Turbo Porter, a small, single-engine aircraft owned by GG Aircraft LLC. [1] The plane took off on July 16, 2005, with Gund at the helm and five passengers on board: Cynthia, Jack, and Justin Ruetz, and Paul and Connor Kells. All six perished when the aircraft crashed off the shore of Costa Rica at approximately 9:25 a.m.

> 1 Gregory Gund was the sole member of GG Aircraft [*3] LLC, which was organized under the laws of Delaware and registered in California. The LLC was dissolved in 2008, its assets distributed to the Gund estate.

Two wrongful death actions were filed in San Francisco Superior Court on July 13, 2007. The first was brought by Gund's surviving relatives, his estate, and GG Aircraft LLC (the "Gund Plaintiffs") against the manufacturers of the plane, Pilatus Aircraft, Ltd. and Pilatus Business Aircraft, Ltd. (collectively, "Pilatus"), and the plane's turbo-prop engine, P&WC. The Gund Plaintiffs assert three causes of action for wrongful death and survival damages, as well as three more claims for property damages and indemnity, based on the loss of the airplane and settlement of the other victims' claims. Surviving members of the Kells and Ruetz families (the "Kells/Ruetz Plaintiffs") and the decedents' estates brought the second action, naming Pilatus, P&WC, and GG Aircraft LLC as defendants. They assert three claims for wrongful death and survival damages against Pilatus and P&WC, [2] as well as a fourth claim against GG Aircraft LLC.

> 2 The first three causes of action for wrongful death and survival damages in both complaints are broken down into [*4] claims for (1) negligence, (2) strict liability, and (3) breach of warranty.

P&WC removed the Gund Plaintiffs' case to federal district court on September 21, 2007, and removed the Kells/Ruetz action on August 7, 2008. The two matters were related on November 24, 2008. The Kells/Ruetz Plaintiffs settled with GG Aircraft LLC and the Gregory Gund estate, and all Plaintiffs dismissed Pilatus without prejudice.

P&WC moved for summary judgment or summary adjudication on January 4, 2010, arguing that Plaintiffs' claims are preempted by DOHSA, *46 U.S.C. § 30301 et seq.*, and should therefore be dismissed. As an alternative to outright dismissal, P&WC asks the Court to find that DOHSA applies -- but that DOHSA's expanded remedies for "commercial aviation accidents" do not -- and to reform the complaints accordingly. Plaintiffs opposed the motion.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A dispute as to a material fact is "genuine" [*5] if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court may not weigh the evidence and must view the evidence in the light most favorable to the nonmoving party. *Id. at 255.*

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007)*. However, on an issue for which its opponent will have the burden of proof at trial, the moving party can prevail merely by "'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex, 477 U.S. at 325*. If the moving party meets its initial burden, the opposing party must then "set out specific facts showing a genuine issue for trial" to [*6] defeat the motion. *Fed. R. Civ. P. 56(e)(2); Anderson, 477 U.S. at 250.*

DISCUSSION

The Death on the High Seas Act, or DOHSA, provides the exclusive remedy for a wrongful death action based on an individual's death "occurring on the high seas beyond 3 nautical miles from the shore of the United States." *46 U.S.C. § 30302; Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986); see also Zicherman v. Korean Air Lines Co., 516 U.S. 217, 231, 116 S. Ct. 629, 133 L. Ed. 2d 596* (finding that DOHSA applies where "an airplane

crash occurs on the high seas"). Such an action, brought by "the personal representative of the decedent," "shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relatives," for whom recovery is limited to "fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought." *46 U.S.C. §§ 30302, 30303.* "Loss of support, services, and inheritance are pecuniary damages available under DOHSA." *Bergen v. F/V St. Patrick, 816 F.2d 1345, 1350 (9th Cir. 1987).* The statute also allows for *nonpecuniary* damages -- which include "damages for loss of care, comfort, and companionship" -- where "the death resulted from a *commercial aviation* [*7] *accident* occurring on the high seas beyond 12 nautical miles from the shore of the United States." *46 U.S.C. § 30307* (emphasis added). If the law of a foreign country provides a cause of action for wrongful death, DOHSA permits the bringing of a civil action in admiralty based on the foreign claim "in a court of the United States." *Id. § 30306.*

Assuming DOHSA governs these lawsuits, the broad question raised by P&WC's motion is the availability of remedies. P&WC argues that only pecuniary damages can be recovered, whereas Plaintiffs assert that additional remedies are made available by two provisions of DOHSA. The Kells/Ruetz Plaintiffs argue that the crash constituted a "commercial aviation accident," and therefore qualifies for the nonpecuniary damages made available by *section 30307.* The Gund Plaintiffs urge the Court to apply -- pursuant to *section 30306* -- the law of Costa Rica, which they contend allows recovery for economic loss and moral damages. The Court will begin by determining whether DOHSA applies here and, if it does, will then address the availability of remedies beyond pecuniary damages.

I. The Applicability of DOHSA

It is undisputed that the plane crashed within the [*8] territorial waters of Costa Rica, more than three nautical miles from the shore of the United States. P&WC moves the Court to conclude that the crash occurred on "the high seas" for purposes of DOHSA, and that the statute therefore provides the exclusive remedy here. Such a conclusion is mandated by *Howard v. Crystal Cruises, Inc.*, in which the Ninth Circuit held that "something that happens within the territorial waters of a foreign state occurs on the 'high seas' for purposes of DOHSA." *41 F.3d 527, 529, 530 (9th Cir. 1994).* Plaintiffs, while acknowledging this Court's obligation to follow *Howard*, contend that the "high seas" do *not* encompass a foreign state's territorial waters, and reserve their right to challenge *Howard* on appeal. Pursuant to *Howard*, this Court concludes that the crash at issue here occurred on the "high seas," and that DOHSA applies.

This conclusion does not require, as P&WC urges, the dismissal of both complaints. In passing DOHSA, Congress "creat[ed] a *remedy* in admiralty for wrongful deaths more than three miles from shore." *Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978)* (emphasis added). Plaintiffs' claims for negligence, strict liability, and breach [*9] of warranty are not inconsistent with DOHSA, which explicitly applies when "the death of an individual is caused by wrongful act, neglect, or default." *46 U.S.C. § 30302; see also, e.g., Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1038 (9th Cir. 1985)* (addressing claims for negligence, strict tort, and breach of warranty under DOHSA). In light of DOHSA's preemption of "[s]tate and general maritime law wrongful death actions" for deaths on the high seas, Plaintiffs "cannot state a claim for relief for wrongful death other than in accordance with DOHSA." *Favaloro v. S/S Golden Gate, 687 F. Supp. 475, 478 (N.D. Cal. 1987).* The Court must therefore examine whether Plaintiffs' claims are stated *in accordance with* DOHSA.

II. Remedies Available Under DOHSA

DOHSA "does not address every issue of wrongful-death law," but it does announce "Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Higginbotham, 436 U.S. at 625.* P&WC therefore asks the Court, as an alternative to dismissal, to limit Plaintiffs' remedies to pecuniary damages, which is all that DOHSA allows for incidents that are not commercial aviation [*10] accidents. Plaintiffs contend that additional remedies are available under two theories: first, that the incident was a "commercial aviation accident" under DOHSA, and second, that the law of Costa Rica should be applied.

A. DOHSA's provision for a "commercial aviation accident."

DOHSA allows for recovery of both pecuniary and nonpecuniary damages in the case of a "commercial aviation accident occurring on the high seas beyond 12

nautical miles from the shore of the United States." *46 U.S.C. § 30307*. Whether or not the incident here qualifies as such an accident is vigorously contested by the parties. [3] The statute never defines "commercial aviation accident," which was added to DOHSA in 2000 as part of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), Pub. L. 106-181, 114 Stat. 61 (2000). The amendment followed a string of aviation disasters off the northeast coast of the United States -- TWA Flight 800, Swissair Flight 111, and EgyptAir 990 -- and was intended to ameliorate DOHSA's limitation on the damages available for surviving family members. *See* 145 Cong. Rec. S15078 (daily ed. Nov. 19, 1999) (statement of Sen. Specter).

3 That the accident [*11] occurred "beyond 12 nautical miles from the shore of the United States" is undisputed.

P&WC argues that the flight at issue here was not commercial, but rather a "private, sightseeing flight." Def.'s Mot. for Summ. J. (Doc. 44), at 8. It claims that the "plain meaning of the phrase 'commercial aviation accident' utilized by Congress in the amended DOHSA statute is a direct reference to commercial airline mass disasters involving transport category aircraft with fare-paying passengers." Def.'s Reply (Doc. 59), at 7. Plaintiffs, relying largely on the Federal Aviation Regulations ("FAR"), insist that the flight was commercial because the passengers paid the pilot for a trip that he would not otherwise have taken.

Donald Ruetz, in his declaration, explained how the arrangements for the flight were made. His wife, Cynthia, telephoned Gregory Gund the evening before the accident, after he had been recommended by a personal trainer at the gymnasium the Ruetzes owned. Neither Donald nor Cynthia had met Gund before. After observing her telephone conversation, Donald gave Cynthia $ 160 from his wallet, which was the amount she told him she needed to pay for the flight. [4] Although Gregory Gund [*12] had obtained a special permit to fly in Costa Rica, he was not authorized to conduct any commercial flights there. He did have a commercial pilot's license in the United States.

4 P&WC objects to the admissibility of Donald Ruetz's declaration regarding his wife's conversation with Gregory Gund, which it asserts is hearsay. Material presented on summary judgment must be admissible under the rules of evidence. *Fed. R. Civ. P. 56(e); see In re Sunset Bay Assocs., 944 F.2d 1503, 1514 (9th Cir. 1991)*. Cynthia Ruetz's statement that she needed $ 160 to pay for the flight is a statement of the declarant's intent under *Federal Rule of Evidence 803(3)*, and is admissible to prove that she did pay $ 160 for the flight. *See United States v. Pheaster, 544 F.2d 353, 376 (9th Cir. 1976)* (under "*Hillmon* doctrine," a hearsay declarant's statement of intent to do something may be used inferentially to prove that she did it). Donald Ruetz's testimony that he gave $ 160 to his wife is not hearsay and is admissible. Plaintiffs' evidence is sufficient to establish that $ 160 was charged for the flight, a material fact that P&WC has failed to rebut or otherwise put in genuine dispute.

Very few cases have interpreted [*13] the meaning of "commercial aviation accident" under DOHSA. Both sides rely on two district court cases from other jurisdictions, *Brown v. Eurocopter S.A., 111 F. Supp. 2d 859 (S.D. Tex. 2000)*, and *Eberli v. Cirrus Design Corp., 615 F. Supp. 2d 1369 (S.D. Fla. 2009)*, that grappled with the definition of "commercial aviation accident." *Brown* dealt with the crash of a helicopter that was ferrying two platform workers from one fixed oil platform to another as part of an "on-demand" air taxi service in the Gulf of Mexico. The *Brown* court relied on dictionary definitions and the FAR to conclude that the helicopter crash was a "commercial aviation accident." "'Commercial activities' is defined as 'any type of business or activity which is carried on for a profit,'" *Brown, 111 F. Supp. 2d at 862* (quoting Black's Law Dictionary 270 (6th ed. 1990)), and "'aviation' is defined as 'the operation of heavier-than-air aircraft,'" *id.* (quoting Webster's Ninth New Collegiate Dictionary 119 (1990)). Those definitions alone were sufficient for the court to find that the flight at issue -- part of an "on-demand air taxi service using heavier-than-air helicopters" -- constituted a "commercial aviation [*14] accident." *Id.*

To buttress that conclusion, the *Brown* court turned to regulations, [5] presuming "that if Congress does not see fit to provide an express definition of ordinary terms, Congress intends for the undefined statutory language to have a meaning consistent with the background federal regulations already in place which govern the subject matter at issue." *Brown, 111 F. Supp. 2d at 863*. "Commercial operator" is defined as "a person who, for compensation or hire, engages in air commerce of

persons or property." *Id.* (quoting *14 C.F.R. § 1.1*), [6] Reviewing the regulations for "commuter or on-demand operations," codified at Part 135 of Title 14 of the Code of Federal Regulations, the court found that a "Part 135 on-demand air taxi service is plainly a 'commercial operation' as that term is used throughout the FAR," and that the helicopter crash therefore constituted a "commercial aviation accident." *Id. at 864.*

> 5 The *Brown* court concluded that, since "AIR 21 is largely concerned with reauthorizing programs of the Federal Aviation Administration, the Court naturally looks to the Federal Aviation Regulations ('FAR'), codified in Title 14 of the Code of Federal Regulations." *Brown, 111 F. Supp. 2d at 863.*
>
> 6 "Air [*15] commerce" means "interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." *Brown, 111 F. Supp. 2d at 863* (quoting *14 C.F.R. § 1.1*).

At issue in *Eberli* was whether the crash of an aircraft being ferried for delivery to its purchaser constituted a "commercial aviation accident." The court found that it did not, because operating instructions attached to the aircraft's certificate of airworthiness -- which "was obtained specifically for the purpose of ferrying" the aircraft -- prohibited it from being operated "for carrying passengers or property for compensation or hire." *Eberli, 615 F. Supp. 2d at 1373.* Noting that "commercial purposes" is defined in the transportation code as "the transportation of persons or property for compensation or hire," *id.* (quoting *49 U.S.C. § 40125*), the court concluded that ferrying the aircraft could not by definition be commercial.

"When dealing with a matter of statutory interpretation, we look first [*16] to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *Retuta v. Holder, 591 F.3d 1181, 1188 (9th Cir. 2010)* (internal citations and quotation marks omitted). The plain meaning of the statutory text -- and the definitions in the regulations -- clearly demonstrate that a flight's "commercial" character hinges on profit or compensation. "Commercial" describes anything "made, done, or operating primarily for profit." Webster's New World Dictionary 280 (1991). Under the FAR, a flight that carries passengers for compensation is commercial. *See 14 C.F.R. § 1.1* (defining "commercial operator" as "a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property"). Although a private pilot may transport passengers where the pilot does "not pay less than the pro rata share of the operating expenses," *14 C.F.R. § 61.113(c)*, such a flight is still considered commercial if the pilot and his passengers do not share "a bona fide common purpose for conducting the flight." Federal Aviation Administration Legal Interpretation on *14 C.F.R. § 61.113(c)* to [*17] Don Bobertz, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 18, 2009).

P&WC relies heavily on the legislative history of AIR 21, the bill that added the "commercial aviation accident" provision to DOHSA, to argue that Congress intended to limit its application to mass airline disasters involving transport category aircraft and fare-paying passengers, as a series of such disasters had prompted the bill's introduction. However, this Court agrees with the *Brown* court's observation that, while the "legislative history clearly reveals an intention to include within the definition accidents involving regularly scheduled, international flights (such as TWA 800), . . . there is nothing to suggest a desire to restrict the definition beyond what is already implied by the adjectives 'commercial' and 'aviation.'" *Brown, 111 F. Supp. 2d at 863.* Furthermore, where a question of statutory interpretation is resolved "by examining the plain language of the statute, its structure, and purpose, our 'judicial inquiry is complete,' and we need not consult a statute's legislative history." *United States v. 475 Martin Lane, 545 F.3d 1134, 1143 (9th Cir. 2008)* (quoting *Campbell v. Allied Van Lines, Inc., 410 F.3d 618, 622 (9th Cir. 2005)*). [*18] There is no need to reach legislative history given the clear meaning of "commercial aviation accident."

Gregory Gund charged $ 160 for the sightseeing excursion. There is no evidence that the $ 160 paid by Cynthia Rustz was meant only to cover the passengers' pro-rata share of operating expenses. Even if the passengers were merely reimbursing Gund, no evidence suggests that the pilot and passengers shared a "bona fide common purpose" for the flight; the passengers boarded

the flight for a tour, and Gund's purpose was to transport them. Although Gund was not authorized to conduct a commercial flight in Costa Rica, the pilot's proper credentialing does not dictate the commercial character of a flight; otherwise, even a mass airliner's commercial character could be stripped away if its pilot were unlicensed, a result Congress would never have intended. Finally, both *Brown* and *Eberli* support the conclusion that Gund's flight was commercial: the flight in *Brown* was commercial because it was conducted for profit or compensation; that in *Eberli* was not because ferrying an airplane was expressly characterized as a non-commercial activity.

Because the passengers paid for the flight and the passengers [*19] and pilot did not share a bona fide common purpose, the crash at issue here constituted a "commercial aviation accident" under DOHSA. Both pecuniary and nonpecuniary damages are therefore available to Plaintiffs.

B. The application of Costa Rican law.

Relying on *section 30306* -- under which actions based on foreign law may be brought in U.S. courts -- the Gund Plaintiffs demand that the law of Costa Rica be applied here, which they assert would allow the recovery of economic and moral damages. A court is to apply "normal choice-of-law principles" to determine whether U.S. law or foreign law "governs an action" under DOHSA. *Dooley v. Korean Air Lines Co., 117 F.3d 1477, 1485, 326 U.S. App. D.C. 127 (D.C. Cir. 1997)*. The Supreme Court established a choice-of-law analysis for maritime actions in *Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953)*, which the parties agree is the appropriate standard for determining what law to apply. *See Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 382, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959)* ("The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally."); *see also In re Air Crash Disaster Near Bombay, India, 531 F. Supp. 1175, 1188 (W.D. Wash. 1982)* [*20] (applying *Lauritzen* to choice of law question under DOHSA).

Lauritzen lists seven factors that, "alone or in combination, are generally conceded to influence choice of law to govern . . . a maritime tort claim": (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. *345 U.S. at 582-92; see also Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 1124 (9th Cir. 2008)* (enumerating *Lauritzen* factors). An eighth factor, "the shipowner's base of operations," was added by *Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970)*. "The question to be answered by reference to these factors is a simple one: are the United States's interests sufficiently implicated to warrant the application of United States law?" *Warn v. M/V Maridome, 169 F.3d 625, 628 (9th Cir. 1999)*. "The purpose of the analysis is to balance the interests of the nations whose law might apply." *Bilyk v. Vessel Nair, 754 F.2d 1541, 1543 (9th Cir. 1985)*.

The *Lauritzen* test "is not a mechanical one," and its elements [*21] do not carry equal weight: "the flag that a ship flies may, at times, alone be sufficient." *Rhoditis, 398 U.S. at 308*. *Lauritzen* "firmly mandates that the law of the flag presumptively controls, unless other factors point decidedly in a different direction." *Bilyk, 754 F.2d at 1545*: "[C]ourts should weigh and evaluate all relevant points of contact between the transaction and the sovereign legal systems that are affected by it, and not simply run through a mechanical analysis of the *Lauritzen* factors." *Trans-Tec Asia, 518 F.3d at 1124*. Applying the facts to the *Lauritzen* elements, the Court finds that the choice-of-law analysis strongly favors U.S. law above that of Costa Rica:

(1) The wrongful act -- the crash of the airplane into the sea -- occurred in Costa Rica's territorial waters. "The locus of a tort is the place where injury takes effect." *Oppen v. Aetna Ins. Co., 485 F.2d 252, 256 (9th Cir. 1973)*.

(2) The plane was registered with the U.S. Federal Aviation Administration, No. N908RL, and its registered owner was GG Aircraft LLC, which was organized under Delaware law and registered in California. The plane therefore carried the flag of the United States. Although the Gund Plaintiffs [*22] point out that the plane "was operating under Costa Rican flight rules," and "was owned through the single-member LLC by Gregory Gund, a Costa Rica domiciliary," Gund Pls.' Opp'n (Doc. 55) at 9, such details do not alter the country whose flag is flown. A ship "is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that

character when in navigable waters within the territorial limits of another sovereignty." *Lauritzen, 345 U.S. at 585.*

(3) All six of the injured parties were citizens of the United States. Two, Paul and Connor Kells, resided in the U.S. at the time of the crash. The other four -- the Ruetz family and Gregory Gund -- resided in Costa Rica and owned homes there.

(4) The shipowner, GG Aircraft LLC, was based in the United States; its only member, deceased pilot Gregory Gund, was a U.S. citizen residing in Costa Rica.

(5) The parties agree that the "place of the contract" "has no literal application" to these facts. *In re Air Crash Disaster Near Bombay, India, 531 F. Supp. at 1190.* However, arrangements for the flight were made in Costa Rica.

(6) According to the Gund Plaintiffs' expert in Costa Rica law, Manrique Lara-Bolanos, the [*23] foreign forum would be available to hear these claims.

(7) The forum is the United States. However, "the law of the forum is largely irrelevant" in the choice-of-law analysis. *Warn, 169 F.3d at 628 n.2.*

(8) The shipowner, GG Aircraft LLC, was organized under Delaware law and registered in California, but its only member -- Gregory Gund -- operated out of Costa Rica.

Only the first factor -- the location of the crash -- would clearly favor Costa Rica. The rest of the factors either support the application of U.S. law, or are mixed or irrelevant. Although some of the injured parties were domiciled in Costa Rica, all were citizens of the United States, where the airplane -- and the corporation that owned it -- were registered. Plaintiffs chose to bring this action in a court in the United States, despite the availability of a forum in Costa Rica. Finally, the most important factor -- law of the flag -- favors the United States. In other words, the interests of the United States are "sufficiently implicated to warrant the application of United States law." *Warn, 169 F.3d at 628.* The correct law to be applied to this action is that of the United States. Costa Rican law, and its remedies, are [*24] not available to Plaintiffs. [7]

7 P&WC also argued that Plaintiffs' notice of foreign law was improper under *Federal Rule of Civil Procedure 44.1.* Since the Court concludes that Costa Rican law is anyhow inapplicable, it is unnecessary to address the procedural argument.

III. Additional Matters

P&WC further argues that the estates of the six decedents are not proper plaintiffs in this action, as DOHSA permits only an action "for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative." *46 U.S.C. § 30302.* Plaintiffs, addressing this argument at hearing, clarified that the actions were filed by representatives of the decedents' estates, but that no recovery is sought by the estates themselves. The Court therefore will not dismiss the estates, as P&WC requests, because the parties agree that recovery is limited to those individuals identified in *section 30302.* P&WC also argued at hearing that some Plaintiffs are not a "spouse, parent, child, or dependent relative" of a decedent, and should therefore be dismissed. However, this issue was not raised on Plaintiffs' motion, and the Court has no basis for evaluating each Plaintiff's compliance with *section 30302.*

Finally, [*25] the Gund Plaintiffs point out that P&WC did not move to dismiss its fourth, fifth, or sixth causes of action, for property damage and indemnity based on the loss of the aircraft and the settlements of claims with the other parties. The Gund Plaintiffs argue that those claims are not subject to the limitations imposed by DOHSA, which covers only wrongful death actions. At hearing, P&WC conceded that the claims for property damage survive its motion, but argued that indemnity claims cannot proceed because they represent an indirect avenue to obtain remedies that DOHSA directly precludes. Again, however, since P&WC did not move to dismiss those claims, they survive summary judgment.

CONCLUSION

The motion is GRANTED IN PART and DENIED IN PART. The Court finds that DOHSA and its provisions regarding "commercial aviation accidents" apply here, and that both pecuniary and nonpecuniary damages are available; Costa Rican law will not govern this action. Therefore, only pecuniary and nonpecuniary damages, as defined in the context of DOHSA, may be recoverable for the wrongful death causes of action. All of Plaintiffs' claims otherwise survive summary judgment.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 10, 2017
Lyle W. Cayce
Clerk

No. 16-30481

VIRGIE ANN ROMERO MCBRIDE,

Plaintiff - Appellee Cross-Appellant

v.

ESTIS WELL SERVICE, L.L.C.,

Defendant - Appellant Cross-Appellee

SAUL C. TOUCHET,

Plaintiff - Appellee Cross-Appellant

v.

ESTIS WELL SERVICE, L.L.C.,

Defendant - Appellant Cross-Appellee

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

Before SMITH and HAYNES, Circuit Judges, and JUNELL, District Judge.*

HAYNES, Circuit Judge:

This consolidated Jones Act and general maritime law case arises out of an accident on a barge in the navigable waterways of Louisiana. The owner of

*District Judge of the Western District of Texas, sitting by designation.

the barge, Defendant Estis Well Services, L.L.C., appeals from the district court's judgment in favor of plaintiffs Virgie Ann Romero McBride, individually and on behalf of the minor child I.M.S., and Saul C. Touchet.[1] For the reasons explained below, we AFFIRM.

I. Background

This is the second time this case has come before our court. The first appeal was interlocutory, and we held in an en banc opinion that McBride[2] and Touchet could not recover punitive damages on their Jones Act and general maritime law claims. *See McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014) (en banc). The accident in this case and the subsequent claims filed against Estis were previously described in the en banc opinion as follows:

> These consolidated cases arise out of an accident aboard Estis Rig 23, a barge supporting a truck-mounted drilling rig operating in Bayou Sorrell, a navigable waterway in the State of Louisiana. The truck right toppled over, and one crew member, Skye Sonnier, was fatally pinned between the derrick and mud tank, and three others, Saul Touchet, Brian Suire, and Joshua Bourque, have alleged injuries. At the time of the incident, Estis Well Service, L.L.C. ("Estis") owned and operated Rig 23, and employed Sonnier, Touchet, Suire, and Bourque (collectively, the "crew members").
>
> Haleigh McBride, individually, on behalf of Sonnier's minor child, and as administratrix of Sonnier's estate, filed suit against Estis, stating causes of action for

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[1] McBride and Touchet cross-appeal asking this court to reconsider its prior en banc decision in this case holding that punitive damages are not available to the cross-appellants on their Jones Act and general maritime law claims. *See McBride v. Estis Well Service, L.L.C.*, 768 F.3d 382 (5th Cir. 2014) (en banc). As McBride and Touchet both concede, consideration of this claim is foreclosed by our prior en banc decision.

[2] The original named plaintiff, individually and on behalf of I.M.S., was the minor child's biological mother, Haleigh Janee McBride. I.M.S. was subsequently adopted by her maternal grandparents, and Virgie McBride was substituted as the named plaintiff.

> unseaworthiness under general maritime law and negligence under the Jones Act and seeking compensatory as well as punitive damages under both claims. The other crew members filed separate actions against Estis alleging the same causes of action and also requesting compensatory and punitive damages. Upon the crew members' motion, the cases were consolidated into a single action.

Id. at 384 (footnote omitted).

After we affirmed the district court's judgment dismissing the punitive damages claims, the case went back to the district court, culminating in a week-long bench trial. Prior to trial, Estis conceded liability under both the Jones Act and general maritime law claims, but continued to dispute damages and the right to maintenance and cure. The district court made findings of fact and conclusions of law on the record, and it awarded damages to McBride and both damages and cure to Touchet. On McBride's claims, the district court ordered Estis to pay damages for, among other things, loss of past support, loss of future support, and survival damages for pre-death fear and conscious pain and suffering. On Touchet's claims, the district court ordered Estis to pay damages for, among other things, future lost earnings / loss of earning capacity and future medical expenses, and to additionally pay cure until Touchet reaches maximum medical improvement. Estis appeals the district court's judgment on these specific awards.

II. Standard of Review

When reviewing a judgment from a bench trial, this court reviews the findings of facts for clear error and the legal issues de novo. *Lehmann v. GE Glob. Ins. Holding Corp.*, 524 F.3d 621, 624 (5th Cir. 2008). "Under the clearly erroneous standard, we will reverse only if we have a definite and firm conviction that a mistake has been committed." *Canal Barge Co. v. Torco Oil*

Co., 220 F.3d 370, 375 (5th Cir. 2000). "If the district court made a legal error that affected its factual findings, 'remand is the proper course unless the record permits only one resolution of the factual issue.'" *Ball v. LeBlanc*, 792 F.3d 584, 596 (5th Cir. 2015) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)).

III. Discussion

A. McBride's Damages Award

Estis challenges the district court's award of damages to McBride for both pre-death conscious pain and suffering and loss of past and future support. We address each of Estis's arguments in turn.

i. Pre-Death Fear and Conscious Pain and Suffering

Under the Jones Act, a plaintiff can recover damages for pre-death pain and suffering. *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 141 (5th Cir. 1986). Compensable pain and suffering includes a victim's "emotional injury caused by *fear of physical injury to himself*." *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 939 (5th Cir. 2014) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 556 (1994)). However, for a plaintiff to recover for a decedent's pain and suffering, he "must prove, by a preponderance of the evidence, that the decedent was conscious after realizing his danger." *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1092 (5th Cir. 1988).

Estis argues that the district court erroneously awarded damages for Sonnier's pre-death fear and conscious pain and suffering because objective evidence shows that Sonnier was not conscious after impact and thus did not suffer. The district court awarded a total of $400,000 for pre-death fear and conscious pain and suffering, without further delineating between pre-injury and post-injury survival damages. As a threshold matter, Estis does not challenge the district court's finding of pre-death fear and thus fails to

challenge one of the predicate injuries supporting the damages award. Nevertheless, even if he had challenged the finding of pre-death fear, there is sufficient evidence to support the district court's finding. Eyewitness testimony showed that Sonnier was aware of the danger and running for his life immediately prior to impact, and photographs from the scene showed that his body was positioned in such a way that his left arm was raised in a defensive posture to protect himself.

As to pre-death conscious pain and suffering, the pathologist who performed the autopsy on Sonnier testified that Sonnier could have been conscious and aware for up to five minutes after impact, but was more likely than not conscious for one to two minutes after impact. Moreover, witness testimony claimed that Sonnier was alive and gurgling blood shortly after impact, and the district court appears to have found this testimony credible. Estis's attempt to undermine the credibility of the eyewitness testimony based on prior inconsistent statements is unavailing. *See In re Port Arthur Towing Co.*, 42 F.3d 312, 318 (5th Cir. 1995) ("[W]eighing conflicting evidence and inference and determining the relative credibility of witnesses to resolve factual disputes is the [factfinder's] province." (alteration in original) (quoting *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 207 (5th Cir. 1992))). We therefore hold that the district court's finding that Sonnier was conscious after impact, the only finding challenged relative to this award, was not clearly erroneous.

ii. Loss of Past and Future Support

Estis next argues that the district court erroneously awarded damages for loss of past and future support. The district court found that damages for loss of support were appropriate because the totality of the facts, including testimony from the child's mother and Sonnier's father, showed that Sonnier consistently supported his daughter to the extent he was able to do so. The

district court then relied on expert testimony to determine the amount awarded.

Estis contends that the amount awarded was too speculative and not supported by competent evidence. However, the district court found the methodology used by both experts to be reliable and generally accepted in the fields of vocational rehabilitation and economics, and Estis does not directly challenge this finding or point to evidence that otherwise discredits it. Although Estis asserts that the district court failed to consider Sonnier's earnings at the time of his death, the record clearly shows otherwise. Moreover, the district court limited its consideration of Sonnier's lost future earnings to a potential career path related to Sonnier's prior work experience, while explicitly rejecting more optimistic scenarios as too speculative.

Estis's remaining argument is that an award of damages for loss of support should be limited to the amount awarded in Sonnier's rescinded child support obligation. Estis points to no evidence that Sonnier's support for the child was limited to a terminated child support obligation, and likewise cites no case law, and we are unaware of any, showing that damages for loss of support must be limited to child support obligations.[3] To the contrary, the district court found that Sonnier was a devoted father who was committed to supporting the child to the extent he was able to do so and, except while incarcerated, provided the primary means of support for the child. Estis has not shown that this finding was clearly erroneous. Accordingly, we affirm the judgment as to McBride.

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[3] *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 584–85 (1974) ("Recovery for loss of support . . . includes *all* the financial contributions that the decedent would have made to his dependents had he lived (emphasis added)), *superseded by statute on other grounds,* Longshore and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, *as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

B. Touchet's Damages and Cure Awards

In challenging the damages and cure awards to Touchet, Estis argues that the district court erred by awarding cure payments for future medical expenses and damages for loss of future wages. We address each argument in turn.

i. Future Medical Expenses

The district court ordered Estis to pay future cure until Touchet reaches maximum medical improvement and $55,185 in future medical expenses beyond Touchet's maximum medical improvement. Estis argues that the $55,185 award for future medical expenses was erroneous because it requires Estis to pay future cure payments for an indefinite period of time. It also seems to argue that the cure payments are erroneous as a matter of law to the extent they continue beyond Touchet's maximum medical improvement. We conclude that this determination was not reversible error.

"Maintenance and cure is an obligation imposed upon a shipowner to provide for a seaman who becomes ill or injured during his service to the ship." *Boudreaux v. United States*, 280 F.3d 461, 468 (5th Cir. 2002). Maintenance entitles an injured seaman to food and lodging, and cure entitles an injured seaman to reimbursement for medical expenses and proper treatment and care. *Id.* "The maintenance and cure duty terminates only when maximum [medical improvement] has been reached, *i.e.*, 'where it is probable that further treatment will result in no betterment in the claimant's condition.'" *Id.* (quoting *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)). When supported by a physician's testimony, it is appropriate for a district court to award future maintenance and cure until the plaintiff reaches maximum medical improvement. *See Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968,

969–70 (5th Cir. 1978). Moreover, a plaintiff can be awarded both cure and tort damages for future medical expenses, so long as no duplication will occur, because the cure obligation is independent of tort law. *Boudreaux*, 280 F.3d at 468–69; *see also Pallis v. United States*, 369 F. App'x 538, 545–46 (5th Cir. 2010)[4] ("It is clear from *Boudreaux* that an award of future medical expenses is not duplicative of cure because the former sounds in tort while the latter is a contractual remedy.").

A review of the record reveals that, contrary to Estis's assertion, the $55,185 award for future medical expenses was not a lump sum future cure payment but rather a damages award for Estis's tort liability. The district court made it clear that cure payments would cease once Touchet reached maximum medical improvement, and medical treatments thereafter would be compensated from the $55,185 award for future medical expenses. Indeed, each time the district court ordered cure payments it explicitly ordered Estis to pay cure, whereas the judgment awarding future medical expenses makes no mention of cure payments.

The future cure payments that the district court did award, however, were limited to paying for a surgical plan of care and continued psychological treatments until Touchet reaches maximum medical improvement. Moreover, the award was appropriately supported by the testimony of Estis's treating physicians. Far from being erroneous, the award for future cure "amounts to little if anything more than a declaration of [Estis's] undoubted duty to pay maintenance [and cure] until [Touchet] attains maximum possible cure, a duty which existed independent of and regardless of the judgment." *See Lirette*, 579 F.2d at 970.

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[4] Although *Pallis* is not "controlling precedent," it "may be [cited as] persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) (citing 5TH CIR. R. 47.5.4).

ii. Future Lost Earnings

Estis argues that the award of damages for lost earnings was clearly erroneous because a video of Touchet actively engaged in crabbing work proves that he was not permanently disabled from offshore work. Touchet's treating physicians testified that Touchet's activities on the video were consistent with his condition but that he was more likely than not permanently disabled from oilfield work. Based on this testimony, the district court found that Touchet was permanently disabled. This factual finding was not clearly erroneous. Accordingly, we affirm the district court's judgment awarding future cure payments, future medical expenses, and future lost earnings to Touchet.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31326

United States Court of Appeals
Fifth Circuit
FILED
September 4, 2015
Lyle W. Cayce
Clerk

MARK BARTO,

Plaintiff - Appellee

v.

SHORE CONSTRUCTION, L.L.C.; MCDERMOTT, INCORPORATED,

Defendants - Appellants

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

Before BENAVIDES, CLEMENT, and HIGGINSON, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Mark Barto, an employee of Shore Construction, L.L.C., ("Shore") was hurt when he fell while working on a derrick barge operated by McDermott, Inc. ("McDermott"). Barto sued McDermott under the Jones Act. He also sued Shore for cure under maritime law. After a bench trial, the district court entered a judgment against McDermott and Shore. McDermott appeals the district court's finding that it was completely at fault for the accident, as well as several components of the Jones Act damages award. Shore appeals a portion of the cure award. We AFFIRM as to most issues but REVERSE and RENDER as to the award of future lost wages against McDermott.

No. 14-31326

FACTS AND PROCEEDINGS

Plaintiff-appellee Mark Barto was a Jones Act seaman employed by Shore. Shore assigned him to work as a rigger aboard Derrick Barge 50 ("DB 50"), a derrick barge operated by McDermott.

Barto had an accident while he was working on DB 50. Barto and several other crew members were performing an operation in which a cable was taken from a crane, inspected and subjected to maintenance, and spooled onto a large spooling machine. As the spooling machine slowly turned to reel in the cable, Barto was responsible for guiding the cable by tapping it to ensure that the cable lines did not overlap. He was offered no guidance on how to perform this task, which is not routine but instead is done approximately once every two years. Barto had been working on DB 50 for about 5 months and had never performed this task before. He was also "one of the lowest ranking riggers on the barge," as well as "the least experienced." The barge's crew included a superintendent, a foreman, several leadermen, and a number of more experienced riggers.

The spooling drum was elevated about eight to ten feet above the deck. To perform his task, Barto first tried to use a two-by-four wooden plank to tap the cable lines into place, which was the method used by the person he had seen performing the task previously. But Barto testified that he began having trouble reaching the spooling drum from the deck. So he decided to get a fir board and lay it across part of the spooling machine's frame so that he could stand on the board. He picked a board that "looked sturdy," although it already had a notch cut out of one end. The notch removed a little over half of the board's width from approximately the last foot of the board's length. After placing the board on the spooling frame, Barto stood on top of the board and used a brass hammer to guide the cables. The district court credited Barto's testimony that he was standing approximately four feet from the deck and that

the board's notched end extended over the frame so that it did not bear any weight.

The district court concluded that Barto's supervisors could easily see him on the board, and that they did not tell him to get down because they did not think it was unsafe. Barto also testified that a leaderman, Rene Vallecillo, came over and talked to Barto while he was standing on the board. Vallecillo told Barto to tap the cable lines if they overlapped on the spool, but he did not tell Barto to get off the board.

In the past, other McDermott employees, including leaderman Vallecillo, had used fir boards as makeshift scaffolding inside the spooling machine's frame. Some McDermott employees had instead performed the task by standing on the frame itself. Other McDermott employees, however, were able to perform the task by standing on the deck and tapping the cable using a two-by-four or even a four-by-four board.

The board on which Barto was standing ultimately broke at the notched end, and Barto fell. The district court found that, given that Barto had placed the board so that the notch overhung the frame, "somehow [the board] apparently moved on him as he was working and broke where the pictures depict that it broke, which is on the end where it was notched out."

After the accident, Barto began having pain in his left leg, lower back, and neck, and he could no longer work. Although Shore paid for most of the maintenance and cure requested by Barto, Shore refused to pay for the lumbar surgery recommended by Barto's neurosurgeon, Dr. Ilyas Munshi. Dr. Munshi recommended the surgery to reduce pain by removing pressure from the nerve sac. About one month before trial, Dr. Munshi performed a three-level laminectomy to remove bone at L2 to L5, which removed the pressure on the nerve sac. He then performed a three-level fusion to strengthen the spine. Shore's expert witness, another neurosurgeon, admitted that Barto's nerve sac

was compressed before the surgery but vigorously contested the surgery's necessity, maintaining that Barto's pain was on the wrong side to be caused by the nerve sac compression.

Dr. Munshi testified by deposition about two weeks after performing the surgery. He testified that it was too early to tell whether the surgery was successful, although Barto had reported improvement in his leg pain. Dr. Munshi testified that, even if the surgery was successful, "[t]here's a good chance, the most he may do is light duty work." Dr. Munshi also testified that, given his experience with other patients who had made a good recovery from the surgery he had performed, he "reasonably anticipate[s]" the following restrictions: "no frequent bending [or] stooping," weight lifting restrictions, and restrictions on "[a]nything that puts a lot of stress on his back." These restrictions would relate not only to work but also to recreational activities, and they would be "long-lasting." At trial about one month later, Barto testified that he was not feeling any pain other than some neck pain "[o]ff and on" and some pain from the surgical incision. He testified that, because of the back and neck injuries, he could not do several things he enjoyed, such as "jogging, lifting weights, baseball, basketball, a lot of sports," "yard work," "fix[ing] on my car," and "[p]lay[ing] with my kids."

Barto sued McDermott for Jones Act negligence. He requested damages for, among other things, future lost wages and future "physical and mental pain and suffering and loss of enjoyment of lifestyle." He also sued Shore for cure, requesting that it pay for the surgery performed by Dr. Munshi.

The district court held a bench trial and then ruled from the bench. It held that McDermott was liable under the Jones Act, reasoning that McDermott failed to provide Barto with a safe place to work. The court also held that Barto was not comparatively negligent. As to damages, the court held that McDermott owed Barto $400,000 in future general damages and

$300,000 in future lost wages. Finally, the court held that Shore was liable for the surgery costs as cure.

STANDARD OF REVIEW

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 (5th Cir. 2009) (quoting *In re Mid–South Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005)) (internal quotation marks omitted). Reversal is warranted under clear error review only if the court is "left with the definite and firm conviction that a mistake has been committed." *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 213 (5th Cir. 2006) (per curiam) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)) (internal quotation marks omitted).

Despite this court's typical deference to a district court's factual findings, "a judgment based on a factual finding derived from an incorrect understanding of substantive law must be reversed." *Mobil Exploration & Producing U.S., Inc. v. Cajun Const. Servs., Inc.*, 45 F.3d 96, 99 (5th Cir. 1995).

DISCUSSION

A. McDermott's Jones Act Liability

McDermott first argues that it is not liable under the Jones Act. We generally "review a district court's finding of negligence and apportionment of fault for clear error." *Jauch*, 470 F.3d at 213. But McDermott argues that we should automatically reverse here because the district court misunderstood the law. *See Mobil Exploration*, 45 F.3d at 99. Specifically, McDermott argues that the district court erroneously believed that a Jones Act employer has a duty to provide an absolutely safe place to work (rather than a reasonably safe

place to work, which is all that is required under *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc)).

To demonstrate that the district court misunderstood the law, McDermott relies upon the district court's statement that "[u]nder the Jones Act, of course, the Jones Act employer has a duty, a nondelegable duty to provide a safe place to work." The court also found that "the safe method would have required—should have required proper scaffolding to be erected before employees were required to climb into or onto this spooling machine."

Upon a review of the entire record, we reject McDermott's contention that the experienced district judge misunderstood elementary principles of Jones Act liability. The district court never stated that a Jones Act employer has an absolute duty to provide a safe place to work. Further, the district court stated that "this is more of a negligence case to me than an unseaworthiness case," suggesting that the court recognized that a normal negligence standard of care applies under the Jones Act. Moreover, in their proposed findings of fact and conclusions of law, both parties provided the correct legal standard (ordinary negligence). It seems unlikely that the district court somehow *sua sponte* settled upon an incorrect legal standard. Also, some of the reasoning in the district court's ruling would made little sense if it thought that McDermott had an absolute duty to provide a safe place to work. For example, the court pointed out that "[t]here was scaffolding available on the DB 50. There was even an experienced scaffolding crew . . . ." If McDermott had an absolute duty to provide a safe place to work, it would not matter whether scaffolding was available. Instead, the district court seemed to weigh this fact as evidence that McDermott's failure to erect scaffolding was unreasonable. The court also held that Barto's supervisors "failed to properly supervise Mr. Barto . . . , particularly since this was not a routine job and something he had never done

before." This reasoning again suggests that the district court was trying to discern whether McDermott had exercised a reasonable amount of care.

Because we find that the district court did not misunderstand the law, we will reverse the negligence finding only if it was clearly erroneous. *Jauch*, 470 F.3d at 213. We hold that it was not. The record reveals ample evidence that the standard practice for performing Barto's assigned task on DB 50 involved seamen figuring out their own makeshift methods of reaching the spooling drum.[1] The district court did not clearly err in finding that McDermott failed to provide Barto with a reasonably safe place to work by failing to provide him with an appropriate way to reach the spooling drum.

B. Barto's Comparative Negligence

McDermott next challenges the district court's conclusion that Barto was not comparatively negligent for the accident. Again, this court "review[s] a district court's finding of negligence and apportionment of fault for clear error." *Jauch*, 470 F.3d at 213. We affirm based on this deferential standard of review.

We have held that:

> A seaman . . . is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education.

Gautreaux, 107 F.3d at 339. Comparative negligence "may reduce the amount of damages owed [to a seaman] proportionate to his share of fault." *Jauch*, 470

[1] In particular, the DB 50 superintendent testified that using fir boards as scaffolding was acceptable and had been done in the past; a DB 50 leaderman testified that using a fir board was safe and that he had done so himself; and a more experienced DB 50 rigger testified that he had stood on top of the frame and used a brass hammer to perform Barto's task. Two of Barto's supervisors also testified that they saw him standing on either a board or the frame, and they apparently thought nothing of it. Admittedly, these supervisors testified that Barto was standing only two feet from the deck. But the district court found Barto's recollection that he was about four feet from the deck to be more credible.

F.3d at 213. The burden of proving comparative negligence is on the Jones Act employer. *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 302 (5th Cir. 2008) ("[C]ontributory negligence is an affirmative defense [in a Jones Act case.]").

McDermott argues that Barto was comparatively negligent because he selected an improper board (i.e., a fir board with a notch in it) and failed to secure the board to the spooling machine's frame. The district court did not specifically explain why Barto was not negligent, even though he selected a notched board and failed to secure it. But the court generally explained its decision not to "impose any comparative fault," noting that Barto "was the low man on the totem pole. He was the least experienced. He had never performed this work before."

Moreover, the district court credited Barto's testimony that he had placed the notched end of the board over the frame such that the notched end was not supporting any part of his weight. The DB 50 superintendent testified that, if the notched portion had overhung the frame, "I think the board would have held [Barto's] weight." Also, the board apparently *did* hold Barto's weight for 25 to 30 minutes, further supporting an inference that Barto's selection of the board was not negligent. The district court therefore did not clearly err by finding that McDermott failed to prove that Barto was negligent in his selection of the board, given how he placed it on the frame.

McDermott also did not demonstrate that a reasonable seaman with Barto's "own experience, training, or education" would have realized that he had to secure the board. *See Gautreaux*, 107 F.3d at 339 ("The circumstances of a seaman's employment include . . . his own experience, training, or education."). Indeed, a DB 50 leaderman, Vallecillo, testified that, "[i]f I would have seen that the board wasn't banded [(i.e., wasn't secured to the frame)], I *probably* would have tell him something, but I didn't see that" (emphasis added). This testimony seems to indicate that even a leaderman would not

view the failure to secure the board as particularly unsafe, given that Vallecillo was unsure whether he would have told Barto to get off an unsecured board. To be sure, McDermott also presented evidence from a barge foreman that the board should have been secured to the frame. But again, McDermott bore the burden of proving that Barto was negligent, given his relative inexperience. Notably, the only other rigger who testified did not opine that the board should have been secured. And McDermott adduced no other testimony that a relatively inexperienced rigger like Barto should have known to secure the board. Further, there was no testimony that the people who had previously used fir boards to perform Barto's task had secured the boards. The district court therefore did not clearly err in finding that McDermott did not prove Barto's comparative negligence, given his relative inexperience.

C. Future General Damages

McDermott also challenges the district court's award of future general damages in the amount of $400,000. "A district court's damages award is a finding of fact, which this court reviews for excessiveness using the clear error standard." *Lebron v. United States*, 279 F.3d 321, 325 (5th Cir. 2002). "Put otherwise, '[w]e do not reverse a verdict for excessiveness except on the strongest of showings.'" *Id.* (quoting *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 590 (5th Cir. 1985)) (alteration in original).

Future general damages are available "for pain and suffering and impact on one's normal life routines." *Crador v. La. Dep't of Highways*, 625 F.2d 1227, 1230 (5th Cir. 1980). On appeal, McDermott focuses its argument on *only* pain and suffering, arguing that there is no evidence that Barto's pain will return now that he has had surgery. McDermott does *not* argue that Barto will be able to return to his normal life routines. This is particularly important because the district court noted that "[t]here is no question he's going to continue to need to be followed and will have some rather significant

permanent restrictions, as has been testified to by Dr. Munshi, with residual pain." Further, the district court's future general damages award specifically contemplated, in part, Barto's "permanent restriction of normal living—normal life activities and so forth." And Barto presented evidence that his life activities would be limited. He testified that he could no longer do things he enjoyed, such as "jogging, lifting weights, baseball, basketball, a lot of sports," "yard work," "fix[ing] on my car," and "[p]lay[ing] with my kids." And Dr. Munshi testified that, even if the surgery was completely successful, he expected that Barto would indefinitely need to avoid "[a]nything that puts a lot of stress on his back."

At oral argument, McDermott maintained that Barto produced insufficient evidence of the impact on his normal life routines. Specifically, McDermott argued that a seaman's own uncorroborated, self-serving testimony is not enough to prove this impact. This argument fails for three reasons. First, McDermott did not raise this argument in its appellate brief, so it is waived. *E.g.*, *Am. Nat. Gen. Ins. Co. v. Ryan*, 274 F.3d 319, 325 n.3 (5th Cir. 2001). Second, Barto's testimony *was* corroborated: Dr. Munshi testified that, even after the surgery, Barto's recreational activities would likely be restricted. Third, even if Barto's testimony were uncorroborated, the mere fact that testimony is uncorroborated and self-serving does not automatically mean that a factfinder is prohibited from crediting it. *See, e.g.*, *Curry v. Fluor Drilling Servs., Inc.*, 715 F.2d 893, 895 (5th Cir. 1983) (rejecting defendant's complaint that district court credited plaintiff's self-serving and uncorroborated testimony).[2]

[2] We note that McDermott has not raised an excessiveness challenge to the component of future general damages that compensates Barto for the impact on his normal life routines. We therefore express no opinion on whether the award was excessive.

McDermott next argues that the future general damages award violates our maximum recovery rule. "This judge-made rule essentially provides that we will decline to reduce damages where the amount awarded is not disproportionate to at least *one factually similar* case from the relevant jurisdiction." *Lebron*, 279 F.3d at 326 (quoting *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1344 (5th Cir. 1990)) (internal quotation mark omitted).

McDermott has not demonstrated that the rule is applicable here because it has not pointed to a damages award in a "*factually similar* case from the relevant jurisdiction." *Id.* In particular, in the case that McDermott offers as a comparator, the court awarded "$50,000 for future physical and mental pain and suffering." *Aycock v. Ensco Offshore Co.*, 833 So.2d 1246, 1248 (La. Ct. App. 2002). Nothing indicates that this award accounted for the "impact on [the plaintiff's] normal life routines." *Crador*, 625 F.2d at 1230. In contrast, the $400,000 award here explicitly accounted for the impact on Barto's everyday life. Thus, McDermott has failed to advance a suitable comparator for Barto's future general damages award, so the maximum recovery rule does not even come into play. *See Lebron*, 279 F.3d at 326 (noting that the maximum recovery rule "'does not become operative unless the award exceeds 133% of the highest previous recovery in the [relevant jurisdiction]' for a factually similar case" (quoting *Douglass*, 897 F.2d at 1344 n.14) (alteration in original)).

D. Future Lost Wages

McDermott's final argument is that the district court erred by calculating Barto's lost wages according to an above-average work-life expectancy. A damages award for future lost wages should generally be based upon a seaman's work-life expectancy, meaning "the average number of years that a person of a certain age will both live *and* work." *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984). "Such an average is not

conclusive. It may be shown by evidence that a particular person, by virtue of his health or occupation or other factors, is likely to live *and* work a longer, or shorter, period than the average." *Id.* "Absent such evidence, however, computations should be based on the statistical average." *Id.*

Here, the district court noted that expert economists provided wage loss estimates for work-life expectancies of age 55 to "age 67, which is the Social Security requirement age for Mr. Barto." The district court then said, "What I'm going to do is award something in the middle. I think that's a reasonable estimation of his loss of future earning capacity." Accordingly, the district court awarded Barto $300,000 for future lost wages. McDermott argues that the district court erred by relying upon an above-average work-life expectancy.

Barto's expert economist provided a range of estimates for Barto's future lost wages for two different retirement ages: 55.8 and 67. The age of 55.8 was selected based on a table of statistical work-life expectancies that had been prepared by other economists. In contrast, the age of 67 was selected because it is Barto's "full retirement age, as determined by the Social Security Administration." McDermott's expert economist provided a different range of estimates based on a retirement age of 58.2, which its expert selected based on a work-life expectancy table from the U.S. Department of Labor's Bureau of Labor Statistics.

Barto's economist did not provide any reason to believe that Barto would continue to work past his statistical work-life expectancy. The only relevant evidence Barto presented at trial was his testimony that he plans to work "[a]s long as I can retire. Whatever the retirement age is." This scant evidence was not enough to show that Barto "by virtue of his health or occupation or other factors, is likely to live *and* work a longer, or shorter, period than the average." *Madore*, 732 F.2d at 478. For one thing, Barto did not specifically testify that he planned to work until age 67. And nothing indicates that Barto knew that

this was the Social Security retirement age. Moreover, even if the district court believed that Barto wanted to work until age 67, *wanting* to work until age 67 is not the only or even the most significant factor in determining whether someone actually *will* work until age 67. As we have previously pointed out, an employee "might have become disabled before [the Social Security retirement age] as a result of illness or some other misadventure." *Id.* Or the employee "might have died before then." *Id.* Certainly Barto presented no evidence that such events were particularly unlikely given his health or other factors. Barto therefore did not successfully rebut the presumption that the average work-life expectancy should apply.

McDermott asks us to render judgment, reducing the future lost wages award from $300,000 to $209,533. The district court explicitly credited the vocational expert's opinion that Barto could still work as an unarmed security guard. Barto's own expert economist determined that his net future lost wages would be $209,533 if he worked as an unarmed security guard and retired at age 55.8. We therefore find it appropriate to render judgment in the amount of $209,533 for future lost wages.

Barto contended at oral argument that we should instead remand for the district court to determine future lost wages based on a retirement age of 58.2, the age selected by McDermott's expert economist. This age is about 2.5 years longer than the statistical work-life expectancy selected by Barto's expert economist. But at trial, Barto failed to provide an expert opinion on future lost wages assuming a retirement age of 58.2. "It is a basic concept of damages that they must be proved by the party seeking them." *Servicios-Expoarma, C.A. v Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 995 (5th Cir. 1998). Barto should have presented a revised expert opinion at trial if he intended to argue that McDermott's slightly higher work-life expectancy should apply. We decline to remand to give Barto a second chance to prove future lost wages.

E. Cure

Shore's sole argument on appeal is that Barto did not prove that the lumbar surgery was intended to improve his physical condition, so the surgery's cost was not available as cure. This question of fact is reviewed for clear error. *Becker*, 586 F.3d at 365. Moreover, "when there are ambiguities or doubts [as to a seaman's right to receive maintenance and cure], they are to be resolved in favor of the seaman." *Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 79 (5th Cir. 1990) (quoting *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962)) (internal quotation marks omitted) (alteration in original).

"Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman . . . until the point of 'maximum cure.'" *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). Maximum cure occurs "when it appears probable that further treatment will result in no *betterment* of the seaman's condition." *Id.* "Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved." *Id.* It logically follows that, "when a particular medical procedure is merely palliative in nature or serves only to relieve pain and suffering, no duty to provide payments for cure exists." *Johnston v. Tidewater Marine Serv.*, No. 96-30595, 116 F.3d 478, 1997 WL 256881, at *2 (5th Cir. Apr. 23, 1997) (per curiam) (unpublished table opinion). For example, if a seaman's epilepsy is caused by scarring in his brain, medicine for "[c]ontrol of seizures is not a cure, for the precipitative factor, the scarring, remains." *Stewart v. Waterman S.S. Corp.*, 288 F. Supp. 629, 633–35 (E.D. La. 1968), *aff'd*, 409 F.2d 1045 (5th Cir. 1969) (per curiam), *cited with approval in Pelotto*, 604 F.2d at 400.

Here, Dr. Munshi testified that the purpose of the surgery was to remove pressure from the nerve sac, which caused at least some of Barto's pain. The removal of pressure from the nerve sac would thereby better Barto's physical condition by curing the root cause of his pain rather than merely correcting the symptom (pain). The surgery was therefore curative rather than merely palliative in nature. The surgery also corrected a physical abnormality that existed in Barto's body (pressure on the nerve sac) and thereby bettered his physical condition by restoring it to a normal, healthy condition. The district court therefore did not clearly err by requiring Shore to pay for the surgery as cure, particularly given that any doubts about cure "are to be resolved in favor of the seaman," *Johnson*, 893 F.2d at 79.

CONCLUSION

As to the award of future lost wages, we REVERSE and RENDER judgment that Barto is entitled to $209,533.00 for future lost wages against McDermott. In all other respects, we AFFIRM the district court's judgment.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 30, 2019
Lyle W. Cayce
Clerk

No. 18-31023

JOHNNY DEAN, SR.,

Plaintiff - Appellant

v.

SEA SUPPLY, INCORPORATED; SEA SUPPLY, INCORPORATED COB; JESSICA ELIZABETH, in rem,

Defendants - Appellees

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

Before CLEMENT, DUNCAN, and OLDHAM, Circuit Judges.

PER CURIAM:*

Vessel Captain Johnny Dean slipped and fell while trying to fix the No. 4 engine on the M/V JESSICA ELIZABETH. He brought this action under the Jones Act and general maritime law against Sea Supply, his employer and the owner/operator of the vessel. (Dean also sued the vessel *in rem*). Dean advanced several theories of liability. After a three-day bench trial, the district court rejected all of them because Dean was solely at fault. We AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

At the time of his fall, Dean was wearing a pair of Starter brand tennis shoes. The vessel safety manual provides that "Safety toed shoes or boots with slip-resistant soles shall be worn at all times while outside the living quarters." The district court found that Dean's shoes were not in compliance with Sea Supply's safety requirements for working in the engine room. The court found that Dean's failure to wear proper footwear and his failure to clean either his shoes or the walking surface in the engine room (which he knew were oily) were the sole cause of the accident. The court found Dean 100% liable.

Dean argued Sea Supply was at least partly at fault. He contended the vessel was unseaworthy because the No. 4 engine was broken, and that Sea Supply was negligent in failing to have it fixed sooner. The district court agreed that the engine's failure to work properly created an unseaworthy condition but said the unseaworthiness did not matter because Dean was solely at fault for the accident. The court further rejected Dean's argument that Sea Supply was negligent for failing to enforce its footwear policy. On appeal, Dean maintains the court's findings are against the weight of the evidence. He also argues for the first time that the design of the JESSICA ELIZABETH—which requires a worker to stand in the oily bilge while repairing the No. 4 engine—rendered the vessel unseaworthy.

Because Dean did not argue below that the vessel was unseaworthy because of its design, he has waived that argument. *See Texas Molecular Ltd. P'ship v. Am. Int'l Specialty Lines Ins. Co.*, 424 F. App'x 354, 357 (5th Cir. 2011) (arguments not made before the district court are waived and will not be considered on appeal). But even if he had not waived it, we would reject his new theory because Dean's reliance on *Rogers v. United States*, 452 F.2d 1149, 1151 (5th Cir. 1971), is misguided. That case does not establish a general rule that a vessel design which forces a seaman to stand in the bilge to work on an

engine always renders the vessel unseaworthy. Two years after *Rogers*, we explained in *Garcia v. Murphy Pacific Marine Salvaging Co.* that the seamen in *Rogers* were required to stand in the bilge "for several hours" and that "[n]othing had been done to avoid or minimize the danger of slipping." 476 F.2d 303, 306 (5th Cir. 1973).

There is no evidence that Dean stood in the bilge for that long. And Dean's placement of absorbent pads in the bilge minimized the danger of slipping while he worked. *See id.* (distinguishing *Rogers* because canvas, burlap, and sawdust were used to reduce the chances of slipping). Most importantly, however, the district court found that the sole cause of the accident was Dean's failure to take other, additional steps which would have further reduced the danger of slipping. *Dean v. Sea Supply, Inc.*, 2018 WL 3391578, at *5 (E.D. La. July 12, 2018). So even if the location of the No. 4 engine did render the JESSICA ELIZABETH unseaworthy, Dean is still barred from recovery unless we reverse that factual finding. The same is true for Dean's other arguments for reversal.

Questions of fault, including determinations of causation, are factual issues that may not be set aside unless clearly erroneous. *In re Mid-S. Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005). "We entertain a strong presumption that the court's findings must be sustained even though this court might have weighed the evidence differently." *Johnson v. Cenac Towing, Inc.*, 544 F.3d 296, 303 (5th Cir. 2008). Reviewing the record, we are not convinced that the district court's findings as to causation are clearly erroneous.

The district court found that Dean's accident was the result of his own unreasonable failure to prepare for the oily conditions he knew he was likely to encounter while fixing the engine. *Dean*, 2018 WL 3391578, at *5. Dean ignored the footwear policy, failed to ask for help from a deckhand, failed to

clean a walkway that he knew was oily, and failed to clean his shoes when he knew they were covered in oil despite the availability of rags and absorbent pads. *Id.* at *2. Reviewing the district court's application of the standard of causation, we are not "left with the definite and firm conviction that a mistake has been committed." *Gavagan v. United States*, 955 F.2d 1016, 1019 (5th Cir. 1992). Accordingly, we affirm.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 30, 2019
Lyle W. Cayce
Clerk

No. 18-31144

GEORGES F. PAYANO,

Plaintiff - Appellant

v.

ENVIRONMENTAL SAFETY & HEALTH CONSULTING SERVICES, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-6425

Before SMITH, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Plaintiff-appellant Georges Payano sued his employer, defendant-appellee Environmental Safety and Health Consulting Services, Inc., ("ES&H"), under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("the Act") after he injured his bicep while conducting oil spill cleanup operations on a vessel. Though conceding that ES&H was immune from suit in its capacity as his employer, Payano argued that ES&H was liable for vessel

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

negligence under § 905(b) because it assumed operational and navigational control over the vessel. The district court granted summary judgment in favor of ES&H, finding that ES&H did not exercise operational control over the vessel and all the alleged negligent acts committed by ES&H occurred in its capacity as Payano's employer, immunizing ES&H from suit. We AFFIRM.

I.

ES&H was hired to retrieve damaged oil boom (a temporary barrier used to contain oil spills) surrounding a leaking wellhead off the Louisiana coast. ES&H time chartered a vessel, The Saint, owned by NOLA Boat Rentals, to transport personnel to and from the work site and conduct the cleanup operations. Captain Brent Trauth of NOLA captained, operated, and controlled The Saint during the cleanup operations, and was responsible for determining whether the seas were too rough to complete the job. ES&H supervisor Jack Scruggs instructed Capt. Trauth on what time to leave shore, where to go, and what time to return to shore, and at the wellhead site, he indicated to Capt. Trauth to pull the vessel back or forward to position the vessel to retrieve the boom.

According to the ES&H manual, to retrieve the damaged boom, hooked pike poles are used to hold the boom line while the captain backs up the vessel to snap the line and unanchor the boom. Payano claims that instead of this standard procedure, Scruggs had him lie down on the vessel's bow, reach over the water, and manually pull up the damaged segments of the boom. Payano struggled to lift the boom, heavy from its anchor, especially because the waves moved the boat. Despite the difficulty in retrieving the boom, Scruggs never told Payano to stop, instead urging him to continue. As Payano continued to work, a wave jerked the bow of the vessel upward and caused Payano's bicep to tear. Payano also says that he did not receive any safety training, and

though he does not speak or read English, no interpreters were present at the job site.

II.

An employer is immune from tort liability under the Act for any negligent act committed in its capacity as employer. 33 U.S.C. § 905(a). The exclusive remedy for a covered worker against his employer is compensation benefits, to which the injured worker is entitled without regard to the employer's fault.[1] *Id.* § 904. A vessel owner, however, is not immune from suit. Under § 905(b), a worker covered by the Act[2] "may pursue a tort action against the owner of a vessel for acts of vessel negligence." *Levene v. Pintail Enters.*, 943 F.2d 528, 531 (5th Cir. 1991). Such a tort action may also be brought against the vessel's "owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). "When an employer acts in a dual capacity as vessel owner, the entity retains its immunity for acts taken in its capacity as an employer, but may still be sued 'qua vessel' for acts of vessel negligence." *Levene*, 943 F.2d at 531.

ES&H, as Payano's employer, can only be held liable for negligent acts committed in its capacity as vessel owner.[3] It is undisputed that NOLA Boat Rentals, not ES&H, owned The Saint. Under our precedent, however, a vessel

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[1] Payano received compensation benefits under the Act while recuperating from his injury until he was cleared to return to work.

[2] Payano and ES&H stipulate that Payano was a longshoreman covered by the Act.

[3] ES&H can also be held liable for vessel negligence under § 905(b) of the Act for negligence committed in its capacity as time-charterer, but its duties and therefore its liability are circumscribed by the nature of its control over the vessel. *See Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1343 (5th Cir. 1987) (holding that "a time-charterer is not liable under section 5(b) unless the cause of the harm is within the charterer's traditional sphere of control and responsibility or has been transferred thereto by the clear language of the charter agreement"). Payano argues for the first time in his reply brief that ES&H is liable for negligence committed in its capacity as time-charterer. This argument was not raised in Payano's initial brief and has therefore been waived. *See United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

owner pro hac vice who has unrestricted use of a vessel can be held liable for vessel negligence under § 905(b). 33 U.S.C. §§ 905(b), 902(21); *Ducote v. Int'l Operating Co. of La.*, 678 F.2d 543, 544 n.1 (5th Cir. 1982); *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1342 n.11 (5th Cir. 1987) ("An owner pro hac vice has unrestricted use of the vessel.").

Viewing the facts and drawing all reasonable inferences in the light most favorable to Payano, he has failed to show that ES&H exerted sufficient control over The Saint to be considered its owner pro hac vice. *See Scott v. Harris*, 550 U.S. 372, 378 (2007); *Ducote*, 678 F.2d at 545-46. Payano argues that ES&H is liable as owner pro hac vice of The Saint because, once at the jobsite, Scruggs exerted complete navigational and operational control over the vessel by directing Capt. Trauth to pull vessel back or forward to position the boat to retrieve the boom. We rejected a similar argument in *Ducote*, where a worker who was injured while cleaning a barge argued that his employer was the barge's owner pro hac vice because the employer completely controlled the barge's movement during the cleaning operations. 678 F.2d at 545-46. We explained that "all [employer]-controlled movements of the barge were simply incidental to the cleaning and loading of the vessel" and the employer "did not have the right to use the barge for its own purposes in maritime commerce." *Id.* at 546. Therefore, the employer "did not have the ownership-like relationship with the vessel required to establish ownership pro hac vice." *Id.* (quoting *Hess v. Port Allen Marine Serv., Inc.*, 624 F.2d 673, 674 (5th Cir. 1980)).

Though this case differs slightly from *Ducote* because ES&H time-chartered The Saint for its own purposes in maritime commerce—to retrieve the damaged boom—it still rebuts Payano's argument that ES&H became the owner pro hac vice of The Saint simply because ES&H controlled the vessel's movement for a temporary time and for a limited purpose. *See id.* ES&H's

directing The Saint's movement to retrieve the damaged boom did not grant it unrestricted use of the vessel—indeed, at all times, Capt. Trauth steered the ship, had the unilateral right to cancel the voyage if the weather was too rough, and swore that he "captained, operated, and maintained sole control over The Saint." If ES&H had the right to unrestricted use of The Saint, it would not have submitted itself to Trauth's "sole control." Directing Capt. Trauth to pull the vessel back or forward to retrieve the boom did not grant ES&H unrestricted use of the vessel and therefore did not render ES&H liable as owner pro hac vice of The Saint.[4] *See id.*; *Kerr-McGee*, 830 F.2d at 1342 n.11.

Moreover, we agree with the district court that though Payano cited "evidence in the summary judgment record indicating that ES&H may have been negligent, there is no evidence in the summary judgment factual record to support a finding that these alleged acts of negligence occurred in ES&H's capacity as time charterer, rather than as employer." All the acts of negligence that Payano alleges—from Scruggs's instructing him to manually retrieve the oil boom, to failing to instruct him to stop despite his difficulties, to failing to adequately train him—"must be classified as potential acts of employer negligence, not vessel negligence." *Levene*, 943 F.2d at 535.

For these reasons, the judgment of the district court is AFFIRMED.

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[4] Scruggs's other actions—instructing Capt. Trauth on what time to leave shore, where to go, and what time to return to shore—are all traditional time-charterer duties and do not subject ES&H to the liability of a vessel owner pro hac vice. *See Kerr-McGee*, 830 F.2d at 1339-41.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-60542

WOOD GROUP PRODUCTION SERVICES,

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; LUIGI A. MALTA,

Respondents

Petition for Review of an Order
of the Benefits Review Board

Before CLEMENT, DUNCAN, and OLDHAM, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

Luigi Malta was injured while unloading a vessel on a fixed platform in the territorial waters of Louisiana. Malta made a claim against his employer, Wood Group Production Services (Wood Group), under the Longshore and Harbor Workers' Compensation Act. To enjoy coverage under the Act, a claimant must show both that he was in a place covered by the Act (situs) and that he was engaged in maritime employment (status). The Benefits Review Board concluded that because Malta—who spent 25 to 35 percent of his working hours loading/unloading vessels—was injured while unloading a

vessel on a platform customarily used for that task, Malta satisfied both the situs and status requirements. We deny Wood Group's petition for review.[1]

I.

Wood Group, which staffs personnel for clients in the oil and gas industry,[2] employed Malta as a warehouseman for the Black Bay Central Facility (Central Facility), a fixed platform located in the territorial waters of Louisiana.[3] Central Facility provides support services for oil and gas production occurring at various satellite production platforms in the Helis Black Bay Field. Twenty-two workers, including Malta, lived, worked, and slept at Central Facility, which comprises four separate platforms, connected by catwalks. A warehouse sits on one of these platforms, and in it the workers stored supplies and tools necessary for their sustenance and operations. Three cranes, located at various parts of Central Facility, assisted the workers as they loaded and unloaded these supplies from vessels, which often came from Venice, Louisiana. When workers on the satellite platforms required tools for their operations, the necessary items were taken from the warehouse and loaded onto vessels by crane. The vessels then travelled to the satellite platforms with these supplies.

Malta worked twelve hours each day—from sunup to sundown—seven days per week at Central Facility (and then he would rest shoreside for seven days). He never worked on any of the satellite platforms. His primary duties included ordering, receiving, and maintaining all supplies and equipment at the Central Facility warehouse. It is undisputed that, although not listed

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[1] Wood Group's insurer—Authorized Group Self-Insurer Signal Mutual Indemnity Association, Ltd. c/o Coastal Risk Services, LLC—is also a petitioner.

[2] Here, Wood Group was a contractor for Helis Oil and Gas Company.

[3] Two photographs of Central Facility appear at the end of our opinion.

among his official job duties, a significant portion of Malta's "hitch" (shift), was dedicated to loading and unloading vessels arriving at and leaving from Central Facility. Wood Group's project manager, Ray Pitre, testified that this was a "big part" of Malta's job. And Malta testified that he spent roughly 25 to 35 percent of each hitch loading and unloading vessels.

Malta explained that he regularly would load/unload all sorts of things into/from the vessels: "It can be anywhere from piping to big valves, compressors, drinking water supplies, various items, nothing in particular everyday. It's just whenever we order and something is needed, [I] pull it off the work barge or the water barge." Pitre similarly testified that Malta would unload "a various assortment of things from rags to repair parts to nitrogen cylinders to valves and phalanges . . . [because] the oil industry uses just a vast assortment of supplies." During a typical 12-hour hitch, if a group of workers on a "satellite platform needed additional supplies and equipment," Malta "would help load the field boat." This required Malta, "depending on exactly what it was [and] how big it was, [to] put it on a basket, and send it down to the boat and then off to the respective platform or field operator." Malta testified that there was "no difference" between his duties and those of "a dock worker loading and unloading" vessels in Venice.

Malta was injured when unloading a boat owned by a third party. He received a call seeking help to offload something coming up from the boats (which had come from one of the satellite platforms). Malta did not go onto the vessel to retrieve the item. Rather, it was "sent up to [him] via crane" while he was standing on the platform in front of the warehouse. As the basket was coming up, he "grabbed the tag line, pulled it in[,] and as the basket collapsed," Malta saw that the item was a CO_2 cannister—which had been mistakenly marked as empty. While Malta was removing the cannister from the cargo basket, it exploded, and he was injured.

Malta made a claim for benefits against Wood Group under the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. § 901, *et. seq.* By way of background, the Act "provides compensation for the death or disability of any person engaged in 'maritime employment,'" under certain conditions. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415 (1985). Wood Group contested Malta's claim for benefits. None of the facts was disputed, and the only question was whether Malta was qualified to recover under the Act. After a hearing, an Administrative Law Judge (ALJ) initially ruled against Malta, concluding "that [because] the fixed platform on which [Malta] worked" was not covered under the Act, there was no jurisdiction to consider his claim. In light of this holding, the ALJ did not initially decide whether Malta enjoyed maritime status under § 902 of the Act.

The Benefits Review Board (Board) reversed the ALJ's decision, concluding the ALJ misapplied this court's precedent and the plain language of the statute. It held that Malta's "injury occurred on a covered situs" and remanded the case so that the ALJ could address Malta's status.

On remand, once again, none of the facts was in dispute. The only question was whether Malta enjoyed maritime status. The ALJ found that, because Malta "loaded or unloaded the cargo from a ship or vessel, he was performing a traditional maritime activity" and satisfied "the status requirement of the Act." Wood Group appealed to the Board, which affirmed the ALJ's decision.

Having exhausted its options before the Department of Labor, Wood Group filed a petition for review with this court, arguing that Malta cannot recover under the Act because he lacks status and his injury did not occur on

a covered situs. Both Malta and the Director of the Office of Worker's Compensation Programs[4] filed briefs defending the Board's decision.

II.

If "the facts are not in dispute"—as is true of this appeal—then whether a worker is covered under the Act presents a "pure question of law" that "is an issue of statutory construction and legislative intent." *New Orleans Depot Servs., Inc. v. DOWCP (Zepeda)*, 718 F.3d 384, 387 (5th Cir. 2013) (quoting *DOWCP v. Perini N. River Assocs.*, 459 U.S. 297, 300, 305 (1983)). Accordingly, we review the Board's decision de novo. *Id.*

III.

Wood Group contends the Board erred by reversing the ALJ's initial decision holding that Malta's injury failed to satisfy the Act's situs requirement. The current form of the situs requirement—found at § 903—says a claimant is eligible for benefits

> 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).

33 U.S.C. § 903(a). Congress has tinkered with the situs requirement. "Prior to 1972, the Act applied only to injuries occurring on navigable waters. Longshoremen loading or unloading a ship were covered on the ship and the gangplank but not shoreward, even though they were performing the same functions whether on or off the ship." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989). The Supreme Court has said that the current version of the situs requirement, which should be "liberally construed," covers "all those

[4] "The Director is a party to the litigation of disputed claims under the Act at all stages of the litigation." *Munguia v. Chevron U.S.A. Inc.*, 999 F.2d 808, 810 n.1 (5th Cir. 1993).

on the situs involved in the essential or integral elements of the loading or unloading process." *Id.* The Supreme Court has defined loading and unloading a vessel to mean "taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 266–67 (1977).

It is undisputed that Central Facility does not meet the definition of "navigable waters" or any of the structures enumerated in this section ("pier, wharf, dry dock, terminal, building way, marine railway"). So, under the language of the statute, Malta can recover only if his injury occurred on an "other adjoining area customarily used by an employer in loading [and] unloading a vessel." § 903(a).

This court has said that, "[t]o qualify as an 'other adjoining area,' the situs must be located in proximity to navigable waters (i.e., possess a geographical nexus) and have a maritime nexus—here, 'customarily used by an employer in loading . . . a vessel.'" *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 432 (5th Cir. 2009) (quoting § 903(a)). These two factors have been described as the geographic and functional components of the situs test. *See Zepeda*, 718 F.3d at 389 (explaining that "'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 vessel'")). "To satisfy the situs inquiry's functional prong, the site of the injury need not be 'exclusively' or 'predominantly' used for unloading—only customarily." *BPU Mgmt., Inc./Sherwin Alumina Co. v. DOWCP (Martin)*, 732 F.3d 457, 461 (5th Cir. 2013). And the court looks to "the general purpose of the area rather than requiring 'every square inch of an area' to be used for a maritime activity." *Id.*

It is undisputed that Central Facility—situated in the territorial waters of Louisiana—has a geographical nexus to navigable waters. So the situs

question boils down to whether Central Facility, or at least the part of it where Malta was injured, meets the functional component of the test—*i.e.*, whether it is "customarily used" in loading and unloading vessels.

Wood Group offers two reasons to support its position that Malta's injury does not satisfy the situs requirement: (a) the purpose of Central Facility was oil and gas production, and so it did not have a maritime purpose; and (b) the items Malta loaded/unloaded were not maritime cargo.

The Board rejected Wood Group's argument and compared the platform where Malta was injured to an offshore dock, emphasizing the plain language of the statute:

> In a case like this one in which claimant is injured in an area that is customarily used for loading and unloading vessels, it follows that the requisite relationship with maritime commerce is established for purposes of the functional component of the situs test, and any further inquiry into whether there is an independent connection to maritime commerce is superfluous.

But, despite the plain language of the statute, Wood Group contends—and the ALJ initially agreed—that the Board's situs reasoning conflicts with this court's precedent as illuminated by Wood Group's two arguments. We address, and reject, each argument in turn.

A.

Wood Group first contends that Central Facility cannot satisfy the situs requirement because it did not have a "maritime purpose." The text of the Act does not expressly include any "maritime purpose" requirement. So, to support its position, Wood Group relies principally on this court's opinion in *Thibodeaux v. Grasso Production Management, Inc.*, 370 F.3d 486 (5th Cir. 2004). In that case, Randall Thibodeaux worked as "a pumper/gauger" on "a fixed oil and gas production platform," and, "[a]s part of his duties," he "monitored gauges both on the platform and on nearby wells." *Id.* at 487.

Thibodeaux's injury occurred after he noticed an oil leak five feet below the deck of the platform. Because a small wooden platform under the deck offered a better vantage to view the leak, he jumped down onto the wooden platform. The wood gave way, Thibodeaux fell into the marsh, and a nail stabbed his hand. *Id.* at 488. Describing the mishap, the court noted that "[t]he accident did not occur on the portion of the platform used to dock the two vessels." *Id.*

After Thibodeaux made a claim under the Act, the "sole issue" before the court was "whether a fixed oil production platform built on pilings over marsh and water inaccessible from land constitutes either a 'pier' or an 'other adjoining area' within the meaning of § 903(a)." *Id.* (footnote omitted). The court decided that "[t]he maritime nature of the LHWCA imparts a meaning to § 903(a)'s enumerated terms that goes beyond their use in ordinary language." *Id.* at 490–91. And, "when viewed together in the context of the LHWCA, a connection to maritime commerce becomes the unifying thread connecting the listed structures" in the Act—*i.e.*, "pier, wharf, dry dock, terminal, building way, marine railway." *Id.* at 491 (discussing § 903(a)). So, the court reasoned, "in light of the statute's origin and aim, it would be incongruous to extend it to cover accidents on structures serving no maritime purpose." *Id.* Because the "work commonly performed on oil production platforms is not maritime in nature," and because "to be a pier within the meaning of the LHWCA a structure must have some maritime purpose," the court held that the oil production platform where Thibodeaux worked did not meet that standard. *Id.* at 493. The court bolstered this reasoning by noting that Supreme Court precedent "considered fixed oil production platforms to be islands." *See id.* at 492 (discussing *Herb's Welding*, 470 U.S. at 422 n.6; *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969)). And, islands, of course, are not covered under the Act. *See id.*

The *Thibodeaux* court also considered whether the platform was an "other adjoining area" under the Act. *Id.* at 494. Even construing the term "area" broadly to include not just the wooden platform but also the production platform, the court determined that the oil production platform was not "the site of significant maritime activity." *Id.* Thus, the court denied Thibodeaux's claim because the injury did not occur on a covered situs.

Wood Group contends that if even an enumerated structure (*e.g.*, a pier as discussed in *Thibodeaux*) requires a "maritime purpose" then, *a fortiori*, an "other adjoining area" like Central Facility must also have a "maritime purpose" to qualify as a covered situs. Wood Group disagrees with the Board's characterization of the Central Facility platform as an "offshore dock." Because Central Facility is a fixed platform with the purpose of finding and producing oil—like the fixed oil production platform in *Thibodeaux*—Wood Group argues Central Facility does not have a maritime purpose. Thus, according to Wood Group, Malta's injury cannot satisfy the statutory situs requirement.

In response, Malta and the Director emphasize the features of Central Facility that differ from the fixed platform discussed in *Thibodeaux*. Specifically, Malta points out that, as evidenced by the pictures in the record, Central Facility is not a standalone fixed platform. It is a facility designed as a central hub to support a multitude of smaller platforms in and around the oilfield. Central Facility comprises four platforms and includes a safe harbor designed to allow for loading and unloading vessels in rough seas. Third-party vessels service the surrounding facilities, including a vessel that travels daily between Central Facility and Venice, Louisiana. Importantly, Central Facility is equipped with three cranes and a fulltime crane operator who works with the dedicated warehousemen (including Malta) to load and unload vessels throughout the day.

Moreover, Malta and the Director contend the Board was correct when it determined that the plain language of the Act is dispositive here. Although this court has said that "the mere act of loading, unloading, moving, or transporting something is not enough"—because, of course, these activities can occur in non-maritime contexts—loading/unloading is maritime when "undertaken with respect to a ship or vessel." *Martin,* 732 F.3d at 462.

We are not persuaded by Wood Group's argument that the purpose of the structure where the injury occurred is the Alpha and Omega of the situs inquiry, regardless of whether the platform is customarily used for loading/unloading vessels. This does not comport with either the plain text of the statute or the Supreme Court's command to construe the Act liberally. *See Schwalb*, 493 U.S. at 46; *see also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."). Here, it is undisputed that significant unloading occurred on the dock where Malta was injured. Indeed, Malta was injured while unloading a boat. And Wood Group's argument overlooks significant nuance in *Thibodeaux*, which expressly noted that "[t]he accident did not occur on the portion of the platform used to dock the two vessels." 370 F.3d at 488. The *Thibodeaux* court observed that minor maritime activity occurring in specific areas of the fixed platform—where the injury did not occur—did not transform the entire platform into a covered situs. It does not follow from this unobjectionable proposition, however, that an injury should evade coverage if it occurs on a specific portion of a platform where loading/unloading *does* occur merely because the general purpose of the entire platform is dedicated to another task. Wood Group's heavy reliance on *Thibodeaux* is misplaced.

B.

The second piece of Wood Group's situs argument is that the Board erred by finding that the nature of the items Malta loaded and unloaded was "irrelevant" to determining whether an "other adjoining area" satisfies the functional component of the situs inquiry. Wood Group's argument is that, to meet the situs requirement, the cargo being loaded/unloaded from a vessel must be "product to be delivered into the stream of commerce."[5] According to Wood Group, the items Malta loaded/unloaded were not maritime "cargo" under its definition because the vessels were loaded with supplies used by the workers on the platforms with the purpose to produce oil and gas. The language of the statute's situs requirement does not use the word "cargo." But Wood Group contends that the Board's reasoning conflicts with several opinions of this court that at least implicitly read a maritime cargo requirement into the Act.

Wood Group looks for support in *Coastal Production Services Inc. v. Hudson*, 555 F.3d at 428. In *Hudson*, a fixed platform with living quarters was connected to a sunken storage barge by pipes and a walkway. *Id.* The platform collected oil via pipeline from surrounding satellite wells, processed that oil, and then transferred it into the sunken barge. Vessels would then dock at the

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[5] Wood Group contends that "[c]rucial in determining whether an item constitutes 'cargo,' is pinpointing the exact point at which the item in question 'moves from the stream of maritime commerce and longshoring operations to . . . its ultimate destination." (quoting *McKenzie v. Crowley Am. Transp., Inc.*, 36 BRBS 41, 2002 WL 937755 at *5 (April 3, 2002)). Wood Group supports this contention by citing numerous trucking cases that limit recovery under the Act for truckers picking up stored cargo. Wood Group contends that these cases stand for the proposition that when items have reached their ultimate destination in the stream of commerce, they cease being "cargo." According to Wood Group, the items initially shipped to the warehouse at Central Facility had reached their final destination and were no longer cargo, even when later shipped to the satellite platforms. Wood Group misreads these cases, which do not graft a maritime cargo requirement onto the text of the statute. Instead, they detail when coverage under the Act applies (or does not apply) to truckers involved (or not) in loading and unloading a vessel. *See, e.g., id.* at *6 ("In this case, claimant drove a truck not to move cargo as part of a loading process, but to start it on its overland journey.").

barge to be loaded with oil. *Id.* While on the fixed platform (not on the barge where the loading occurred), Terry Hudson was injured when a saltwater disposal pump he was fixing exploded. *Id.* at 429. The question for the court was whether the situs requirement was satisfied even though Hudson was injured on the fixed platform. Wood Group points to a line from *Hudson* that notes the "[v]essels were not loaded or unloaded directly from the [fixed] platform, *at least not with cargo*." 555 F.3d at 434 (emphasis added). Wood Group argues that, from this line of text, the court should conclude that, although *something* was being loaded and unloaded from the fixed platform, whatever it was apparently was not "cargo" as Wood Group defines that term. As a result, whatever loading/unloading activity was occurring on the fixed platform was insufficient to render it a covered situs under the Act.

Even assuming the *Hudson* court meant to freight that one stray line of text with such meaning, the court held that the platform was a covered situs under the Act on other grounds, and so the language was dicta. Under the plain language of the statute, coverage extends to an area "customarily used by an employer in loading [or] unloading . . . a vessel." *Zepeda*, 718 F.3d at 389. When the plain language of the statute is clear, as it is here, that ends our inquiry. *See Cowart*, 505 U.S. at 475. In any event, we do not read *Hudson* to add anything to the statute, including a maritime cargo requirement.

Wood Group also looks to this court's decision in *Martin* to support its position. 732 F.3d at 459. David Martin was injured in an "underground transport tunnel." *Id.* The court held that the tunnel did not meet the situs requirement because the tunnel was not "'customarily used' for unloading vessels." *Id.* at 461. In arriving at this conclusion, the *Martin* court reiterated this court's analysis that "the primary purpose of . . . loading and unloading [is] to get cargo on or off the [vessel]." *Id.* at 462. The facility where Martin worked processed bauxite (a clayey rock that is the chief commercial ore of

aluminum), and some of the bauxite, which was delivered to the facility by ship, would go through the underground tunnel where Martin was injured. But the bauxite would enter the tunnel only after it "[sat] in a long-term storage stockpile, migrate[d] to the bottom of its respective ore pile, [was] specifically selected . . . for production, [was] crushed in the screw feeder, and [was] finally transported towards the metal-extraction facility." *Id.* at 464. The court concluded that the "[o]re at this stage is clearly no longer being 'unloaded' from a vessel in any sense of the word." *Id.*

Wood Group argues that *Martin* shows the nature of the items being unloaded matters when determining whether a structure serves a maritime purpose. According to Wood Group, the bauxite ceased being "cargo" before it arrived at the underground tunnel, and because Martin was unloading something other than maritime cargo, he was ineligible for coverage under the Act. But Wood Group reads too much into *Martin*, which addressed the express term "unloading" in the statute. § 903(a). The court explained that the long process the bauxite took before entering the tunnel was not "unloading." And "the fact that surface-level storage buildings are connected to the unloading process [did] not automatically render everything above and below the buildings [including underground transport tunnels] a part of the unloading process." 732 F.3d at 461–62. Whether the bauxite was "cargo" was irrelevant.

Nor does this court's opinion in *Munguia v. Chevron U.S.A. Inc.*[6] offer refuge to Wood Group's position. Noel Munguia, a pumper-gauger, was injured while working on a fixed well platform. 999 F.2d at 809. The court listed Munguia's duties as follows: "He loaded onto [a] boat the tools and equipment

[6] The court in *Munguia* was asked to decide whether the claimant satisfied the *status* requirement of the Act, not the *situs* requirement. But because Wood Group contends the nature of the cargo is relevant to both the situs and status inquiries, we address Wood Group's argument here.

he would need for the day and then navigated the boat to and from the various platforms. At each platform he unloaded the tools and equipment needed to do the work required at that platform." *Id.* at 812. The court noted that his duties "involved little or no loading and unloading of boats." *Id.* And the court downplayed the loading/unloading that the claimant performed: "Because the transfer of small amounts of supplies between tank batteries by Munguia and his fellow roustabouts . . . [furthered] the non-maritime-related purpose of servicing and maintaining the fixed platform wells, the mere fact that Munguia may have loaded and unloaded them onto his skiff cannot confer coverage." *Id.* at 813. The court further explained that "[a]ny contact Munguia may have had with cargo was fleeting, unrelated to maritime commerce, and usually at a time by which these supplies no longer possessed the properties normally associated with 'cargo.'" *Id.*

Wood Group contends this language adds a maritime cargo requirement to the Act, but *Munguia*, like *Martin*, merely glosses the Act's express terms "loading and unloading." According to *Munguia*, if a claimant unloads nothing more than personal gear from a boat in furtherance of pursuits not customarily thought of as maritime commerce, that claimant has failed to satisfy the loading/unloading requirement because he has performed "little or no loading and unloading of boats." Moreover, the facts of *Munguia* are distinguishable from Malta's case in important respects. First, it is undisputed that Malta spent at least 25 percent of his hitch unloading vessels. But the rare loading/unloading Munguia performed applied only to his own personal gear. And although Wood Group attempts to characterize the items Malta unloaded as his own personal tools and equipment, Malta used a crane to unload vessels containing tools and supplies for the use of 22 men on multiple satellite production platforms throughout the oilfield.

Wood Group again looks to *Thibodeaux* for support. When finding the Act did not extend to Thibodeaux, this court explained that, "[a]lthough personal gear and occasionally supplies [were] unloaded at docking areas on the platform, the purpose of the platform is to further drilling for oil and gas, which is not a maritime purpose."[7] 370 F.3d at 494. Wood Group reads this analysis as grafting a maritime cargo requirement onto the plain language of the statute. But, again, Thibodeaux's accident did not occur on the part of the platform where the loading/unloading occurred, and those activities were limited in any event. Under the Act, the nature of the items loaded and unloaded is not determinative. Rather, coverage under the Act extends to "all those on the situs involved in the essential or integral elements of the loading or unloading process." *Schwalb*, 493 U.S. at 46. And Malta, unlike Thibodeaux, was injured while unloading a boat on a platform used to load and unload boats. So, the cases are distinguishable and coverage extends to Malta.

In sum, because the Board correctly applied the plain language of the Act,[8] we affirm its conclusion that Malta met the situs requirement.

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[7] Like the platform in *Thibodeaux*, oil is not shipped directly from Central Facility.

[8] The Board, Malta, and the Director view this court's opinion in *Gilliam v. Wiley N. Jackson Co.* as settling the proposition that the use to which cargo will be put after its unloading is irrelevant to the question of coverage under the Act. 659 F.2d 54 (5th Cir. 1981). There the court held that the Act covered a worker injured while unloading a vessel even though the pilings unloaded from the supply barge were used in the construction of a bridge at the site of the unloading. *Id.* at 55. To avoid the force of this case and its holding, Wood Group argues that it is no longer good law after the Supreme Court's holding in *DOWCP v. Perini North River Associates*, 459 U.S. 297 (1983), and this court's later decision in *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991). In light of our holding that the Board correctly applied the plain language of the statute, we need not address this issue.

IV.

Wood Group also challenges the Board's conclusion that Malta meets the Act's maritime status requirement. That requirement—located at § 902—is satisfied by

> 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.

§ 902(3). The Supreme Court has characterized the requirement as "an occupational test that focuses on loading and unloading." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979); *see Schwalb*, 493 U.S. at 46 ("[Section] 903(a) extended coverage to the area adjacent to the ship that is normally used for loading and unloading, but restricted the covered activity within that area to maritime employment.").

This court has explained that "[a]n employee may qualify for maritime status based on either (1) the nature of the activity in which he is engaged at the time of the injury or (2) the nature of his employment as a whole." *Hudson*, 555 F.3d at 439. A claimant will satisfy the status requirement if he spends at least some time loading or unloading ships, and this court has expressly ruled that this time need not be "substantial." *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1347 (5th Cir. 1980) (holding that a worker who only spent 2.5 to 5 percent of his time loading and unloading was covered under the Act); *see also Caputo*, 432 U.S. at 273; *Hudson*, 555 F.3d at 440 (concluding claimant was covered even though he spent less than 10 percent of his time in maritime activities). But if a claimant "was not injured on actual navigable waters at the time of the injury, then the employee is engaged in 'maritime employment' only if his work is directly connected to the commerce carried on by a ship or vessel." *Fontenot*, 923 F.2d at 1130.

The undisputed record shows that Malta—who spent 25 to 35 percent of his hitches loading/unloading vessels—was injured while unloading a vessel. This seems, on its face, to satisfy the maritime status requirement. And, indeed, the Board affirmed the ALJ's ruling that Malta satisfied the status requirement, reasoning that Malta was covered "based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury."

Wood Group contends that the Board reversibly erred because the purpose of Malta's employment was not maritime in nature as his loading/unloading did not "enable a ship to engage in maritime employment."[9] *See Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n.16 (5th Cir. 1980). Wood Group explains that the "sole purpose" of Malta's work on Central Facility was oil and gas exploration and production. And all the items he loaded/unloaded were intended solely for that purpose. So Malta's loading/unloading was "incidental to non-maritime work" and cannot constitute maritime employment as required by the status requirement.

Wood Group supports this argument with discussions of three Board opinions. But we conclude that none of these opinions is helpful to Wood Group. In *Smith v. Labor Finders*, Lee Smith worked as a "beach-walker"—gathering oil residue and pollutants after an oil spill from the beaches of an island dedicated as a wildlife preserve. Each day, Smith would load his tools and supplies into a boat and ride for 30-45 minutes to/from the mainland. After Smith gathered the oil and pollutants, another crew would then bag and load

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[9] Wood Group also contends that Malta lacks maritime status because his loading/unloading was not connected to maritime commerce. To advance this position, Wood Group again relies on the "maritime cargo" argument we rejected when determining that Malta satisfied the situs requirement. Because no cargo requirement appears in the language of § 902(3), we similarly reject Wood Group's maritime cargo argument in the context of Malta's status.

them into a boat. Smith was injured after his trailer crashed into another trailer when returning to the transport boat. The Board denied Smith's claim for recovery under the Act after concluding that Smith's "work duties were not in furtherance of 'maritime commerce' because [Smith's] purposes in cleaning up the island were to protect the wildlife preserve." No. BRB No. 12-0035, 2012 WL 4523618, at *4 (DOL Ben. Rev. Bd. Sept. 11, 2012). Wood Group contends that Malta's case is similar because the purpose of his work was oil and gas production. But this argument overlooks the fact that the Board found it relevant that Smith "did not routinely participate in the loading/unloading of the collected oil onto vessels." *Id.* at *5. Plus, Smith was injured on a trailer, and he was not engaged in loading/unloading a vessel at the time of his injury. The facts of Malta's case are clearly distinguishable. So it is unclear how this case shows that the loading/unloading Malta performed could be "incidental to non-maritime work."[10]

In *Hough v. Vimas Painting Co., Inc.*, the claimant vacuumed up and disposed of debris that accumulated from the cleaning of a bridge. The vacuum deposited the debris into a machine on a barge. The Board found it significant that "the debris was merely collected and stored on the barge until the end of the bridge cleaning project; the vacuumed debris did not 'enable' the barge to 'engage in maritime commerce.'" No. BRB No. 10-0534, 2011 WL 2174854, at *7 (DOL Ben. Rev. Bd. May 24, 2011). And the Board found that "[n]either the vacuumed debris nor claimant's role in vacuuming the debris was integral to

[10] Wood Group also directs us to another decision by the Board that relied heavily on *Smith*'s analysis, *Miller v. CH2M Hill Alaska, Inc.*, Ben. Rev. Bd No. 13-0069, 2013 WL 6057071 (DOL Ben. Rev. Bd. Sept. 25, 2013). There the Board explained that "there is no significant distinction to be drawn between this case and *Smith*." *Id.* at *6. Because there is "no significant distinction" between these cases, the reasons for concluding that *Smith* is unhelpful to Wood Group apply equally to *Miller*.

any maritime purpose." *Id.* The Board concluded that, "[b]ecause claimant's work was neither maritime in nature nor integral to maritime commerce, . . . claimant's vacuuming of debris from the bridge does not constitute 'loading' as that term relates to coverage under the Act." *Id.* Wood Group similarly contends that Malta's work was not integral to maritime commerce. But there is a great deal of daylight between the facts of Malta's case and those of *Hough*. For one thing, the ALJ found that the claimant grew sick while working on the bridge, not the barge. And, for another, vacuuming debris from a bridge onto a vessel is quite different from the loading/unloading activities that Malta undertook. Ultimately, the Board's analysis was geared to determining whether the vacuuming could be considered "loading" a vessel as that term is understood in the Act. There is no dispute that Malta was loading/unloading vessels at the time of the injury.

In the third case, *Bazenore v. Hardaway Constructors, Inc.*, the claimant was injured while working in a construction yard cutting poles with a chainsaw. The Board noted that "claimant's work essentially facilitated the sale of construction materials to a nonmaritime customer, and as such did not in any way further maritime commerce." No. BRB no. 83-2842, 1987 WL 107407, at *2 (DOL Ben. Rev. Bd. June 18, 1987). This fact "support[ed] the administrative law judge's determination that any connection to the ship-loading, ship-construction, and harbor-maintenance processes was too attenuated to afford coverage." *Id.* Because cutting poles for nonmaritime customers in a construction yard differs significantly from the loading/unloading occurring here, *Bazenore* is inapposite.

At bottom, because Malta's injury occurred when he was loading/unloading a vessel, and because he regularly loaded/unloaded vessels, the status requirement is satisfied. The cases Wood Group relies on offer no

real support for the contention that Malta's employment takes him outside the ambit of the statute.

The petition for review is DENIED.