 432 U.S. at 268. However, the first rule of statutory construction is that we may not ignore the plain language of a statute. See *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 974 (5th Cir. 1994) ("[T]o ignore the plain language of the statute would be to substitute improperly our own policy predilections for the express intent of

¹⁸ See *P.C. Pfeiffer Co.*, 444 U.S. at 75 ("By enlarging the covered situs . . . , Congress intended that a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land."); see also *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989).

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Congress.”). The LHWCA dictates that a covered situs actually adjoin navigable waters, and we may not ignore this limitation.

V. Conclusion

For the reasons stated above, we adopt the *Sidwell* definition of “adjoining” navigable water to mean “border on” or “be contiguous with” navigable waters.¹⁹ We, therefore, overrule the contrary definition and analysis of *Winchester* and its progeny inconsistent with this opinion. We adopt this definition primarily because it is more faithful to the plain language of the statute. We are also influenced by the fact that the vague definition of “adjoining” we adopted thirty years ago in *Winchester* provides litigants and courts, in cases such as this one, with little guidance in determining whether coverage is provided by the Act.²⁰ More than perhaps any other statutory scheme, a worker’s compensation statute should be “geared toward a nonlitigious, speedy, sure resolution of the compensation claims of injured workers.” *Winchester*, 632 F.2d at 518 (Tjoflat, J., dissenting). One could hardly imagine an area where predictability is more important.

Applying the *Sidwell* definition of “adjoining” to the instant case, there is no dispute that the Chef Yard where Mr. Zepeda’s injury occurred did not adjoin navigable waters. Because the Chef Yard did not border upon and was not contiguous with navigable waters, it is not an LHWCA-covered situs.²¹

¹⁹ See also BRYAN GARNER, GARNER’S DICTIONARY OF LEGAL USAGE 25 (3d ed. 2011) (“Etymologically, *adjoining* means ‘directly abutting; contiguous’ . . .”).

²⁰ Also, as demonstrated by this case, our former vague definition of “adjoining area” makes it difficult for an employer to know whether it should purchase insurance coverage for injuries under the Act.

²¹ Because we determine that the Act’s situs requirement is not satisfied in this case, we need not address the question of whether Mr. Zepeda’s employment activities would satisfy the Act’s status requirement.

2018 WL 3344551

Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Richard Orin WILLEY, Plaintiff,

v.

ORION MARINE
CONSTRUCTION, INC., Defendant.

Case No: 8:17-cv-1216-T-36AAS

|

Signed 07/09/2018

Attorneys and Law Firms

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Kimberly Andreu Hendee, Hamilton, Miller & Birthisel LLP, Tampa, FL, for Defendant.

ORDER

Charlene Edwards Honeywell, United States District Judge

*1 This matter comes before the Court upon the Defendant Orion Marine Construction, Inc.'s Motion for Judgment on the Pleadings as to Count IV of Plaintiff's Complaint for § 905(b) Negligence (Doc. 19), and Plaintiff's response in opposition (Doc. 27). In the motion, Defendant argues that Plaintiff's claim fails the "situs test" required under the Longshore Harbor Workers' Compensation Act, and therefore it is entitled to judgment as a matter of law. Under federal law, an injury must occur on the navigable waters of the United States, which includes the "high seas," to sustain a claim under the Act. Because the "high seas" do not include foreign territorial waters, and Plaintiff alleges that his injury occurred in the Dominican Republic, the Defendant is entitled to judgment as a matter of law. The Court, having considered the motion and being fully advised in the premises, will grant Defendant Orion Marine Construction, Inc.'s Motion for Judgment on the Pleadings as to Count IV of Plaintiff's Complaint for § 905(b) Negligence.

I. Statement of Facts¹

Plaintiff, Richard Orin Willey, a United States citizen, worked for Defendant Orion Marine Construction, Inc. ("Orion"), a Florida corporation, Doc. 1 at ¶¶ 1-4. On May 30, 2014, Willey sustained injuries during his employment with Orion while he was working on the construction of a dock facility in the Dominican Republic. *Id.* at ¶¶ 3-4, 29. Willey fell while on navigable waters of the Dominican Republic when he was attempting to cross from a tug to a barge. *Id.* at ¶ 4.

On May 23, 2017, Willey filed a four-count complaint alleging various causes of action, including one for negligence under the Longshore Harbor Workers' Compensation Act, ("LHWCA" or the "Act"), 33 U.S.C. § 905(b). Doc. 1. Willey dismissed the first three counts and only the LHWCA § 905(b) claim remains. *See* Docs. 24, 26. Willey alleges that he is entitled to damages under LHWCA § 905(b) because Orion negligently operated the tug and the barge which caused his injuries. Doc. 1 at ¶¶ 29-30.

II. Legal Standard

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings. In evaluating a motion for judgment on the pleadings, a court will accept the facts in the complaint as true and view them in the light most favorable to the nonmoving party. *See Cunningham v. Dist. Attorney's Office for Escambia County*, 592 F.3d 1237, 1255 (11th Cir. 2010). "Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 965 (11th Cir. 2014). If there is a material dispute of fact, judgment on the pleadings must be denied. *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014).

III. Discussion

a. Willey's Declaration is Inappropriate for Consideration

*2 At the outset, the Court notes that Plaintiff filed the Declaration of Richard Orin Willey, (the "Declaration"), Doc. 27-1, in opposition to Orion's Motion.² Under

Federal Rule of Civil Procedure 12, “[i]f, on a motion under Rule...12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). The rule requires that “[a]ll parties...be given a reasonable opportunity to present all the material that is pertinent to the motion.” *Id.* Given that the standard for motions for judgment on the pleadings is akin to motions to dismiss, the Declaration is proper for consideration only if it meets one of the exceptions to Rule 12(d). The only applicable exception in this case would be that the Declaration is central to Willey’s claim and its authenticity is not in dispute.³ See *Esys Latin Am., Inc. v. Intel Corp.*, 925 F. Supp. 2d 1306, 1314 (S.D. Fla. 2013) (citing *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)).

Because the Court must either confine its consideration to the pleadings in its evaluation of the Motion, or convert the Motion into one for summary judgment, the Court will not consider the Declaration. It is not “central” to Willey’s claim as contemplated by Rule 12(d); instead, it is responsive to the Motion. See *id.* (declining to consider a declaration filed in opposition to a motion for judgment on the pleadings and finding that it was merely responsive to the motion as opposed to being central to the complaint). See also *Adamson v. Poorter*, No. 06-15941, 2007 WL 2900576, at *3 (11th Cir. 2007) (“A document is not central merely because it is directly responsive to a factual allegation....[T]he foundation for a defendant’s ability to introduce central documents at the motion to dismiss stage is that when a plaintiff files a complaint based on a document but fails to attach that document to the complaint, the defendant may so attach the document....”) (internal quotation marks omitted). In any event, the Declaration does not create a disputed material fact regarding Willey’s satisfaction of the situs requirement.⁴

b. Willey’s injury does not meet the Act’s situs requirement

The Act creates a comprehensive workers’ compensation scheme which holds employers liable for securing the payment of compensation to qualified maritime employees injured in the course of their employment, irrespective of fault. See *Dir., Off. of Workers’ Comp. Programs, U.S. Dept. of Lab. v. Perini N. River Associates*, 459 U.S. 297, 326 (1983); 33 U.S.C. § 904. This liability

is “exclusive and in place of all other liability of such employer to the employee.” 33 U.S.C. § 905(a). But section 905(b) of the Act authorizes certain covered employees to bring an action against the vessel as a third party if their employment injury was caused by the negligence of the vessel. *Id.* at § 905(b).

*3 A plaintiff must satisfy four elements to receive compensation under the LHWCA. *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390, 1392 (11th Cir. 1998). First, he must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaging in maritime employment. *Id.* at § 902(4). Third, the plaintiff must have been engaged in maritime employment (referred to as the “status requirement”). *Id.* at § 902(3); *Perini N. River Assocs.*, 459 U.S. at 317. Last, the injury must occur on 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 (known as the “situs” requirement). 33 U.S.C. § 903(a); *Brooker*, 133 F.3d at 1392.

After its inception, Congress broadened the Act’s coverage to extend to maritime activities occurring on land near the water. See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989). And case law has interpreted the term “navigable waters of the United States” to include the “high seas.” See *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 75 (2d Cir. 1994) (holding that the term “navigable waters” includes the high seas without qualification). “[T]he high seas are...international waters not subject to the dominion of any single nation.” *United States v. Louisiana*, 394 U.S. 11, 23 (1969), *decision supplemented*, 394 U.S. 836 (1969), *decision supplemented sub nom. United States v. State of La.*, 525 U.S. 1 (1998).

Where, as in this case, the facts are not in dispute, satisfying the situs requirement under the Act is an issue of law. See *New Orleans Depot Services, Inc. v. Dir., Off. of Worker’s Comp. Programs*, 718 F.3d 384, 387 (5th Cir. 2013) (citing *Perini North River Associates*, 459 U.S. at 300) (“[W]here, as in this case, the facts are not in dispute, ‘[LHWCA] coverage is an issue of statutory construction and legislative intent,’ and should be reviewed as a pure question of law.”).

Orion challenges whether Wiley's allegations satisfy the Act's situs requirement. Orion relies on *Keller Foundl/Case Foundl v. Tracy*, 696 F.3d 835 (9th Cir. 2012), for the proposition that the United States' "navigable waters" do not include foreign territorial waters and their adjoining ports and shore-based areas. Doc. 19 at 4. In *Keller*, the plaintiff, who worked primarily overseas, suffered an injury while working on a barge in Malaysia. *Id.* at 840. He filed a benefits claim under the Act, asserting coverage based on his assignment on a barge in Mexico, and in ports in Indonesia and Singapore. *Id.* Plaintiff appealed the administrative law judge's denial of coverage. *Id.* Keller made an argument analogous to Wiley's—that the navigable waters of the United States include the "high seas" which therefore includes "foreign territorial waters"—in support of coverage. *Id.* at 843. The Ninth Circuit rejected this argument; it relied on the presumption against extraterritoriality, examined the plain language of the statute, and concluded that "foreign territorial waters and their adjoining ports and shore-based areas are not the 'navigable waters of the United States' as the Act defines that phrase." *Id.* at 846.

Keller recognized Congress' intent to extend the reach of the Act's coverage to the high seas but found "no indication at all, much less a clear indication, that Congress meant 'navigable waters of the United States' to include territorial waters of foreign sovereigns." *Id.* at 844 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010)). *Keller* is persuasive, particularly in light of the Eleventh Circuit's silence on the issue.⁵

*4 Wiley argues that the Supreme Court has instructed courts to take an expansive view of the Act's coverage citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274 (1977). He also relies on cases from the Department of Labor Benefits Review Board, the agency charged with interpreting the Act. He argues that it has found coverage under the Act for injuries occurring on the high seas, in foreign waters and on foreign land. Doc. 27 at 2 (citing *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 270 (5th Cir. 1986), cert. denied, 479 U.S. 885 (1986);⁶ *Cove Tankers Corp. v. United Ship Repair*, 683 F.2d 38 (2d Cir. 1982); and *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (DOL Ben.Rev.Bd.), 1994 WL 712512 (Nov. 29, 1994)).

Decisions of the Benefits Review Board are entitled to deference. See *Mississippi Coast Marine, Inc. v. Bosarge*,

637 F.2d 994, 999 (5th Cir. 1981), reh'g denied and opinion modified, 657 F.2d 665 (5th Cir. 1981)⁷ ("In questions of statutory interpretation, this [Court of Appeals] is required to give substantial deference to the interpretations of the administrative body charged with responsibility for applying the Act[.]"). See also *Mazariegos v. Off. of U.S. Atty. Gen.*, 241 F.3d 1320, 1327 n. 4 (11th Cir. 2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("[T]he interpretation of the statute by an agency entitled to administer it is entitled to deference so long as it is reasonable."). But the cases upon which Plaintiff relies are not binding on this Court and are otherwise unpersuasive.

Courts have acknowledged that Congress created an expansive view of the term "navigable waters of the United States" to permit a more uniform application of the Act. See *Kollias*, 29 F.3d at 75. The *Kollias* court concluded that the presumption against extraterritoriality applied, *id.* at 72, but that it was overcome by Congress' clear indication that it intended the Act to apply outside the United States. *Id.* at 73. But it did not go so far as to extend that term to specifically include foreign waters and ports. See *Keller Foundl/Case Foundl*, 696 F.3d at 844 (noting that plaintiff's argument that the "high seas" included foreign waters was an extension of the law that neither it nor any other circuit had previously adopted).

In *Reynolds*, the United States Court of Appeals for the Fifth Circuit extended coverage to a claimant injured during a ship's sea trials on the high seas. The court stated that employers should not be able to avoid liability by shifting into non-covered territory. It held that navigable waters may include the high seas because the term embodies the same distinction under the Act as it does under admiralty, i.e., the distinction between state waters and waters of the United States, and not between territorial waters and the high seas. 788 F.2d at 269–270. The court stated that had Congress wished to limit the Act's coverage, it could have used the term "territorial waters" instead of "navigable waters." *Id.* at 270.

*5 In *Cove Tankers Corp.*, the United States Court of Appeals for the Second Circuit extended coverage to one worker injured, and another killed, while working on an employer's ship on the high seas. It noted that the injuries occurred onboard a vessel bearing the United States flag which moved from one United States port to another with

no deviation, scheduled or otherwise, into the territorial waters of any foreign nation. 683 F.2d at 41. The court held that the Act should apply in some cases to waters farther than United States territorial waters to prevent employers from avoiding liability merely by deviating into non-covered territory. *Id.* at 42. The court found it significant that the claimants would not be covered by a state workers' compensation scheme, that there was no planned deviation of the ship into a foreign port, and that the trip was not planned for the high seas. *Id.*

In *Weber*, the Benefits Review Board allowed coverage under the Act for a longshoreman who was injured in a Jamaican port while unloading grain from a vessel that had been loaded in New Orleans. 28 BRBS 321 at *1. He testified that 90 to 95 percent of his work occurred within the United States. *Id.* The Benefits Review Board reversed the administrative law judge's denial of the claim based on the claimant's failure to meet the situs requirement. *Id.* at *9. The Benefits Review Board traced the history of the Act and its expansion and reviewed the treatment of injuries occurring in foreign territorial waters under other federal admiralty statutes by various courts. *Id.* at *6. It concluded that the Courts of Appeals for the Second and Fifth Circuits' extension of the Act to injuries occurring on the high seas, and of other courts' extension of coverage to seamen or United States citizens injured or killed in foreign territorial waters under the Jones Act, 46 U.S.C. § 688 *et seq.*, and the Death on the High Seas Act, 46 U.S.C. § 762 *et seq.*, justified the Act's coverage of the claimant's injury in a port in Jamaica. *Id.* at *9. See also *Grenman v. Crowley Marine Services, Inc.*, 116 P.3d 1024, 1030 (Wash. App. Div. 1 2005) (relying on *Weber* and holding that plaintiff, a United States citizen based in the United States, who sustained an injury in the territorial waters of a foreign nation met the Act's situs requirement). Willey argues that this case is analogous to his, and requests that the Court adopt its reasoning and interpret the Act's definition of navigable waters to include foreign territorial waters.

Upon examining the legislative history of the Act, the policy considerations underlying the extension of the Act's coverage to the high seas, as well as comparing the facts of this case with those of cases in which coverage has been afforded to injuries occurring in foreign territorial waters as cited above, the Court concludes that the Act does not cover Willey's injuries. As noted in *Mittola v. Johns Hopkins U. Applied Physics Laboratory*, 839 F. Supp. 351,

362 (D. Md. 1993), the courts in the *Reynolds* and *Cove Tankers Corp.* cases stressed the "fortuity of the plaintiff workers' presence on the high seas" and emphasized that the facts of those cases were "highly unusual" and involved "special facts" upon which the courts rested their analyses. *Id.*

The *Mittola* court found that a plaintiff did not meet the situs requirement where his journey on the vessel both contemplated and necessitated his presence on the high seas. *Id.* Unlike *Reynolds* and *Cove Tankers Corp.* where the plaintiff just "happened to have been" on the vessel when it entered foreign territorial waters or deviated from its course on a voyage between two U.S. ports, the claimant in *Mittola* was part of a research mission destined for the high seas. *Id.* at 363. Under those facts, the court declined to expand coverage of the Act. *Id.* Although recent case law has made it clear that the Act includes the "high seas," the *Mittola* court's analysis is persuasive as to whether the Act warrants an even further expansion of the term "navigable waters of the United States" to include foreign territorial waters. See also *Marroquin v. Am. Trading Transp. Co., Inc.*, 711 F. Supp. 1165, 1168 (E.D.N.Y. 1988) (distinguishing *Reynolds* and *Cove Tankers Corp.*, and finding that plaintiff's injury did not meet the Act's situs requirement because injury while on a vessel scheduled to sail through the Panama Canal made his presence on the high seas neither a fortuitous occurrence nor a deviation).

IV. Conclusion

*6 The Court, having giving due deference to the Benefit Review Board's interpretation of the Act, and reviewing the available case law, concludes, as in *Keller*, that the term "navigable waters of the United States" which includes the "high seas" does not include foreign territorial waters. Since Willey sustained his injury while in the waters of the Dominican Republic, his claim does not meet the situs requirement of the Act and Orion is entitled to judgement in its favor as a matter of law. Because Willey dismissed his remaining claims before this Court, no other matters remain for this Court's consideration.

Accordingly, it is ORDERED AND ADJUDGED:

1. Defendant Orion Marine Construction, Inc.'s Motion for Judgment on the Pleadings as to Count IV of Plaintiff's Complaint for § 905(b) Negligence (Doc. 19) is GRANTED.

DONE AND ORDERED in Tampa, Florida on July 9, 2018.

2. The Clerk is directed to enter judgment in favor of Defendant Orion Marine Construction, Inc., terminate all pending motions and close this case.

All Citations

Slip Copy, 2018 WL 3344551

Footnotes

- 1 The following statement of facts is derived from the Complaint, (Doc. 1), the allegations of which the Court must accept as true and view in the light most favorable to the plaintiff in ruling on the instant Motion for Judgment on the Pleadings. *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 965 (11th Cir. 2014).
- 2 Orion did not move for leave to file a reply or to strike the Declaration.
- 3 There are two additional exceptions to this rule; when the court takes judicial notice of relevant public documents attached as exhibits under specific circumstances, *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276-79 (11th Cir. 1999); and when the court determines that the parties made all of the arguments and submitted all of the documents they would have presented had they received sufficient notice. *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 605 (11th Cir. 1985).
- 4 The Declaration mirrored the allegations in the Complaint and added the following facts: Orion owned the vessels which both bore the United States flag, Doc. 27-1 at ¶ 5; Willey's job in the Dominican Republic was temporary; he was filling in for another Orion employee, *id.* at ¶ 6; and during the nine years he worked for Orion, 90 percent of his work was in United States' territorial waters. *Id.* at ¶ 7.
- 5 The Eleventh Circuit has addressed whether the Act covers a claimant's injury with regard to the "adjoining area" portion of the situs requirement. See, e.g., *Blanco v. Georgia Pacific Corp.*, 304 F.3d 1053 (11th Cir. 2002); *Ramos v. Dir.*, OWCP, 486 Fed. Appx. 775, 777 (11th Cir. 2012).
- 6 In *Hudson v. Schlumberger Tech. Corp.*, 452 Fed. Appx. 528, 533 (5th Cir. 2011), the court noted that *Reynolds* was overruled by *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 496 (2005) on grounds other than whether navigable waters included the high seas.
- 7 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

End of Document

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National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f))

Division of Federal Employees' Longshore and Harbor Workers' Compensation (DFELHWC)

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FISCAL YEAR	PERIOD	NAWW	MAX	MIN	PERCENT INCREASE
FY24	10/01/2023-09/30/2024	\$963.29	\$1,926.58	\$481.65	[5.05%] ²
FY23	10/01/2022-09/30/2023	\$916.99	\$1,833.98	\$458.50	[6.20%] ²
FY22	10/01/2021-09/30/2022	\$863.49	\$1,726.98	\$431.75	[5.77%] ²
FY21	10/01/2020-09/30/2021	\$816.35	\$1,632.70	\$408.18	4.65%
FY20	10/01/2019-09/30/2020	\$780.04	\$1,560.08	\$390.02	3.26%
FY19	10/01/2018-09/30/2019	\$755.38	\$1,510.76	\$377.69	2.65%
FY18	10/01/2017-09/30/2018	\$735.89	\$1,471.78	\$367.94	2.46%
FY17	10/01/2016-09/30/2017	\$718.24	\$1,436.48	\$359.12	2.17%
FY16	10/01/2015-09/30/2016	\$703.00	\$1,406.00	\$351.50	2.10%
FY15	10/01/2014-09/30/2015	\$688.51	\$1,377.02	\$344.26	2.25%
FY14	10/01/2013-09/30/2014	\$673.34	\$1,346.68	\$336.67	1.62%
FY13	10/01/2012-09/30/2013	\$662.59	\$1,325.18	\$331.30	2.31%
FY12	10/01/2011-09/30/2012	\$647.60	\$1,295.20	\$323.80	3.05%
FY11	10/01/2010-09/30/2011	\$628.42	\$1,256.84	\$314.21	2.63%
FY10	10/01/2009-09/30/2010	\$612.33	\$1,224.66	\$306.17	2.00%
FY09	10/01/2008-09/30/2009	\$600.31	\$1,200.62	\$300.16	3.47%
FY08	10/01/2007-09/30/2008	\$580.18	\$1,160.36	\$290.09	4.12%
FY07	10/01/2006-09/30/2007	\$557.22	\$1,114.44	\$278.61	3.80%
FY06	10/01/2005-09/30/2006	\$536.82	\$1,073.64	\$268.41	2.53%
FY05	10/01/2004-09/30/2005	\$523.58	\$1,047.16	\$261.79	1.59%
FY04	10/01/2003-09/30/2004	\$515.39	\$1,030.78	\$257.70	3.44%
FY03	10/01/2002-09/30/2003	\$498.27	\$996.54	\$249.14	3.15%
FY02	10/01/2001-09/30/2002	\$483.04	\$966.08	\$241.52	3.45%
FY01	10/01/2000-09/30/2001	\$466.91	\$933.82	\$233.46	3.61%
FY00	10/01/1999-09/30/2000	\$450.64	\$901.28	\$225.32	3.39%

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-30007

United States Court of Appeals
Fifth Circuit

FILED
December 18, 2017

Lyle W. Cayce
Clerk

MANSON GULF, L.L.C.,

Plaintiff

v

MODERN AMERICAN RECYCLING SERVICE, INCORPORATED

Defendant

In re: In the Matter of Complaint of Manson Gulf, L.L.C., as Bareboat
Charterer of the Barge Marmac 262, for Exoneration from or Limitation of
Liability

MANSON GULF, L.L.C., as bareboat charterer of the barge Marmac 262,

Petitioner - Appellee

v.

JAMES LAFLEUR, Estate of; ANGIE LAFLEUR, Widow of James LaFleur
and on behalf of minor children L.L., D.L., and B.L.,

Claimants - Appellants

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

Longshoreman James “J.J.” LaFleur fell 50 feet to his death after stepping through a hole in a decommissioned oil platform. The platform sat atop a barge chartered by Manson Gulf, L.L.C., who ordered the hole’s creation but did not cover the hole or warn J.J. of its existence.

J.J.’s spouse alleged negligence on the part of Manson and sought damages. The district court, however, granted summary judgment for Manson, finding no liability under any of the three *Scindia* duties—the duties a vessel owner owes to a longshoreman. Because we conclude a fact issue precluded summary judgment with respect to the duty to warn of hidden dangers, we reverse.

I. BACKGROUND

Manson Gulf, L.L.C. is in the business of decommissioning oil-drilling platforms in the Gulf of Mexico. In 2015, Manson acquired one such platform, the BA A-23-A, from Freeport-McMoRan Oil & Gas. Manson extracted the 50-foot-tall, four-leg platform and placed the structure on a chartered barge. To lift the structure, Manson ordered four holes cut in the platform’s grating adjacent to each of the support legs. Rigging chains could then be passed through the holes and around the legs to take hold of the platform. Each hole was approximately two feet by two feet. Manson left the holes uncovered and unmarked.

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Modern American Recycling Service (MARS) is in the business of dismantling steel structures and selling the metal for scrap. MARS agreed to purchase and scrap the BA A-23-A platform, and Manson delivered the structure to MARS's dock, located on Bayou Black, Louisiana.

On the morning of June 16, 2015, a Manson project engineer, Dustin Clement, warned MARS of oil in the platform's pipes but not of the unmarked holes. Afterwards, Clement left MARS's dock and no Manson personnel remained. Jeff Smith, a MARS foreman in charge of riggers and cutters, then boarded the platform (still atop the barge) to locate the presence of oil. After Smith investigated for ten minutes, J.J. LaFleur joined Smith aboard the platform to lend a hand. J.J. was an independent contractor, employed by MARS to take inventories, do inspections, and perform other miscellaneous tasks.

As Smith and J.J. walked across the platform, they discussed the oil dilemma and looked at the pipes that ran overhead. While turning, J.J. stepped through an unmarked hole. Smith, then eight feet behind, attempted to intervene, but it was too late—J.J. fell 50 feet to the barge's deck and died from his injuries. Pictures of the structure and hole in the grating are attached. See Appendix, figs. 1–3.

Following J.J.'s death, Manson filed a complaint seeking exoneration or limitation from liability. MARS answered the complaint and asserted various claims and defenses. And Angie LaFleur, J.J.'s surviving spouse, filed claims for damages against Manson and MARS, alleging negligence under both maritime and Louisiana law. Manson and MARS then moved for summary judgment, and the district court granted both parties' motions, finding neither liable under § 905 of the Longshore and Harbor Workers' Compensation Act (LHWCA). The LaFleur claimants appealed only from the summary judgment with respect to Manson.

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II. DISCUSSION

A. Standard of Review

We review a “district court’s grant of summary judgment *de novo* applying the same standards as the district court.” *DePree v. Saunders*, 588 F.3d 282, 286 (5th Cir. 2009). Summary judgment is appropriate if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a).

The decision-making process is tweaked slightly when the case is to be tried before the court and not a jury. *See Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123–24 (5th Cir. 1978). In that circumstance, “the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though [the] decision may depend on inferences to be drawn from what has been incontrovertibly proved.” *Id.* However, the court may exercise this inference-drawing function only when “the evidentiary facts are not disputed” and “there are no issues of witness credibility.” *Id.*

B. The *Scindia* Duties

Section 905(b) of the LHWCA governs the present suit and supplies the relevant tort-based duties owed by vessel owners to longshoremen. 33 U.S.C. § 905(b); *see also Kirksey v. Tonghai Mar.*, 535 F.3d 388, 391 (5th Cir. 2008). Decades ago, those duties were open-ended, premised in part on a nondelegable warranty of seaworthiness that required no proof of fault. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 164 (1981). But following the 1972 amendment to § 905(b), the Supreme Court clarified in *Scindia* that vessel-owner liability sounds only in negligence. *Id.* at 165. To that end, *Scindia* articulated three “narrow duties” owed by the vessel owner: “(1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship

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under the active control of the vessel, and (3) a duty to intervene.” *Kirksey*, 535 F.3d at 391.

The turnover duty encompasses two distinct-but-related obligations. First, the vessel owner “owes a duty to exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that an expert stevedore can carry on stevedoring operations with reasonable safety.” *Id.* at 392. And second, the vessel owner “owes a duty to warn the stevedore of latent or hidden dangers which are known to the vessel owner or should have been known to it.” *Id.* However, a vessel owner need not warn of “dangers which are either: (1) open and obvious or (2) dangers a reasonably competent stevedore should anticipate encountering.” *Id.*

The active control duty requires that the vessel owner “exercise due care to avoid exposing longshoremen to harm from hazards that they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.” *Scindia*, 451 U.S. at 167.

Finally, the duty to intervene imposes liability “if the vessel owner fails to intervene in the stevedore’s operations when he has actual knowledge both of the hazards and that the stevedore, in the exercise of ‘obviously improvident’ judgment means to work on in the face of it and therefore cannot be relied on to remedy it.” *Burchett v. Cargill, Inc.*, 48 F.3d 173, 178 (5th Cir. 1995) (quoting *Pimental v. LTD Canadian Pac. Bul*, 965 F.2d 13, 15 (5th Cir. 1992)).

C. The Active Control Duty and the Duty to Intervene

As a preliminary matter, we agree with the district court that neither the active control duty nor the duty to intervene apply to this case. Both liability theories fail for the same reason: it is undisputed that all Manson personnel departed the barge prior to J.J.’s fall.

Though the mere presence of vessel employees is not necessarily indicative of active control, we have twice cited the complete *absence* of such

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personnel as evidence of the opposite—a lack of vessel control. *See Fontenot v. United States*, 89 F.3d 205, 208 (5th Cir. 1996); *Burchett*, 48 F.3d at 179. The LaFleur claimants point to testimony that Manson had not yet transferred ownership of the platform when J.J. fell. But our cases speak in terms of control, not legal ownership.¹ Without evidence that Manson continued to exercise control over the platform, liability cannot rest on the second *Scindia* duty.

As for the duty to intervene, the absence of Manson personnel is similarly dispositive. Assuming Manson had actual knowledge of the hole, the LaFleur claimants still needed to prove Manson had actual knowledge of “obviously improvident judgment” on the part of MARS (the stevedore). *Burchett*, 48 F.3d at 178. Because no Manson personnel remained when Smith and J.J. boarded the platform, the LaFleur claimants offered no evidence that Manson observed MARS employees interacting with the hazard, let alone in an obviously improvident manner. *See id.* (affirming summary judgment on the duty-to-intervene issue because the vessel owner “had no personnel present at the job site who could have had knowledge of any peculiar dangers related to [the stevedore’s] operations”). As a consequence, the duty to intervene is inapplicable.

D. The Turnover Duty

We disagree, however, with the district court’s decision to grant summary judgment with respect to Manson’s turnover duty. The parties frame the turnover duty in terms of the duty-to-warn component, several elements of which are undisputed. First, the hole was, needless to say, a “danger”—it was

¹ Indeed, if mere ownership of a hazardous condition was sufficient to create control, would not every vessel owner automatically control hazards appurtenant to its vessel? Our cases say otherwise. *See, e.g., Fontenot*, 89 F.3d at 208 (a vessel’s hatch cover was not under the vessel owner’s control).

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at such a height to make death or grievous injury a near certainty for anyone who fell through it. Second, Manson had actual knowledge of the hole, or is at least charged with knowledge, because Manson orchestrated the cutting before delivering the platform. See *Hernandez v. M/V Rajaan*, 841 F.2d 582, 586 (5th Cir. 1988) (“If the condition existed from the outset, the shipowner is charged with actual knowledge of the dangerous condition . . .”). And finally, Manson warned MARS only of explosive fluids, not holes.

Therefore, the validity of the LaFleur claimants’ turnover-duty claim hinges on whether the hole was hidden or was instead (1) open and obvious or (2) a danger “a reasonably competent stevedore” should have anticipated. *Kirksey*, 535 F.3d at 392. The district court concluded the hole was both open and obvious and to be anticipated by a competent stevedore, and on that basis, granted summary judgment for Manson. Sure enough, some evidence in the record supports that finding. Jeff Smith testified that nothing would have obstructed J.J.’s view of the hole. Smith testified also that if J.J. had looked at the hole from four or eight feet away, he would have seen the hole. And Smith opined that, were he in J.J.’s shoes, he would not have fallen because he “double-check[s] were [he] go[es].” On the general foreseeability of holes, Smith testified that he would expect a decommissioned structure (like the platform at issue) to contain holes. Dwight Caton, the owner of MARS, likewise stated that holes are a common occurrence on decommissioned platforms.

But so too did record evidence provide a contrasting account, supporting instead the notion that the hole was a hidden hazard, one a stevedore would not anticipate. Smith, the only witness to view the hole from J.J.’s vantage point,² provided the contradiction (indeed, a self-contradiction of the testimony

² A panel of this court once observed that an open-and-obvious inquiry should take place from the perspective of the injured longshoreman. See *McCuller v. Nautical Ventures, L.L.C.*, 434 F. App’x 408, 412 (5th Cir. 2011) (per curiam) (explaining that a defective ladder’s

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cited above). On the visibility of the hole, Smith explained that the platform's "grating can play tricks on your eyes," the hole was not easily seen until one was right on top of it, and the hole "look[ed] like a solid floor." Moreover, Smith did not see the hole until J.J. began to fall through it. The hole's size (or lack thereof) is also relevant; Caton testified the hole was approximately the size of two legal pads and he "still [did not] know how a person fit through" it. Finally, we have reviewed the pictures of the hole and its surroundings, and those pictures cement further the conclusion that the hole's obviousness is subject to live dispute. True, the pictures taken directly over the hole, as one might expect, depict a visible opening. *See, e.g.*, Appendix, fig. 2. But the pictures taken from an angle—similar to the point of view of a person approaching the hole—depict the way in which the platform's grating, in Smith's words, can "play tricks on your eyes" and make the opening difficult to see. *See, e.g.*, Appendix, fig. 3. As for the hole's foreseeability, Smith clarified that, though he expected holes to be present, those holes are "typically covered" by replacing the grating or marked by "cables going all the way around." More pointedly, Smith explained that an uncovered, unmarked hole—the very danger that befell J.J.—was "just not common at all." And Caton echoed that sentiment: "usually everything is roped off."

The district court did not acknowledge this testimonial conflict in its summary-judgment opinion. Instead, the court appeared to place great weight on the procedural nuance we mentioned earlier—that of summary judgment in a bench-trial case—when it remarked, "proceeding to trial would not enhance the Court's ability to draw inferences and conclusions." The court was quite right that the *Nunez* rule allows a judge to sometimes draw inferences in

obviousness should not be gauged by what would be revealed if "the ladder was laid out flat and the rungs could be examined from several angles" but rather by what would be apparent "to a longshoreman climbing up and down the ladder"). We agree.

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rendering summary judgment. *See* 572 F.2d at 1123–24. But neither *Nunez* nor any other case permits the court to do so when a factual dispute exists. *Id.* at 1124. Smith’s divergent testimony created such a dispute here, and on the key issues no less. By adopting one side of Smith’s story as “[t]he most convincing evidence” while neglecting Smith’s contrary account, the court, in essence, found one version more credible than the other. And *Nunez* forbids credibility determinations on a cold summary-judgment record. *Id.* at 1123.

Judicial efficiency is a noble goal, to be sure. But when an evidentiary record contains a material factual dispute (as this one does), we simply cannot bypass the role of the fact-finder, whoever that may be. Summary judgment was improper.

E. The *West* Caveat and Manson’s Alternative Basis for Affirmance

We pause to consider Manson’s final ground for affirmance, one premised on a little-explored exception to vessel-owner liability. In a pre-*Scindia* case, *West v. United States*, 361 U.S. 118, 119 (1959), the United States hired a contractor to overhaul a deactivated vessel. A shore-based employee of the contractor suffered a repair-related injury. *Id.* at 120. The Supreme Court denied recovery because, among other things, the defect was not hidden and the vessel owner was “under no duty to protect [the employee] from risks that were inherent in the carrying out of the contract.” *Id.* at 123. This circuit has applied the *West* rationale under similar circumstances. *See Hess v. Upper Miss. Towing Corp.*, 559 F.2d 1030, 1035–36 (5th Cir. 1977) (no liability when gasoline was obvious and “the danger inherent in removing gasoline . . . from a barge was well known” to the independent contractor hired to do just that); *Hill v. Texaco, Inc.*, 674 F.2d 447, 451 (5th Cir. 1982) (no liability when rust on a tank’s walls—the precise condition an independent contractor was retained to inspect—injured an employee of the contractor). Manson argues the *West* rule should apply here because J.J.’s role (*vis-à-vis* his stevedore) was to check

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the platform for hazards, including holes. The LaFleur claimants reply that the record reveals J.J.'s responsibility was to investigate for oil, not holes.

Setting aside whether the evidence actually supports Manson's characterization of J.J.'s role, we decline Manson's request to affirm because we find no authority for extending the *West* exception to situations beyond (1) an open and obvious defect that (2) an independent contractor is retained by the vessel owner to repair or inspect. *West* itself acknowledged the limits of its holding. See 361 U.S. at 124 ("[T]here might be instances of hidden or inherent defects, sometimes called 'latent,' that would make the owner guilty of negligence, even though he had no control of the repairs . . .").

This case is different. When control of the structure was turned over, a warning was given about oil but not holes—and this is more than a hole in the grating. Unseen is a hole in the platform underneath, and if a man slips or steps over the edge of the hole, he will fall to a terribly painful death. Surely, this danger could be found to constitute a latent hazard. And, moreover, this case involves a stevedore retained by the vessel owner to remove a structure for scrap, not to repair or inspect for particular known dangers. It is thus outside *West*'s narrow liability bar.

III. CONCLUSION

The judgment is reversed and the case is remanded for proceedings consistent with this opinion.

Appendix

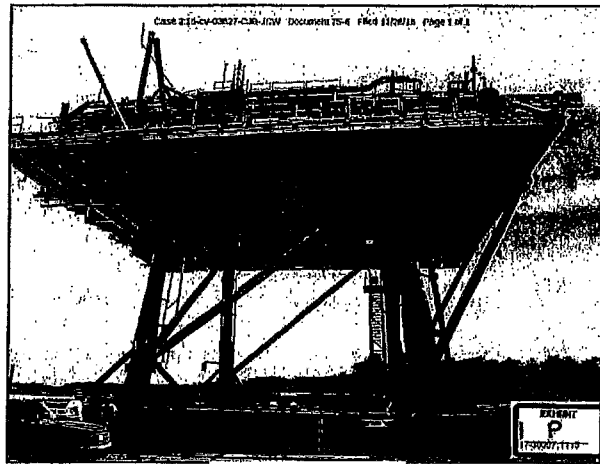


Fig. 1

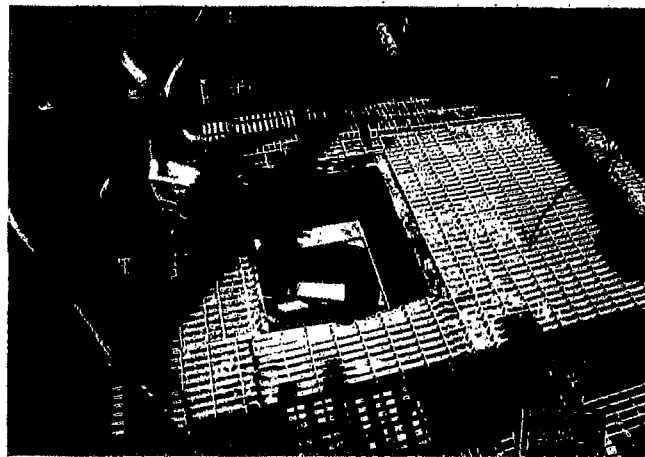


Fig. 2

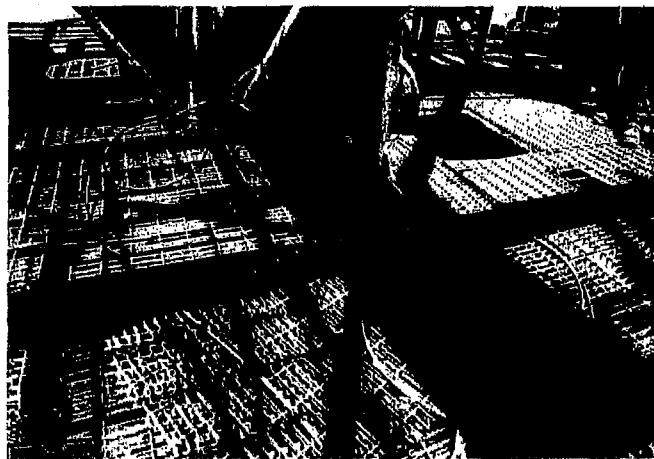


Fig. 3

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SUPREME COURT OF THE UNITED STATES

No. 10–507

**PACIFIC OPERATORS OFFSHORE, LLP, ET AL.,
PETITIONERS v. LUISA L. VALLADOLID
ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[January 11, 2012]

JUSTICE THOMAS delivered the opinion of the Court.

The Outer Continental Shelf Lands Act (OCSLA) extends the federal workers' compensation scheme established in the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. §901 *et seq.*, to injuries "occurring as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting natural resources from the shelf. 43 U. S. C. §1333(b). The United States Court of Appeals for the Ninth Circuit determined that the OCSLA extends coverage to an employee who can establish a substantial nexus between his injury and his employer's extractive operations on the Outer Continental Shelf. We affirm.

I

Petitioner Pacific Operators Offshore, LLP (Pacific), operates two drilling platforms on the Outer Continental Shelf off the coast of California and an onshore oil and gas processing facility in Ventura County, California. Pacific employed Juan Valladolid as a general manual laborer—known in the trade as a roustabout—in its oil exploration

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and extraction business. Valladolid spent about 98 percent of his time on one of Pacific's offshore drilling platforms performing maintenance duties, such as picking up litter, emptying trashcans, washing decks, painting, maintaining equipment, and helping to load and unload the platform crane. Valladolid spent the remainder of his time working at Pacific's onshore processing facility, where he also performed maintenance duties, including painting, sandblasting, pulling weeds, cleaning drain culverts, and operating a forklift.

While on duty at the onshore facility, Valladolid died in a forklift accident. His widow, a respondent here, filed a claim for benefits under the LHWCA pursuant to the extension of that Act contained within the OCSLA. The OCSLA provides, in relevant part:

"With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the [LHWCA]." 43 U. S. C. §1333(b).

After a hearing, an Administrative Law Judge (ALJ) dismissed respondent's claim. The ALJ reasoned that Valladolid's fatal injury was not covered under §1333(b) because his accident occurred on land, rather than on the Outer Continental Shelf. On appeal, the United States Department of Labor's Benefits Review Board affirmed, concluding that Congress intended to limit the coverage provided by the OCSLA to injuries suffered by employees within the "geographical locale" of the Outer Continental Shelf. *L. V. v. Pacific Operations Offshore, LLP*, 42 BRBS 67, 71 (2008) (*per curiam*).

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The Ninth Circuit reversed, holding that §1333(b) neither contains a “situs-of-injury” requirement, as the Fifth Circuit has held, nor imposes a “but for” causation requirement, as the Third Circuit has held. See 604 F. 3d 1126, 1130–1140 (2010) (rejecting the holdings of *Mills v. Director, Office of Workers’ Compensation Programs*, 877 F. 2d 356 (CA5 1989) (en banc); *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F. 2d 805 (CA3 1988)). Instead, the Ninth Circuit concluded that “the claimant must establish a substantial nexus between the injury and extractive operations on the shelf” to qualify for workers’ compensation benefits under the OCSLA. 604 F. 3d, at 1139. We granted Pacific’s petition for a writ of certiorari to resolve this conflict. 562 U. S. ____ (2011).

II

In 1953, Congress enacted the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. §1301 *et seq.*, which extended the boundaries of Coastal States three geographic miles into the Atlantic and Pacific Oceans and three marine leagues into the Gulf of Mexico. At the same time, Congress enacted the OCSLA, affirming the Federal Government’s authority and control over the “outer Continental Shelf,” defined as the submerged lands subject to the jurisdiction and control of the United States lying seaward and outside of the submerged lands within the extended State boundaries. 67 Stat. 462, 43 U. S. C. §§1331(a), 1332(1). As defined by the OCSLA, the Outer Continental Shelf includes the “submerged lands” beyond the extended state boundaries, §1331(a), but not the waters above those submerged lands or artificial islands or installations attached to the seabed. For simplicity’s sake, we refer to the entire geographical zone as the “OCS.”

Section 1333 extends various provisions of state and federal law to certain aspects of the OCS. For example, §1333(a)(1) extends the Constitution and federal laws of

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civil and political jurisdiction "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed," for the purpose of extracting its natural resources. Section 1333(a)(2)(A) makes the civil and criminal laws of each adjacent State applicable to "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf." Section 1333(b), the provision involved in this case, makes LHWCA workers' compensation benefits available for the "disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting its natural resources.

The question before us is the scope of coverage under §1333(b). The parties agree that §1333(b) covers employees, such as oil rig and drilling platform workers, who are injured while working directly on the OCS to extract its natural resources. They disagree, however, whether employees who are involved in extraction operations but who are injured beyond the OCS are also covered under the OCSLA. This dispute focuses on the meaning of the phrase "any injury occurring as the result of operations conducted on the outer Continental Shelf" in §1333(b).

The Courts of Appeals have offered competing interpretations. In *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d, at 811, the Third Circuit held that, because Congress intended LHWCA coverage to be expansive, §1333(b) extends to all injuries that would not have occurred "but for" operations on the OCS. The Third Circuit thus concluded that an employee who worked on a semi-submersible drill rig, but who was killed in a car accident on the way to the helicopter that was to fly him to that rig,

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was eligible for §1333(b) benefits. *Id.*, at 806, 811. As the Third Circuit summarized, “But for’ [Curtis] travelling to [his drill rig] for the purpose of conducting ‘operations’ within §1333(b), employee Curtis would not have sustained injuries in the automobile accident.” *Id.*, at 811.

In *Mills v. Director*, *supra*, the Fifth Circuit, sitting en banc, adopted a narrower interpretation of §1333(b). The court concluded that Congress intended to establish “a bright-line geographic boundary for §1333(b) coverage,” and held that §1333(b) extends coverage only to employees engaged in OCS extractive activities who “suffer injury or death on an OCS platform or the waters above the OCS.” *Id.*, at 362. Applying its “situs-of-injury” test, the Fifth Circuit held that a welder who was injured on land during the construction of an offshore oil platform was not eligible for §1333(b) benefits. *Id.*, at 357, 362.

In the case below, the Ninth Circuit rejected the Fifth Circuit’s “situs-of-injury” requirement as unsupported by the text of §1333(b), and the Third Circuit’s “but for” test as too broad to be consistent with Congress’ intent. 604 F. 3d, at 1137, 1139. Instead, the Ninth Circuit adopted a third interpretation of §1333(b), holding that a “claimant must establish a substantial nexus between the injury and extractive operations on the shelf” to be eligible for §1333(b) benefits. *Id.*, at 1139. “To meet the standard,” the Ninth Circuit explained, “the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations.” *Ibid.*

The Solicitor General suggests yet a fourth interpretation of §1333(b).¹ This interpretation would extend cover-

¹The Director, Office of Workers’ Compensation Programs, United States Department of Labor, is a respondent in this case because the Director administers the OCSLA workers’ compensation scheme established by §1333(b).

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age to two categories of injuries: (1) all on-OCS injuries suffered by employees of companies engaged in resource extraction on the OCS; and (2) the off-OCS injuries of those employees who spend a substantial portion of their worktime on the OCS engaging in extractive operations. Brief for Federal Respondent 32–33. According to the Solicitor General, this test would provide §1333(b) coverage for off-OCS injuries only to those employees whose duties contribute to operations on the OCS and who perform work on the OCS itself that is substantial in both duration and nature. *Id.*, at 35.

III

Pacific argues that the Fifth Circuit's "situs-of-injury" test presents the best interpretation of §1333(b). The crux of Pacific's argument is that off-OCS injuries cannot be "the result of operations conducted on the outer Continental Shelf" for purposes of §1333(b). Pacific asserts that because Valladolid was injured on dry land, his death did not occur as the result of extraction operations conducted on the OCS, and therefore respondent is ineligible for LHWCA workers' compensation benefits. We disagree.

A

The OCSLA extends the provisions of the LHWCA to the "disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf." §1333(b). Contrary to the view of Pacific and the Fifth Circuit, nothing in that language suggests that the injury to the employee must occur on the OCS. Section 1333(b) states only two requirements: The extractive operations must be "conducted on the outer Continental Shelf," and the employee's injury must occur "as the result of" those operations.

Despite the lack of a textual "situs-of-injury" requirement in §1333(b), Pacific argues that it is logically impos-

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sible for an off-OCS employee to be injured “as the result of” on-OCS operations. Pacific offers no basis for this assertion, and we find none. Indeed, given that many OCS platforms are physically connected to onshore processing facilities via oil and gas pipelines, it is not difficult to imagine an accident occurring on an OCS platform that could injure employees located off the OCS.

Moreover, if, as Pacific suggests, the purpose of §1333(b) was to geographically limit the extension of LHWCA coverage to injuries that occurred on the OCS, Congress could easily have achieved that goal by omitting the following six words in §1333(b)’s text: “as the result of operations conducted.” Had Congress done so, the statute would extend LHWCA coverage to the “disability or death of an employee resulting from any injury occurring on the outer Continental Shelf.” But that is not the text of the statute Congress enacted.

Pacific also argues that, because all of §1333(b)’s neighboring subsections contain specific situs limitations, we should infer that Congress intended to include a situs-of-injury requirement in §1333(b). See, *e.g.*, §1333(a)(2)(A) (adopting the civil and criminal laws of the adjacent State as federal law “for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf”).²

²See also 43 U.S.C. §1333(a)(1) (extending the Constitution and federal laws of civil and political jurisdiction “to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State”); §1333(c) (making the National Labor Relations Act

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But our usual practice is to make the opposite inference. *Russello v. United States*, 464 U. S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (alteration and internal quotation marks omitted)). Congress' decision to specify, in scrupulous detail, exactly where the other subsections of §1333 apply, but to include no similar restriction on injuries in §1333(b), convinces us that Congress did not intend §1333(b) to apply only to injuries suffered on the OCS. Rather, §1333(b) extends LHWCA workers' compensation coverage to any employee injury, regardless of where it happens, as long as it occurs "as the result of operations conducted on the outer Continental Shelf."

Pacific argues that this conclusion is foreclosed by language in *Herb's Welding, Inc. v. Gray*, 470 U. S. 414 (1985), and *Offshore Logistics, Inc. v. Tallentire*, 477 U. S. 207 (1986); but neither of those cases held that §1333(b) extends only to injuries that occur on the OCS. In *Herb's Welding*, this Court considered whether an oil platform welder, who worked both within the territorial waters of Louisiana and on the OCS, was covered under the

applicable to any unfair labor act "occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section"); §1333(d)(1) (granting the Coast Guard enforcement authority "on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto"); §1333(d)(2) (granting the Coast Guard authority to mark "any artificial island, installation, or other device referred to in subsection (a) of this section" for the protection of navigation); §1333(e) (granting the Army authority to prevent the obstruction of access "to the artificial islands, installations, and other devices referred to in subsection (a) of this section"); §1333(f) (saving clause applying "to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section").

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LHWCA after suffering an injury in the waters of Louisiana. 470 U. S., at 416–417. The Court explicitly declined to address whether the employee was eligible for workers' compensation benefits under §1333(b) because that question was neither passed upon by the Court of Appeals nor fully briefed and argued before this Court. *Id.*, at 426, n. 12. Although the Court acknowledged that an employee might walk in and out of workers' compensation coverage during his employment due to the "explicit geographic limitation to the [OCSLA's] incorporation of the LHWCA," *id.*, at 427, the exact meaning of that statement is unclear. We cannot ascertain whether the comment was a reference to §1333(b)'s explicit situs-of-operations requirement, as respondents suggest, or the recognition of an implicit situs-of-injury requirement, as Pacific argues. In any event, the ambiguous comment was made without analysis in dicta and does not control this case.

The same is true of the Court's opinion in *Offshore Logistics*. In that case, the Court considered whether the widows of oil platform workers who were killed when their helicopter crashed into the high seas could file wrongful-death suits under Louisiana law. In the Court's analysis of §1333, it stated, "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale, not by the status of the individual injured or killed." 477 U. S., at 219–220 (citing the situs requirement in §1333(a)(2)(A)). In a footnote, the Court commented: "Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; §1333(b) makes compensation for the death or injury of an 'employee' resulting from certain operations on the Outer Continental Shelf payable under the [LHWCA]." *Ibid.*, n. 2. These comments about the scope of the OCSLA's coverage and its determinative "situs requirement" do not provide definitive evidence that §1333(b) applies only to injuries that occur on the OCS.

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As in *Herb's Welding*, it is unclear whether the statement in the *Offshore Logistics* footnote regarding §1333(b) was referring to the explicit situs-of-operations requirement or to an implicit situs-of-injury requirement. Moreover, the entire footnote is dictum because, as the Court explicitly stated, §1333(b) had no bearing on the case. 470 U. S., at 219-220.

Finally, Pacific argues that including off-OCS injuries within the scope of the workers' compensation coverage created by §1333(b) runs counter to Congress' intent in drafting the OCSLA. According to Pacific, Congress intended to create a uniform OCS compensation scheme that both filled the jurisdictional voids and eliminated jurisdictional overlaps between existing state and federal programs. Pacific points out that, without a situs-of-injury requirement to narrow the scope of §1333(b), an off-OCS worker could be eligible for both state and federal workers' compensation coverage.

There is no indication in the text, however, that the OCSLA excludes OCS workers from LHWCA coverage when they are also eligible for state benefits. To the contrary, the LHWCA workers' compensation scheme incorporated by the OCSLA explicitly anticipates that injured employees might be eligible for both state and federal benefits. An offsetting provision in the LHWCA provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under [the LHWCA] pursuant to any other workers' compensation law or [the Jones Act] shall be credited against any liability imposed by [the LHWCA]." 33 U. S. C. §903(e). This provision, in addition to the lack of any textual support for Pacific's argument, convinces us that Congress did not limit the scope of 43 U. S. C. §1333(b)'s coverage to only those geographic areas where state workers' compensation schemes do not apply.

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B

Pacific also offers an alternative argument derived from the interaction of §1333(b) and a provision of the LHWCA. Specifically, Pacific argues that because the LHWCA contains an explicit situs-of-injury requirement, see 33 U. S. C. §903(a) (providing benefits only for injuries occurring “upon the navigable waters” of the United States), and because 43 U. S. C. §1333(b) extends the LHWCA workers’ compensation scheme to the OCS, §1333(b) incorporates the strict LHWCA situs-of-injury requirement from §903(a). According to Pacific, the words “occurring as the result of operations” in §1333(b) impose a status requirement in addition to the imported LHWCA situs-of-injury requirement, with the result that employees who are injured on the OCS, but whose jobs are not related to extractive operations, are excluded from the workers’ compensation coverage created by §1333(b). Thus, an accountant who is injured on a field trip to the drilling platform would be ineligible under §1333(b) despite being an employee who is injured on the OCS.

Although this alternative argument has the advantage of assigning some meaning to the words “occurring as the result of operations” in §1333(b), we still find it unpersuasive. First, it is unlikely that Congress intended to impose a situs-of-injury requirement in §1333(b) through such a nonintuitive and convoluted combination of two separate legislative Acts. As we have already noted, creating an express situs-of-injury requirement in the text of §1333(b) would have been simple. Second, combining the §1333(b) definition of “United States” with the LHWCA situs-of-injury requirement in 33 U. S. C. §903(a) would result in an OCS workers’ compensation scheme that applies only to the seabed of the OCS and to any artificial islands and fixed structures thereon. See 43 U. S. C. §1333(b)(3) (stating that “the term ‘United States’ when used in a geographical sense includes the outer Continental Shelf

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and artificial islands and fixed structures thereon"). Pacific concedes that this scheme would exclude the navigable waters above the shelf, including the waters immediately adjacent to any drilling platforms. Consequently, under Pacific's view, even employees on a crew ship immediately adjacent to an OCS platform who are injured during a platform explosion would be excluded from §1333(b) coverage. That view cannot be squared with the text of the statute, which applies to "any injury occurring as the result of operations conducted" on the OCS.

C

Pacific also makes several policy arguments in favor of a situs-of-injury requirement, but policy concerns cannot justify an interpretation of §1333(b) that is inconsistent with the text of the OCSLA. "[I]f Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them." *Herb's Welding*, 470 U.S., at 427. The language of §1333(b) simply does not support a categorical exclusion of injuries that occur beyond the OCS.

IV

The Solicitor General urges us to adopt a status-based inquiry that applies one test to on-OCS injuries and a different test to off-OCS injuries. Specifically, the Government proposes that when a worker is injured on the OCS, he is eligible for workers' compensation benefits if he is employed by a company engaged in extractive operations on the OCS. But if the employee is injured off the OCS, the employee will be covered only if his "duties contribute to operations" on the OCS and if he performs "work on the [OCS] itself that is substantial in terms of both its duration and nature." Brief for Federal Respondent 35. This approach is derived from our decision in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) (establishing

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criteria by which an employee qualifies as a “seaman” under the Jones Act), and might well have merit as legislation. But it has no basis in the text of the OCSLA as presently enacted. The “occurring as the result of operations” language in §1333(b) plainly suggests causation. Although the Government asserts that a status-based test would be preferable to a causation-based test, we cannot ignore the language enacted by Congress.

The Third Circuit’s “but for” test is nominally based on causation, but it is also incompatible with §1333(b). Taken to its logical conclusion, the “but for” test would extend workers’ compensation coverage to all employees of a business engaged in the extraction of natural resources from the OCS, no matter where those employees work or what they are doing when they are injured. This test could reasonably be interpreted to cover land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS. Because Congress extended LHWCA coverage only to injuries “occurring as the result of operations conducted on the outer Continental Shelf,” we think that §1333(b) should be interpreted in a manner that focuses on injuries that result from those “operations.” This view is consistent with our past treatment of similar language in other contexts. In *Holmes v. Securities Investor Protection Corporation*, 503 U. S. 258 (1992), we considered a provision of the Racketeer Influenced and Corrupt Organizations Act that provided a cause of action to “[a]ny person injured in his business or property by reason of a violation of section 1962.” 18 U. S. C. §1964(c) (emphasis added). We rejected a “but for” interpretation, stating that such a construction was “hardly compelled” and that it was highly unlikely that Congress intended to allow all factually injured plaintiffs to recover. 503 U. S., at 265–266. Instead, we adopted a proximate-cause standard consistent with our prior interpretation of the same language in the Sherman and Clay-

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ton Acts. *Id.*, at 267–268. Similarly, 43 U. S. C. §1333(b)'s language hardly compels the Third Circuit's expansive "but for" interpretation.

Accordingly, we conclude that the Ninth Circuit's "substantial-nexus" test is more faithful to the text of §1333(b). We understand the Ninth Circuit's test to require the injured employee to establish a significant causal link between the injury that he suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS.

Although the Ninth Circuit's test may not be the easiest to administer, it best reflects the text of §1333(b), which establishes neither a situs-of-injury nor a "but for" test. We are confident that ALJs and courts will be able to determine whether an injured employee has established a significant causal link between the injury he suffered and his employer's on-OCS extractive operations. Although we expect that employees injured while performing tasks on the OCS will regularly satisfy the test, whether an employee injured while performing an off-OCS task qualifies—like Valladolid, who died while tasked with onshore scrap metal consolidation—is a question that will depend on the individual circumstances of each case. The Ninth Circuit remanded the case for the Benefits Review Board to apply the "substantial-nexus" test in the first instance, and we agree with that disposition.

The judgment is affirmed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

STOP



GEORGE GUND III, et al., Plaintiffs, v. PILATUS AIRCRAFT, LTD., et al.,
Defendants. AND ALL RELATED ACTIONS

NO. C07-4902 TEH, Related to NO. C08-3795 TEH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

2010 U.S. Dist. LEXIS 22434

March 11, 2010, Decided
March 11, 2010, Filed

COUNSEL: [1] For George Gund, III, and as the personal representative of the Estate of Greg Gund, Theo Gund, George Gund, IV, Plaintiffs; Elizabeth Lane Crooke, Walter J. Lack, LEAD ATTORNEYS; Mark Evans Millard, Engstrom Lipscomb & Lack, Los Angeles, CA; Steven R. Pounjian, PRO HAC VICE, Stuart R. Fraenkel, Kreindler & Kreindler LLP, New York, NY;

For GG Aircraft, LLC, Plaintiff; Elizabeth Lane Crooke, Walter J. Lack, LEAD ATTORNEYS, Engstrom Lipscomb & Lack, Los Angeles, CA; Steven R. Pounjian, PRO HAC VICE, Stuart R. Fraenkel, Kreindler & Kreindler LLP, New York, NY.

For Lori Kells, Plaintiff; Stuart R. Fraenkel, LEAD ATTORNEY, Steven R. Pounjian, PRO HAC VICE, Kreindler & Kreindler LLP, New York, NY;

For Pratt & Whitney Canada Corp., Defendant; Courtney M. Povel, LEAD ATTORNEY, Mendes & Mount, Los Angeles, CA; Eduardo Magorell, LEAD ATTORNEY, Seyerson & Worsen, Irvine, CA; Garth W. Aubert, LEAD ATTORNEY, Mendes & Mount, LLP, Los Angeles, CA.

JUDGES: THELTON E. HENDERSON, UNITED STATES DISTRICT JUDGE.

OPINION BY: THELTON E. HENDERSON

OPINION

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on March 3, 2010, on the motion for summary judgment or summary adjudication of Defendant, [2] Pratt & Whitney Canada Corp. ("P&WC"), regarding the applicability of the Death on the High Seas Act ("DOHSA") to this action. For the reasons set forth below, the motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

This action arises out of a plane crash in Costa Rica that killed the pilot and all five passengers. The Ruetz family -- Donald, his wife Cynthia, and their children Tyler Donald ("Jack") and Raymond Justin ("Justin") -- had moved from Manhattan Beach, California, to Playa Flamingo, Costa Rica, upon Donald's retirement. In July 2005, the Ruetzes hosted Paul Kells and his son Connor, former neighbors from Manhattan Beach, for a vacation in Costa Rica. For the last day of the Kells family's trip, Cynthia Ruetz booked an aerial sightseeing tour of Playa Flamingo Bay with pilot Gregory Gund on a Pilatus PC-6