665 F.2d 1367, 1371 (5th Cir. 1982) (en banc). If so, the jury's verdict must be upheld. *See id.* Manifestly, the testimony of O'Neal, the crane operator, that he noticed no defects; the testimony of seven witnesses who stated that they were unable to visually detect any defects, and the testimony of the foremen who stated that no one reported any problems to them is sufficient for a reasonable jury to conclude that this defect was hidden and unknown to the stevedore. While the majority should be looking to see if substantial evidence exists to support the jury, it instead takes on the role of a fact finder. The majority in this case picks and chooses the evidence that it feels supports its theory of the case, while refusing to recognize the existence of credible evidence sufficient to uphold the jury's verdict.

CONCLUSION

There is clearly substantial evidence in the record such that a reasonable jury could conclude that the defect in crane number four was not open and obvious to the stevedore. The majority's conclusion to the contrary, based on its unwavering faith in the testimony of the crane operator to the exclusion of all other evidence, is difficult to comprehend. Accordingly, I respectfully dissent.

United States District Court,
S.D. Texas,
Galveston Division.
Kelvin Keith BIAS, Plaintiff,
v.
HANJIN SHIPPING CO., LTD., et al., Defendants.
Civil Action No. G-07-0338.

March 18, 2009.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

*1 Pending before the court is Defendant Hanjin Shipping Co. Ltd.'s ("Hanjin") Motion for Summary Judgment (Docket Entry No. 39). In response, plaintiff Kelvin Keith Bias filed Plaintiff's Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion to Dismiss and Motion for Summary Judgment (Docket Entry No. 46). Hanjin then filed Defendant's Hanjin Shipping Co. Ltd.'s Reply to Plaintiff's Response to Hanjin's Motion for Summary Judgment (Docket Entry No. 49). At the court's request, the parties have also filed Plaintiff's Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 57), Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 60), and Hanjin's Brief Concerning Deposition of Crane Operator and Plaintiff's Recent Authority (Docket Entry No. 61). For the reasons stated below, Hanjin's motion for summary judgment will be granted.

I. *Background*

Kelvin Keith Bias was injured on the evening of either January 22, 2007, or January 23, 2007,[FN1] at the Port of Houston's Greensport Terminal [FN2] as he assisted in the process of unloading steel slabs [FN3] from the *M/V Hanjin Calcutta* (*"Calcutta"*),[FN4] a cargo ship owned and operated by defendant Hanjin.[FN5] Bias was employed as a longshoreman by Gulf Stream Marine, Inc. ("Gulf Stream") at the time of the incident.[FN6]

FN1. Videotaped Oral Deposition of Kelvin Keith Bias, at 163 (May 2, 2008) (included in Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit J); Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G; Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit E, Exhibit H.

FN2. Videotaped Oral Deposition of Kelvin Keith Bias, at 73; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN3. Videotaped Oral Deposition of Kelvin Keith Bias, at 73; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN4. Oral Videotaped Deposition of Jesus Loyde, at 14-15 (Oct. 17, 2008) (included in Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit K).

FN5. Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at 12.

FN6. Videotaped Oral Deposition of Kelvin Keith Bias, at 57; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

The steel slabs were unloaded from the *Calcutta* using the ship's four cranes.[FN7] The crane involved in Bias' accident was operated by Felipe Rodriguez, another Gulf Stream employee.[FN8] The crane would lift slabs, one at a time, from the hold of the ship and

then lower them to the dock below where Bias and another Gulf Stream employee, Louis Redman, waited to manhandle them onto two steel beams.[FN9] The slabs were placed onto the steel beams so that a forklift could easily pick them up and move them off of the dock.[FN10] The surface below the beams was not level, so the beams did not sit flush on the dock when a slab was not resting on them.[FN11] As a slab was lowered onto the beams, one of Bias' feet remained in the space between one of the beams and the dock.[FN12] His foot was crushed between the beam and dock when the full weight of the slab-over twenty tons [FN13] came to rest on the beams.[FN14] Bias suffered several broken bones and other severe injuries to his foot as a result.[FN15] Bias underwent multiple surgeries, and two of his toes were amputated.[FN16]

FN7. Videotaped Oral Deposition of Kelvin Keith Bias, at 74; *see* Oral Videotaped Deposition of Jesus Loyde, at 47, 60; Oral Videotaped Deposition of Captain Hojin Park, at 20 (Oct. 23, 2008) (included in Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit J).

FN8. Oral and Videotaped Deposition of Felipe Rodriguez, at 9, 13, 15 (Feb. 28, 2009) (included in Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment, Docket Entry No. 60).

FN9. Videotaped Oral Deposition of Kelvin Keith Bias, at 75-76, 86-92; Oral Videotaped Deposition of Jesus Loyde, at 29-30; Affidavit of Louis Redman (Jan. 27, 2009) (included in Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit C).

FN10. Videotaped Oral Deposition of Kelvin Keith Bias, at 75-76, 86-92; Affidavit of Louis Redman.

FN11. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-102; Oral Videotaped Deposition of Jesus Loyde, at 68-70; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F.

FN12. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-99, 110; Affidavit of Louis Redman; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

FN13. Oral Videotaped Deposition of Jesus Loyde, at 78; Oral and Videotaped Deposition of Felipe Rodriguez, at 15 (Feb. 28, 2009) (included in Plaintiff's Second Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment, Docket Entry No. 60).

FN14. Videotaped Oral Deposition of Kelvin Keith Bias, at 98-99, 110; Affidavit of Louis Redman; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit G, Exhibit H.

FN15. Videotaped Oral Deposition of Kelvin Keith Bias, at 114, 122-24; Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment, Docket Entry No. 39, at Exhibit F, Exhibit H.

FN16. Videotaped Oral Deposition of Kelvin Keith Bias, at 122-24.

Bias sued Hanj in alleging negligence under 33 U.S.C. § 905(b), a provision of the Longshore and Harbor Worker's Compensation Act ("LHWCA"). Hanjin now moves for summary judgment.

II. *Summary Judgment Standard*

The court may grant summary judgment if the movant establishes that there is no genuine dispute about any material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An examination of substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Material facts are those facts that "might affect the outcome of the suit under the governing

law."*Id.* A genuine issue of material fact exists if the evidence is such that a reasonable trier of fact could resolve the dispute in the nonmoving party's favor. *Id.* at 2511.

*2 The movant has the initial burden to inform the court of the basis for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). To meet this initial burden the moving party need not submit affidavits or other evidence negating the nonmoving party's claim. *Id.* Instead, the movant may satisfy its burden by pointing out that the pleadings, depositions, answers to interrogatories, admissions, or affidavits on file demonstrate that the plaintiff has failed to make a showing adequate to establish the existence of a genuine issue of material fact as to an essential element of his case. *Id.* at 2552-53.

If the movant makes the required initial showings, the burden shifts to the nonmoving party to show by affidavits, depositions, answers to interrogatories, admissions, or other evidence that summary judgment is not warranted because genuine fact issues exist. *See id.* Conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence will not satisfy the nonmovant's burden. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994). If the nonmovant fails to present specific evidence showing there is a genuine issue for trial, summary judgment is appropriate. Topalian v. Ehrman, 954 F.2d 1125, 1132 (5th Cir.1992).

In reviewing the evidence "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). But if "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant," summary judgment should be granted. Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir.1993). Moreover, if there is an *absence* of evidence, the court will not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (citing Lujan v. National Wildlife Fed'n, 497 U.S. 871, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990)).

III. *Analysis*

A. Negligence Under § 905(b)

Section 905(b) of the LHWCA provides longshoremen and certain other persons a cause of action against a shipowner to recover for injuries "caused by the negligence of a vessel ...." 33 U.S.C. § 905(b). Interpreting this section, the Supreme Court has identified three limited duties owed by shipowners to longshoremen: (1) the "turnover duty," (2) the "active control" duty, and (3) the "duty to intervene." Howlett v. Birkdale, 512 U.S. 92, 114 S.Ct. 2057, 2063, 129 L.Ed.2d 78 (1994); *see also* Scindia Steam Navigation Co. v. De los Santos, 451 U.S. 156, 101 S.Ct. 1614, 1622-23, 68 L.Ed.2d 1 (1981). A breach of one of these duties is actionable only if it is a "legal cause" of the longshoreman's injury; that is the breach of a duty must have been a "substantial factor" in the injury. Moore v. M/V Angela, 353 F.3d 376, 383 (5th Cir.2003); Donaghey v. ODECO, 974 F.2d 646, 649 (5th Cir.1992).

*3 Bias contends that Hanjin violated all three duties, resulting in his injury. The court therefore considers whether there is sufficient evidence in the record to establish a genuine issue of material fact as to whether Hanjin breached any of the three duties, and thereby caused Bias' injury.

B. The Turnover Duty

The turnover duty requires a shipowner to exercise ordinary care to turn over the ship, its equipment, and appliances to a stevedore contractor " 'in such condition that an expert and experienced stevedoring contractor ... will be able by the exercise of ordinary care' to carry on cargo operations 'with reasonable safety to persons and property.'" Howlett, 114 S.Ct. at 2063 (quoting Fed. Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404, 89 S.Ct. 1144, 1151 n. 18, 22 L.Ed.2d 371 (1969)). The duty further requires a shipowner to warn a stevedoring contractor of any non-obvious hazard on the ship or with respect to the ship's equipment if the shipowner knows of the hazard or should know of the hazard through the exercise of reasonable care. *Id.* (citing Scindia Steam, 101 S.Ct. at 1622).

Bias contends that evidence in the record suggests that Hanj in violated the turnover duty by turning the ship over to Gulf Stream in an unreasonably safe condition because one of the cranes was malfunction-

ing and/or by failing to warn Gulf Stream of the crane malfunction. Specifically, Bias asserts that the evidence tends to show that the crane that was lowering the slab that crushed his foot was not working correctly, causing the load to come down prematurely before he could move his foot out from beneath the beam. He further asserts that had Gulf Stream been warned of the crane malfunction, it could have taken additional safety precautions that could have prevented Bias' injury. *See Moore*, 353 F.3d at 381-83 (finding that a shipowner's failure to warn a stevedore of a latent crane defect was a breach of the turnover duty and that this breach caused the plaintiff's injury, in part, because the stevedore "would have conducted its operations differently" had it been warned of the danger).

Bias testified in his deposition that his foot was crushed beneath the beam because the steel slab came down "too fast," before he was ready.[FN17] He said that he had heard earlier that day from other workers that the crane involved in his accident "wasn't lifting right," and that "it was getting jammed and it wasn't ... working properly."[FN18] He speculated that this crane malfunction could have been a cause of his injury, but also admitted that it was equally likely that the slab came down before he was ready because the crane operator lowered it too soon.[FN19]

FN17. Videotaped Oral Deposition of Kelvin Keith Bias, at 169-70, 182-83.

FN18. *Id.* at 178-81.

FN19. *Id.* at 183.

A note in the records kept by Richardson Steel Yard, another stevedoring company that was involved in unloading the *Calcutta*, suggests that on January 21, *a day or two before* Bias was injured, unloading operations on hatch number four were halted for less than an hour because the ship's crane servicing that hatch was down.[FN20] The captain of the *Calcutta*, Hojin Park, confirmed this information in his deposition: Captain Park testified that the number four crane on the *Calcutta* experienced a problem on January 21.[FN21] He explained that the joystick, which the operator used to control the crane, was sticking.[FN22] This caused the crane to jerk, rather than move smoothly, in its slewing motion.[FN23] Captain Park testified that unloading operations were temporarily halted, and that the joystick was lubricated. The lubrication of the joystick fixed the problem and the crane returned to normal operation.[FN24] Captain Park further stated that no other problems with any of the *Calcutta*' s cranes were reported during the unloading operation,[FN25] nor does any other evidence in the record suggest that there were any further crane problems during the course of the unloading operation. Felipe Rodriguez, who was operating the crane involved in Bias' accident at the time the accident occurred, testified that the crane was working properly on the day Bias was injured.[FN26]

FN20. Plaintiff's Response to Defendant Hanjin Shipping Co., Ltd.'s Motion to Dismiss and Motion for Summary Judgment, Docket Entry No. 46, at Exhibit B, p. 6.

FN21. Oral Videotaped Deposition of Captain Hojin Park, at 22.

FN22. *Id.* at 23-26.

FN23. *Id.* Captain Park described the crane's slewing motion as its left-to-right motion. *See id.*

FN24. *Id.*

FN25. *Id.* at 26.

FN26. Oral and Videotaped Deposition of Felipe Rodriguez, at 65.

*4 Jesus Loyde, who was the supervisor for Gulf Stream's stevedore crew at the time of Bias' injury, testified that he was never told that the crane had been having problems.[FN27] He stated that had he been informed that the crane had been experiencing problems, he would have "looked into it."[FN28]

FN27. Oral Videotaped Deposition of Jesus Loyde, at 82-83. This directly contradicts Bias' testimony that Loyde was one of the people who told him about the crane problems. *See* Videotaped Oral Deposition of Kelvin Keith Bias, at 179. Viewing the evidence in the light most favorable to Bias, however, the court assumes that neither Loyde nor anyone else with Gulf Stream

was warned by Hanjin about the earlier crane malfunction.

FN28. Oral Videotaped Deposition of Jesus Loyde, at 82-83.

Even assuming *arguendo* that turning the ship over to Gulf Stream with a malfunctioning crane and/or without warning Gulf Stream about the crane malfunction amounts to a violation of the turnover duty, this evidence is insufficient to create a genuine issue of material fact as to whether the crane malfunction was a "substantial factor" in Bias' injury. *Moore*, 353 F.3d at 383.

Viewing the credible evidence in the light most favorable to Bias, it establishes only that one of the *Calcutta's* cranes experienced a problem a day or two before Bias was injured.[FN29] The problem affected only the crane's slewing motion and was unrelated to the crane's lifting or descending motion. Bias' unsubstantiated and inadmissible hearsay testimony suggesting that the crane was malfunctioning on the day of his injury and that the crane's lifting functionality was affected may not be given any credence. *See Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir.1995) ("Evidence on summary judgment may be considered to the extent not based on hearsay ....").

FN29. There is conflicting evidence in the record as to which hatch Bias was working to unload when he was injured. Therefore, it is not clear whether Bias was unloading a hatch serviced by the crane that had been experiencing problems. But viewing the evidence in the light most favorable to Bias, the court assumes that the crane involved in Bias' accident was the same crane.

A crane malfunction involving only the crane's slewing motion that occurred one or two days before Bias was injured could not possibly have caused the slab that actually injured Bias to come down too fast to enable him to remove his foot from beneath the beam. Bias' pure speculation that the crane may have contributed to his injury fails to create a genuine issue of fact. *See Little*, 37 F.3d at 1078-79 (holding that evidence that does not "suggest which of [several] speculative [causation] theories ... is most plausible" is insufficient to create a genuine issue of material fact).

Moreover, the evidence shows only that had Gulf Stream been told about the crane problem Loyde would have "looked into it." There is no evidence in the record suggesting how, if at all, Gulf Stream would have actually altered its unloading operations had it been informed. *See id.* at 1075 ("We do not ... in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."). Therefore, there are no genuine fact issues for trial with regard to the turnover duty.

C. The Active Control Duty

Under the active control duty the shipowner can be held liable if it actively participates in the stevedoring operations and negligently injures a longshoreman. *Scindia Steam*, 101 S.Ct. at 1622. The active control duty also requires the shipowner to "exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." *Id.*

*5 Bias does not allege that Hanjin actively participated in the stevedoring operation or that he was injured in an area under the active control of the vessel. Instead, he contends that equipment under the active control of the vessel caused his injury.

Bias testified that it was dark on the dock the evening that he was injured, so he complained to Loyde, his supervisor, about the darkness.[FN30] Bias stated that although he does not remember seeing Loyde going onto the ship, he believes Loyde then asked the ship's crew to provide lights.[FN31] According to Bias, after he notified Loyde about the darkness, he saw the crew of the ship rigging some lights to the structure of the ship to provide light on the dock where Bias was working.[FN32] He testified that these lights were inadequate and that the lighting on the dock remained poor.[FN33] Bias suggested that the darkness was a cause of his injury.[FN34] Based on this testimony, Bias argues that his injury was caused by a breach of the active control duty because the inadequate lights mounted on the *Calcutta* were equipment under the active control of the vessel.

FN30. Videotaped Oral Deposition of Kelvin Keith Bias, at 172-73.

FN31. *Id.* at 172-76.

FN32. *Id.* at 173-76.

FN33. *See id.* at 96, 141-42, 172-73.

FN34. *See id.* at 96, 117-18, 135.

As Hanjin points out, courts have consistently held that a vessel owner has no duty to provide adequate lighting for longshoremen. *See, e.g.*, *Lipari v. Kawasaki Kisen Kaisha, Ltd.*, No. 89-16229, 1991 WL 3060, *2 (9th Cir. Jan.11, 1991) ("[G]enerally speaking, responsibilities for lighting the work area fall upon the stevedore and not the shipowner."); *Wright v. Gulf Coast Dockside, Inc.*, No. 97-2745, 1998 WL 334851, *3 (E.D.La. June 23, 1998) (holding that the shipowner "was entitled to rely on [the stevedore] to provide adequate lighting"); *Ryan-Walsh, Inc. v. Maritima Aragua, S.A.*, No. 92-3662, 1994 WL 247217, *3 (E.D.La. June 2, 1994) (explaining that "it is the stevedoring company's responsibility," not the shipowner's, to provide adequate lighting); *McCullough v. S/S Coppename*, No. 75-2440, 1983 AMC 2547, (E.D.La. Apr.23, 1982) ("[T]he stevedoring company that employs the longshoreman, not the shipowner, is required by statute and regulation ... to protect the longshoreman from the danger of poor lighting."(citation omitted)). This is because § 941 of the LHWCA and the regulations promulgated thereunder place this duty squarely on the stevedore who employs the longshoremen. *See* 33 U.S.C. § 941(a) (providing that the "*employer* shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employment covered by this chapter" (emphasis added)); 29 C.F.R. § 1917.123 ("Working and walking areas shall be illuminated."); 29 C.F.R. § 1918.92 ("Walking, working, and climbing areas shall be illuminated."); *Scindia Steam*, 101 S.Ct. at 1626-27 ("The statutory duty of the *stevedore* under § 941 to provide a safe place to work has been implemented by the Safety and Health Regulations for Longshoring. 29 CFR § 1918.1 *et seq.*" (emphasis added)).[FN35]

FN35. Because Bias was working on the dock, and not on the vessel, the illumination standards found in 29 C.F.R. § 1917.123 probably apply instead of the standards found in § 1918.92. *See* 29 C.F.R. § 1917.1(a) ("The regulations of this part apply to employment within a marine terminal ... including the loading, unloading, movement or other handling of cargo, ship's stores or gear within the terminal ...."); 29 U.S.C. § 1918.1(a) ("The regulations of this part apply to longshoring operations and related employments *aboard vessels.*"(emphasis added)). Regardless of which regulation applies, however, both are promulgated under the authority of 33 U.S.C. § 941, which clearly places the responsibility for compliance on the stevedore, not the vessel.

*6 Bias seeks to circumvent this well established principle by disguising the duty to provide adequate lighting as the active control duty. The court is not persuaded. As another district court faced with an identical argument explained,

> [i]t may be true that the lights on the ship remained in the control of the shipowner. But the lighting in that area [where the plaintiff longshoreman was working] did not remain in the control of the shipowner. Even accepting as true the plaintiff's deposition testimony that it was dark and shadowy in the corner where he fell, ... that evidence cannot support a finding that the shipowner was negligent, because it is the duty of the stevedore, not the shipowner, to provide adequate lighting.

Landsem v. Isuzu Motors, Ltd., 534 F.Supp. 448, 451 (D.Ore.1982). *See also Matthews v. Pan Ocean Shipping Co., Ltd.*, No. 91-0069, 1992 WL 59158, *1-2 (E.D.Pa. March 19, 1992) (adopting the analysis from *Landsem* and concluding that the shipowner owed no duty to provide adequate lighting for the longshoreman plaintiff even though "[t]he ship's crew moved lights to areas of active operations, and no other lighting was provided"). As the Fifth Circuit has explained, allowing Bias "to foist the duty of complying with these health and safety regulations upon the shipowner [would] employ exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments [to the LHWCA]." *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 333 (5th Cir.1977) (internal quotation marks and citation omitted). Furthermore, adopting Bias' legal theory would perversely encourage shipowners to shut off all lighting attached to the

ship since they would be better off providing no light whatsoever, rather than risk liability by providing some light which might not be adequate and triggering the active control duty. As a matter of law, Bias cannot recover on the basis of the active control duty.[FN36]

FN36. Bias cites *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir.892), for the proposition that stevedores are not always responsible for providing adequate lighting and that the vessel has that duty if it maintains control of the lighting. *See* Plaintiff's Supplemental Response to Defendant, Hanjin Shipping Co, Ltd.'s, Motion for Summary Judgment, Docket Entry No. 57, at 4. Bias, however, misinterprets *Masinter*. In *Masinter* the Fifth Circuit did conclude that the vessel was liable to the plaintiff under the active control duty, in part because it negligently failed to provide adequate lighting. *See Masinter*, 867 F.2d at 897-98. The court reached this conclusion, however, because the vessel owner was *"contractually bound"* to remain in control of the vessel, and therefore had a "continuing duty of care to those aboard the vessel." *Id.* at 897. Thus, the vessel owner had a duty to the plaintiff because the plaintiff was injured in an *area* under the active control of the vessel, not because the vessel retained active control of the lights themselves. *See id.* at 897-98. *Masinter* does not establish that a shipowner is responsible for providing adequate lighting in an area controlled by a stevedore just because the vessel maintains control over lights that happen to shine into that area.

D. The Duty to Intervene

The duty to intervene "concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore." *Howlett*, 114 S.Ct. at 98. In such areas the shipowner has no duty "to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process." *Scindia Steam*, 101 S.Ct. at 1623. The shipowner may generally rely on the stevedore to ensure that cargo transfer operations are conducted safely. *Id.* If, however, the vessel owner has *actual* knowledge (1) that a hazard exists, (2) that the hazard poses an unreasonable risk of harm, (3) "that the stevedore, in the exercise of 'obviously improvident' judgment, means to work on in the face of it and therefore cannot be relied on to remedy it," the shipowner must intervene. *Randolph v. Laeisz*, 896 F.2d 964, 970-971 (5th Cir.1990) (quoting *Masinter v. Tenneco*, 867 F.2d 892, 897 (5th Cir.1989)). *See also Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1248 (5th Cir.1997); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852-53 (5th Cir.1989), *abrogated on other grounds by Kirksey v. Tonghai Maritime*, 535 F.3d 388, 396 (5th Cir.2008).

*7 Bias asserts that because there is evidence in the record that the vessel owner was notified of the dark conditions on the dock, and that it responded by mounting lights on the ship to illuminate the work area, there is at least a fact issue as to whether the shipowner had actual knowledge of the hazard and that the stevedore intended to continue work in the face of the hazard. Further, Bias contends that whether the shipowner knew that the darkness presented an unreasonably dangerous condition and whether the stevedore's decision to continue work in the darkness was obviously improvident are fact questions for the jury.

The court does not agree with Bias' interpretation of the evidence in the record. Specifically, Bias has not pointed to any evidence suggesting that Hanjin knew that Gulf Stream would order its workers to resume working without first providing adequate lighting.

Bias testified that Hanjin was made aware of the lack of adequate illumination on the dock where Bias was working.[FN37] Further, he testified that members of the ship's crew, presumably Hanjin employees, responded by affixing lights to the *Calcutta* to illuminate Bias' work area on the dock.[FN38] Bias explained that Loyde, his supervisor, instructed Bias' crew of longshoremen to cease working while the lights were being affixed, and that they did not resume working until after the lights had been attached to the ship.[FN39] Bias testified that even after the lights were attached, it remained too dark on the dock.[FN40]

FN37. Videotaped Oral Deposition of Kelvin Keith Bias, at 172-76.

FN38. *Id.* at 173-76.

FN39. *Id.* at 173-77, 185-87.

FN40. *See id.* at 96, 141-42, 172-73.

This evidence tends to show only that Hanjin was put on notice of the hazardous condition and perhaps, viewing the evidence in the light most favorable to Bias, that Hanjin knew that the darkness posed an unreasonable risk of harm. The evidence may even support an inference that Hanjin employees observed and recognized that the lights they affixed to the ship did not remedy the dangerous condition.

Lacking, however, is any evidence that Hanjin employees knew or observed that Gulf Stream ordered or would order its employees back to work in the dangerous condition. *See Futo v. Lykes Bros. Steamship Co., Inc.*, 742 F.2d 209, 220 (5th Cir.1984) (explaining that the "critical" issue was "whether or not any [shipowner] employee actually saw a [stevedore] employee working on the [unreasonably dangerous] scaffold, and concluding that there was no evidence in the record indicating that "the [shipowner's] employees knew that the [stevedore's] employees were working or would work under this condition"). The court cannot presume that just because there were Hanjin employees on the ship or in the area that they actually observed Gulf Stream employees resuming work in the inadequately lit area. *See id.* ("Mere presence of [the shipowner's] employees on the vessel and even their knowledge of the [unreasonably dangerous] condition ... itself are simply not enough."). Such a presumption would amount to a "speculative leap." *Id.*; *see also Little*, 37 F.3d at 1075 ("We do not ... in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts).

*8 Further, no evidence suggests that Hanjin employees knew that they could not rely on Gulf Stream to take further steps, if necessary, to provide adequate illumination.[FN41] *See Greenwood*, 111 F.3d at 1248 (explaining that shipowner must have "actual knowledge that it could not rely on the stevedore to protect its employees"). Moreover, Hanjin had no duty to monitor Gulf Stream to ensure that it did not put its employees back to work without first providing sufficient light. *See Scindia Steam*, 101 S.Ct. at 1623 (explaining that the shipowner has no duty "to take reasonable steps to discover ... dangerous conditions," or to "oversee the stevedore's activity").

FN41. This is particularly true here because, as discussed above, regulations promulgated under the LHWCA explicitly require the *stevedore* to provide adequate lighting. *See* 29 C.F.R. § 1917.123; 29 C.F.R. § 1918.92. *See also Landsem*, 534 F.Supp. at 451 ("[T]he duties imposed on the stevedore by law and the shipowner's justifiable expectation that they will be met are relevant to determining whether the shipowner has breached its duty.").

Bias has failed to point to evidence in the record sufficient to create a genuine issue of material fact as to whether Hanjin's duty to intervene was triggered.[FN42] Hanjin is entitled to summary judgment.

FN42. The court is not persuaded by the authority provided by Bias in his Supplemental Response to Defendant, Hanjin Shipping Co. Ltd.'s, Motion for Summary Judgment (Docket Entry No. 57). Two of the six cases cited clearly support the proposition that the duty to intervene is not triggered absent a showing by the plaintiff that the vessel owner had actual knowledge that the stevedore would proceed in the face of the unreasonably dangerous condition *and* could not be relied upon to ensure that the work environment was safe for its longshoreman employees. *Gay v. Barge 266*, 915 F.2d 1007, 1012 (5th Cir.1990); *Randolf*, 896 F.2d at 970. Therefore, to the extent these cases reach a different result, they can be distinguished on the fact. *Turner v. Costa Line Cargo Servs., Inc.*, 744 F.2d 505, 510-11 & n. 9 (5th Cir.1984), and *LeBlanc v. United States*, 732 F.Supp. 709, 715-16 (E.D.Tex.1990), suggest that the plaintiff may not need to show that the vessel owner actually knew that the stevedore would work on in the face of the unreasonably dangerous condition, but only that the vessel owner actually knew the stevedore could not be relied upon to ensure that the work environment was safe for its longshoreman employees. Even if these two cases correctly recite the law, Bias has not presented any evidence suggesting that Hanjin knew that Gulf Stream would not fulfil its responsibility to

ensure that its employees had adequate light. *Ponce v. M/V Altair*, 493 F.Supp.2d 880, 892-93 (S.D.Tex.2007), is not consistent with Fifth Circuit precedent. The *Ponce* court concluded that the duty to intervene applied based on a finding that the vessel owner "did or should have recognized the risk," and did not require the plaintiff to show that the vessel owner had *actual* knowledge of the dangerous condition. *Id.* at 892.Further, the court in *Ponce* did not require the plaintiff to show that the vessel owner had *actual* knowledge that the stevedore would work on in the face of the dangerous condition and could not be relied upon to remedy the dangerous condition, allowing the plaintiff instead to show only that the stevedore was unlikely to recognize the dangerous condition, and implying that the vessel owner should have known this. *Id.* at 892-93.Finally, in *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir.1989), the court concluded the vessel owner was liable based only on the active control duty. Therefore, the holding did not involve the duty to intervene and provides no guidance for applying it.

IV. *Conclusion and Order*

Based on the foregoing analysis, Defendant Hanjin Shipping Co. Ltd.'s Motion for Summary Judgment (Docket Entry No. 39) is **GRANTED.**

STANLEY D. EDMONDS, Petitioner,

v

COMPAGNIE GENERALE TRANSATLANTIQUE

443 US 256, 61 L Ed 2d 521, 99 S Ct 2753

[No. 78-479]

Argued March 19, 1979. Decided June 27, 1979.

OPINION OF THE COURT

[443 US 258]

Mr. Justice White delivered the opinion of the Court.

On March 3, 1974, the S. S. Atlantic Cognac, a containership owned by respondent, arrived at the Portsmouth Marine Terminal, Va. Petitioner, a longshoreman, was then employed by the Nacirema Operating Co., a stevedoring concern that the shipowner had engaged to unload cargo from the vessel. The longshoreman was injured in the course of that work, and he received benefits for that injury from his employer under the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat 1424, as amended, 33 USC §§ 901 et seq. [33 USCS §§ 901 et seq.]. In addition, the longshoreman brought this negligence action against the shipowner in Federal District Court.

[1a] A jury determined that the longshoreman had suffered total damages of $100,000, that he was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a coemployee's negligence, contributed 70%, and that the shipowner was accountable for 20%.[1] Following an established principle of maritime law, the District Court reduced the award to the longshoreman by the 10% attributed to his own negligence.[2] But also in accordance with maritime law, and the common law as well, the court refused further to reduce the award against the shipowner in proportion to the fault of the employer.

[2a, 3a] The United States Court of Appeals for the Fourth Circuit, with two judges dissenting, reversed en banc, holding that the

[443 US 259]

1972 Amendments to the Act, 86 Stat 1251, had altered the traditional admiralty rule by making the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. 577 F2d 1153, 1155-1156 (1978).[3] Other Courts of Appeals have reached the contrary conclusion.[4] We granted certiorari to resolve this conflict, 439 US 952, 58 L Ed 2d 343, 99 S Ct 348 (1978), and, once again,[5] we have before us a question of the meaning of the 1972 Amendments.

1. The District Court set aside a jury verdict for the longshoreman in an earlier trial because of errors in the jury instructions.

2. [1b] The plaintiff's negligence is not an absolute bar to recovery under maritime law, which accepts the concept of comparative negligence of plaintiff and defendant. Pope & Talbot, Inc. v Hawn, 346 US 406, 408-409, 98 L Ed 143, 74 S Ct 202 (1953); The Max Morris, 137 US 1, 15, 34 L Ed 586, 11 S Ct 29 (1890); see n 23, infra.

3. A panel of the Court of Appeals had earlier reached a similar conclusion. 558 F2d 186, 193-194 (1977); see n 28, infra.

4. Zapico v Bucyrus-Erie Co. 579 F2d 714, 725 (CA2 1978); Samuels v Empresa Lineas Maritimas Argentinas, 573 F2d 884, 887-889 (CA5 1978), cert pending, No. 78-795; Dodge v Mitsui Shintaku Ginko K. K. Tokyo, 528 F2d 669, 671-673 (CA9 1976), cert denied, 425 US 944, 48 L Ed 2d 188, 96 S Ct 1685 (1976); Shellman v United States Lines, Inc., 528 F2d 675, 679-680 (CA9 1975), cert denied, 425 US 936, 48 L Ed 2d 177, 96 S Ct 1668 (1976). See also Cella v Partenreederei MS Ravenna, 529 F2d 15, 20 (CA1 1975) (indicating agreement with Dodge, supra), cert denied, 425 US 975, 48 L Ed 2d 799, 96 S Ct 2175 (1976); Marant v Farrell Lines, Inc., 550 F2d 142, 145-147 (CA3 1977) (discussing but reserving the issue); id., at 147-152 (Van Dusen, J., concurring) (expressing concern over validity of apportionment of damages).

5. See also Northeast Marine Terminal Co. v Caputo, 432 US 249, 53 L Ed 2d 320, 97 S Ct

I

[4a, 5, 6a, 7a] Admiralty law is judge-made law to a great extent, United States v Reliable Transfer Co. 421 US 397, 409, 44 L Ed 2d 251, 95 S Ct 1708 (1975); Fitzgerald v United States Lines Co. 374 US 16, 20, 10 L Ed 2d 720, 83 S Ct 1646 (1963), and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 amendments, see Pope & Talbot, Inc. v Hawn, 346 US 406, 413–414, 98 L Ed 143, 74 S Ct 202 (1953), as it has been since.[6] As that law had evolved by 1972, a

[443 US 260]

longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries.[7] This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.[8]

[443 US 261]

The problem we face today, as was true of similar problems the Court has dealt with in the past, is complicated by the overlap of loss-allocating mechanisms that are guided by somewhat inconsistent principles. The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law and, in the present context, depends on a showing of negligence or some other culpability. The long-

2348 (1977); Director, Workers' Compensation Programs v Rasmussen, 440 US 29, 59 L Ed 2d 122, 99 S Ct 903 (1979); P. C. Pfeiffer Co. v Diverson Ford, No. 78–125 (to be reargued October Term 1979).

6. Title 33 USC § 933(a) [33 USCS § 933(a)], which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such third person." Section 905(b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of section 933 . . . ."

7. [4b] See, e.g., Cooper Stevedoring Co. v Fritz Kopke, Inc., 417 US 106, 108, 113, 40 L Ed 2d 694, 94 S Ct 2174 (1974) (longshoreman could have recovered entire damages from shipowner responsible for 50% of the total fault); Halcyon Lines v Haenn Ship Ceiling & Refitting Corp., 342 US 282, 283, 96 L Ed 318, 72 S Ct 277 (1952) (shipowner responsible for 25% of negligence required to pay 100% of damages, and contribution unavailable from negligent shoreside contractor, an employer under the Act). See also The Atlas, 93 US 302, 23 L Ed 863 (1876); The Juniata, 93 US 337, 23 L Ed 930 (1876). We stated the common-law rule in The Atlas and adopted it as part of admiralty jurisprudence: "Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." 93 US, at 315, 23 L Ed 863.

8. [6b, 7b] Restatement (Second) of Torts §§ 433A, 875, and 879 (1965 and 1979); T. Cooley, Law of Torts 142–144 (1879); W. Prosser, Law of Torts § 47, pp 297–299, and § 52, pp 314–315 (4th ed 1971); cf. Washington & Georgetown R. Co. v Hickey, 166 US 521, 527, 41 L Ed 1101, 17 S Ct 661 (1897). A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, supra, § 879, comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. Id., § 886. A concurrent tortfeasor generally may seek contribution from another, id., § 886A, but he is not relieved from liability for the entire damages even when the nondefendant tortfeasor is immune from liability. Id., § 880. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. Id., §§ 433A(1) and 881.

shoreman-victim, however, and his stevedore-employer—also a tortfeasor in this case—are participants in a workers' compensation scheme that affords benefits to the longshoreman regardless of the employer's fault and provides that the stevedore's only liability for the longshoreman's injury is to the longshoreman in the amount specified in the statute.[9] 33 USC § 905 [33 USCS § 905]. We have more than once attempted to reconcile these systems.

[2b] Against this background, Congress acted in 1972, among other things,[11] to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words, to overrule Sieracki and Ryan. See Northeast Marine Terminal Co. v Caputo, 432 US 249, 260–261, and n 18, 53 L Ed 2d 320, 97 S Ct 2348 (1977); Cooper Stevedoring Co. v Fritz Kopke, Inc., supra, at 113 n 6, 40 L Ed 2d 694, 94 S Ct 2174. Though admitting that nothing in either the statute or its history expressly indicates that Congress intended to modify as well the existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of the nonparty stevedore, 577 F2d, at 1155, and n 2, the en banc Court of Appeals found that such a result was necessary to reconcile two sentences added in 1972 as part of 33 USC § 905(b) [33 USCS § 905(b)]. The two sentences state:

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall

be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 USC § 905(b) [33 USCS § 905(b)].

The Court of Appeals described the perceived conflict in this fashion:

"The first sentence says that if the injury is caused by the negligence of a vessel the longshoreman may recover, but the second sentence says he may not recover anything of the ship if his injury was caused by the negligence of a person providing stevedoring services. The sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it. They may be harmonized only if read in apportioned terms." 577 F2d, at 1155.

For a number of reasons, we are unpersuaded that Congress intended to upset a "long-established and familiar princip[e]" of maritime law by imposing a proportionate-fault rule. Cf. Isbrandtsen Co. v Johnson, 343 US 779, 783, 96 L Ed 1294, 72 S Ct 1011 (1952).

9. Generally, workers' compensation benefits are not intended to compensate for an employee's entire losses. 1 A. Larson, Law of Workmen's Compensation § 2.50, (1978). The 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable.

11. The Amendments also increased compensation benefits, expanded the Act's geographic coverage, and instituted a new means of adjudicating compensation cases. Robertson, Jurisdiction, Shipowner Negligence and Stevedore Immunities under the 1972 Amendments to the Longshoremen's Act, 28 Mercer L Rev 515, 516 (1977).

In the first place, the conflict seen by the Court of Appeals is largely one of its own creation. Both sides admit that each sentence may be read so as not to conflict with the other. The first sentence addresses the recurring situation, reflected by the facts in this case, where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern. In these circumstances, the longshoreman may sue the vessel as a third party, but his employer, the stevedore, is not to be liable directly or indirectly for any damages that may be recovered. This first sentence overrules Ryan and prevents the vessel from recouping from the

stevedore any of the damages that the longshoreman may recover from the vessel. But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.

The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore.[12] In this situation, the second sentence places some limitations on suits against the vessel for injuries caused during its stevedoring operations.[13] Whatever these limitations may be, there is no conflict between the two sentences, and one arises only if the second sentence is read, as the Court of Appeals read it, as applying to all injured longshoremen, whether employed by the ship or by an independent stevedore. Nothing in the legislative history advises this construction of the sentence,[14] and we see no reason to depart from the language of the statute in this respect.

This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.

12. The first proposals in the legislative movement that produced the 1972 Amendments would have made all shipowners statutory employers, not just those also acting as stevedores, and thus cut off any tort action by the longshoreman. S 525, 92d Cong, 1st Sess, § 1 (1971), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), pp 393–394 (1972). Congress ultimately decided to preserve the longshoremen's tort action against shipowners acting as shipowners.

13. In Jackson v Lykes Bros. S. S. Co. 386 US 731, 18 L Ed 2d 488, 87 S Ct 1419 (1967), and Reed v The Yaka, 373 US 410, 10 L Ed 2d 448, 83 S Ct 1349 (1963), we upheld a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore.

14. See S Rep No. 92-1125, p 11 (1972) (hereinafter S Rep) ("Accordingly, the bill provides in the case of a longshoreman who is *employed directly* by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services") (emphasis supplied). The House Report, HR Rep No. 92-1441 (1972), is identical to the Senate Report in all respects material to this case. Accordingly, further references will be only to the Senate Report.

B

The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 Amendments contain not a word of this concept.[17] This silence is most eloquent, for such reticence while contemplating an

[443 US 267]

important and controversial change in existing law is unlikely.[18] Moreover, the general statements appearing in the legislative history concerning § 905(b) are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue. The Committees repeatedly refer to the refusal to limit the shipowner's liability for negligence,[19] which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee.[20] Because an employee generally may recover in full from a third-party concurrent tortfeasor,[21] these statements are hardly indicative of an intent to modify the law in the respect found by the Court of Appeals. At the very least, one would expect some hint of a purpose to work such a change, but there was none.

[443 US 268]

The shipowner denies that the legislative history is so onesided, relying upon statements that vessels "will not be chargeable with the negligence of the stevedore or [the] employees of the stevedore." S Rep 11; see 577 F2d, at 1156 n 2. But in context these declarations deal only with removal of the shipowner's liability under the warranty of seaworthiness for acts of the stevedore[22]—even nonnegligent ones.[23]

C

Finally, we note that the proportionate-fault rule adopted by the Court of Appeals itself produces consequences that we doubt Congress intended. It may remove some inequities, but it creates others and appears to shift some burdens to the longshoreman.

17. In the Senate hearings, a plaintiff's lawyer mentioned diminution of damages as a possible solution so long as the shipowner's liability for unseaworthiness was retained. The only committee member present rejected this proposal, and Congress apparently never gave it serious consideration. See Hearings on S 2318, S 525, and S 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong, 2d Sess, 354–355 (1972).

18. Laborers' International Union, Local No. 1057 v NLRB, 186 US App DC 13, 20, 567 F2d 1006, 1013 (1977).

The debate over § 905(b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a quid pro quo for increasing the compensation benefits. See S Rep 9–10. Some Congressmen objected to removing the vessel's liability for unseaworthiness because that would deny millions of dollars of relief for longshoremen's injuries. 118 Cong Rec 36382–36384 (1972) (Reps. Eckhardt, Dent, and Ashley). Indeed, the concern shared by some Congressmen over any modification of third-party actions "had political ramifications which . . . resulted in forestalling any improvements in the . . . Act for over twelve years." S Rep 9. Those Congressmen likely would have assailed the diminution of the longshoreman's recovery in proportion to the stevedore's fault if they had any inkling that the amendments did that.

19. S Rep 2, 5, 10.

20. Id., at 8 ("where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured"); accord, id., at 10 and 11.

21. See n 8, supra; 2A Larson, supra n 9, § 75.22, at 14-263; Soule, Toward an Equitable and Rational Allocation of Employee Injury Losses in Cases with Third Party Liability, 1979 Ins Counsel J 201, 202–208.

22. S Rep 9–11.

23. E.g., Italia Societa per Azioni di Navigazione v Oregon Stevedoring Co. 376 US 315,

As we have said, § 905 permits the injured longshoreman to sue the vessel and exempts the employer from any liability to the vessel for any damages that may be recovered. Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act. Furthermore,

[443 US 269]

under the traditional rule, the employee may recover from the ship the entire amount of the damages so determined. If he recovers less than the statutory benefits, his employer is still liable for the statutory amount.

Under this arrangement, it is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less.

Under the Court of Appeals' proportionate-fault rule, however, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the vessel. If, for example, his damages are at least twice the benefits paid or payable under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced recovery from the ship will not equal his total damages. More generally, it would appear that if the stevedore's proportionate fault is more than the proportion of compensation to actual damages, the longshoreman will always fall short of recovering the amount that the factfinder has determined is necessary to remedy his total injury, even though the diminution is due not to his fault, but to that of his employer.[24]

But the impact of the proportionate-fault rule on the longshoreman does not stop there. Under § 933(b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's

[443 US 270]

favor operates where the longshoreman himself sues.[25] In the past, this lien has been for the benefits paid up to the amount of the recovery.[26] And under § 933(c), which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. Under the Court of Appeals' proportionate-fault system, the longshoreman would get very little, if any, of the diminished re-

11 L Ed 2d 732, 84 S Ct 748 (1964).

The shipowner also relies upon the Reports' reference to "comparative negligence," S Rep 12, but in context it is obvious that Congress alluded only, and not erroneously, see Prosser, Comparative Negligence, 51 Mich L Rev 465 n 2 (1953), to the comparative negligence of the plaintiff longshoreman and the defendant shipowner—a concept that, unlike the proposal before us today, was well established in admiralty. See S Rep 12; 33 USC § 905(a) [33 USCS § 905(a)]; n 2, supra. It would be particularly curious for Congress to refer expressly to the established principle of comparative negligence, yet say not a word about adopting a new rule limiting the liability of the shipowner on the basis of the nonparty employer's negligence.

24. See Zapico v Bucyrus-Erie Co. 579 F2d, at 725 ("one is still left to wonder why the longshoreman injured by the negligence of a third party should recover less when his employer has also been negligent than when the employer has been without fault").

25. See The Etna, 138 F2d 37 (CA3 1943).

26. The original Fourth Circuit panel opinion would have made the shipowner liable for

covery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.[27] Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages *directly or indirectly*," 33 USC § 905(b) [33 USCS § 905(b)] (emphasis supplied),[28] and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter

[443 US 271]

should no longer have to appear routinely in suits between longshoreman and shipowner.[29] Consequently, as we have done before, we must reject a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . ." Northeast Marine Terminal Co. v Caputo, 432 US, at 278–279, 53 L Ed 2d 320, 97 S Ct 2348.

Accordingly, we reverse the judgment below and remand for proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the consideration or decision of this case.

STOP

SEPARATE OPINION

Mr. Justice Blackmun, with whom Mr. Justice Marshall and Mr. Justice Stevens join, dissenting.

The jury in this case found that the shipowner, the stevedore, and the longshoreman were each partially responsible

[443 US 274]

for the latter's (petitioner Stanley Edmonds) injury. A member of

an amount equal not just to his proportionate fault, but also to the employer's lien. 558 F2d, at 194. The en banc court refused to make the vessel liable for the additional amount of the lien and declined to rule on any alteration of the lien since the employer was not party to the suit. 577 F2d, at 1156.

27. Cf. Northeast Marine Terminal Co. v Caputo, 432 US, at 279, 53 L Ed 2d 320, 97 S Ct 2348.

28. "It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort." S Rep 11; see Pope & Talbot, Inc. v Hawn, 346 US, at 412, 98 L Ed 143, 74 S Ct 202 ("reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution"); Dodge v Mitsui Shintaku Ginko K. K. Tokyo, 528 F2d, at 673; Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen against Shipowners —A Proposed Solution, 37 Ohio St LJ 767, 792–793 (1976).

29. See S Rep 9 ("much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs" of stevedores in third-party actions).

NOTES

1. Open and obvious. Where an open and obvious danger aboard a ship does not involve the ship or its gear, but instead is a condition created by the contractor, the shipowner has no duty to intervene. *Bass v. Aetna Cas. & Sur. Co.*, 727 F. Supp. 312 (S.D. Miss. 1989). One court found no vessel owner liability in a situation of a longshoreman tripping over a padeye (open and obvious danger), *Salvato v. Hakko Maritime Corp.*, 718 F. Supp. 1443 (N.D. Cal. 1989), while another denied liability if the accident was due to previously stowed cargo (open and obvious), *Gigante v. Runship*, 904 F.2d 694 (3rd Cir. 1990); and a third reached the same conclusion due to the hazards of a coiled rope at a foot of a ladder being obvious, *Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991). But, another court found that the hazards of an unguarded or uncovered ladder opening was a question for the jury on the issue of vessel owner negligence. *Martenez v. Korea Shipping Corp.*, 903 F.2d 606 (9th Cir. 1990). Additional decisions on the subject of the turnover duty being satisfied if a dangerous condition aboard the vessel is obvious to the stevedore are: *Delange v. Dutra Construction Co., Inc.*, 183 F.3d 916, 921 (9th Cir. 1999) (the duty to warn attaches only to hazards that are not known to the injured worker and would not be obvious or anticipated by him); *Manuel v. Cameron Offshore Boats, Inc.*, 103 F.3d 31 (5th Cir. 1997); *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995); *Pimental v. Ltd. Canadian Pacific Bul.*, ____ F. Supp. ____, 1991 WL 369922 (S.D. Tex. 1991) *aff'd.* 956 F.2d 13 (5th Cir. 1992); *Davis v. Portline Transportes Maritime International*, 16 F.3d 532 (3d Cir. 1994) (imposed liability since the vessel owner should have foreseen that the longshore workers would not be aware of ice patches on the deck); *Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849 (9th Cir. 1991); *Gigante v. Runship, Ltd.*, 904 F.2d 694 (3d Cir. 1990); *Dino v. Farrell Lines, Inc.*, 80 F. Supp. 282 (D.N.J. 1999); and *La Martina v. Pan Ocean Drilling Co., Ltd.*, 815 F. Supp. 878 (D. Md. 1992).

2. Proving negligence. *Witt v. American Trading Transportation Co., Inc.*, 820 F. Supp. 1249 (D. Ore. 1993), concludes that a repairer has no action under 905(b) if the source of the injury is the subject of the repair work. *Davis v. Portline Maritime*, 16 F.3d 532 (3d Cir. 1994) holds that if the vessel owner remedies a dangerous condition, it must do so with reasonable care. In a *SS YAKA* situation, there is no right to recover if the conduct is that of a stevedoring nature as opposed to that of a vessel owner. *Morehead v. Atkinson-Kiewit, Inc.*, 97 F.3d 603 (1st Cir. 1996) (*en banc*). However, there may be a recovery if the

employer in its capacity of a vessel owner is negligent. *Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381 (2d Cir. 1993).

3. Cargo operations underway/duty to intervene. *Fontenot v. United States*, 89 F.3d 205 (5th Cir. 1996) holds that there is no duty to intervene if the defect is not caused by the vessel's equipment, it is open and obvious, and is in the contractor's work area. In *Brown v. Philippine President Lines*, 704 F. Supp. 606 (E.D. Pa. 1989), the vessel owner did not breach its duty to act once it became aware that the stevedore was continuing to use its malfunctioning equipment even if the stevedore's judgment was obviously improvident. *Wilcox v. Trans Pacific Shipping Co., Inc.*, 923 F.2d 3 (1st Cir. 1991) concerns improper lighting in the hold of a vessel. In order to establish liability, the plaintiff must show that the vessel was under an obligation to supply the lights and the vessel owner knew or should have known that additional lights were needed. *Prinski v. Termar Navigation Co.*, ____ F. Supp. ____, 1992 A.M.C. 1541 (E.D. Pa.), *aff'd*, 944 F.2d 898 (3d Cir. 1991) holds that the vessel owner has no duty to supervise cargo operations at a U.S. port in order to discover dangerous conditions. *See also, Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995). *Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 2000) recognized that a passive vessel owner has no ongoing duty to supervise and to inspect once cargo operations commence. *England v. Reinauer Transportation Companies, L.P.*, 194 F.3d 265 (1st Cir. 1999) holds that there can be no "turnover" defense by the vessel owner if it retained operational control relative to the work areas or the equipment furnished by the vessel. In the *England* case, it was customary in the Port of Boston for the tug owner to check and to tighten the barge's lines during the course of cargo operations. The longshoreman was injured due to a slack line. Both the tug and barge owners were found to have been negligent with respect to the plaintiff's injury. Another decision accepting a 905(b) negligence action if the vessel's representative participated in the work is *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002).

4. Cargo operations completed. A cargo checker injured five days after discharge operations were completed could not maintain a 905(b) negligence action because the plaintiff did not face the hazards of navigation. *Bachemin v. Mitsui and Company (U.S.A.), Inc.*, 713 F. Supp. 204 (E.D. La. 1989).

5. The Supreme Court missed an opportunity to clarify a dispute between the Third and Ninth Circuits regarding the extent of the shipowner's duty. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d

490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) involved a longshore worker who was assigned to discharge cargo that had shifted during the course of the voyage. Derr was aware of this condition prior to his injury. The trial court gave a directed verdict for the vessel owner, which was affirmed on appeal. The Third Circuit held that the ship has no duty to inspect cargo loading operations, and concluded that it had the duty to warn the discharging stevedore only when the ship has actual knowledge of a danger with the stow in situations in which the danger is not open and obvious. This Court recognized that its analysis was contrary to *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). This split between the Ninth and Third Circuits was later resolved in favor of *Derr, Howlett v. Birkdale Chipping Co., S.A.*, 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994). A Ninth Circuit decision that accepts the *Howlett* decision by reversing its prior conclusion is *Riggs v. Scindia Steam Navigation Co.*, 35 F.3d 1466 (9th Cir. 1994).

Woods v. Sammisa Co., Ltd., 873 F.2d 842, 848 (5th Cir. 1989) concerned an injury due to the manner in which the steel cargo was loaded at a foreign port. The Fifth Circuit used the rationale of *Derr* and concluded that *Scindia* imposed "a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct." The Fifth Circuit parted with *Derr* by concluding that a jury should pass on the negligence issue if evidence indicated that the vessel knew or should have known of the cargo being stowed at the load port in such a manner that would create an unsafe condition in the course of discharging operations. The court further concluded that the vessel owner has no duty to warn the stevedore or its employees of obvious defects with the stow. Justices Rehnquist, White and Kennedy dissented from the denial of the vessel owner's petition for writ of certiorari on the basis of a conflict between the Third and Fifth Circuits. *Sammiline Company, Inc. v. Woods*, 493 U.S. 1050 (1990).

6. The *Woods* decision is important for another reason, namely the liability of a time charterer to the injured longshoreman for damages, and to the vessel owner by way of indemnity/contribution. The court concluded that pursuant to the "load, trim and discharge provision" (Clause 8), the time charterer breached a duty to the injured longshoreman due to its supervisory role in the cargo operations at the load port. *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, as amended on rehearing with respect to Part IV, 22 F.3d 568 (5th Cir. 1994), concluded that a time charterer/employer is subject to a 905(b) action for negligence

by one of its employees who is not a seaman; the action turns on whether the employer is acting in its capacity as time charterer. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991), concluded that the "load, stow and trim" provision set forth in Clause 8 of the charter party afforded no remedy to the injured longshoreman against the charterer, but could be used in the vessel's claim for contribution/indemnity against the charterer. Also in *Woods*, the vessel owner's request for indemnity/contribution was rejected on the ground that the owner retained overall control of the vessel. This conclusion relative to the interpretation of the charter party was acknowledged to contradict *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-1306 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), and *Fernandez v. Chios Shipping Co.*, 542 F.2d 145, 151-153 (2d Cir. 1976). The dissent in the Supreme Court's refusal to accept a writ of certiorari in *Woods* referred to this lack of uniformity among the Circuit Courts.

8. *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146 (7th Cir. 1992) sets forth a very restrictive obligation of the vessel owner with respect to a duty to intervene relative to conditions in the work area. *Williams v. M/V SONORA*, 958 F.2d 808 (5th Cir. 1993) holds that the vessel owner has a duty to intervene if the stevedore will not remedy a condition that arises if the vessel owner has some element of control over the cargo operations, or an appurtenance of the ship is involved.

13. *Pacini v. Island Stevedores, Inc., et al.*, 55 F.3d 633 (5th Cir. 1995) reviews the vessel owner's turnover duty with the statement that it does not extend to open and obvious conditions. It is a duty to warn the stevedore of defects about which the vessel owner should know, which would include the placing of a warning sign across a ladder in the stevedore's work area prior to the start of work. *Delange v. Dutra Construction Co., Inc.*, 183 F.3d 916 (9th Cir. 1999) states that the "turnover duty" or "duty to warn" attaches only to hazards "that are not known by the longshoreman and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *Reed v. U.S.L. Corporation*, 178 F.3d 988 (8th Cir. 1999) is in accord. *Jackson v. Egyptian Navigation Co.*, F.3d 2004 W.L. 736865 (3d Cir. 2004) relied upon *Howlett* and *Serbin v. Bora Corp.*, 96 F.3d 66, 70 (3d Cir. 1996) stated that the turnover duty is to warn the stevedore of non-obvious hazards. The plaintiff fell from a board in the stow; the trial court concluded that the case could not go to the jury. This conclusion was affirmed with the statement "[T]he ship has no duty to warn

about an obvious hazard in the work area that a competent stevedore would be expected to discover while properly performing its duties."

14. *Ryan-Walsh, Inc. v. Maritima Aragua, S.A.*, ____F. Supp.____, 1994 U.S. Dist. Lexis 7427, (E.D. La. 1994), *aff'd* 48 F.3d 531, (5th Cir. 1995), is a decision in which the compensation carrier/employer filed a 905(b) negligence action against the vessel owner on behalf of the injured longshoreman. The court held that the vessel's turnover duty associated with the work area does not extend to open and obvious defects unless the alternative to facing the unsafe condition is unduly impracticable or time consuming. The duty of reasonable care extends to longshore workers with respect to areas that remain "under the active control of the vessel." The duty to intervene extends to areas under the principal control of the stevedore.

15. *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998) holds that a worker at a duck camp injured on navigable waters had an action based upon unseaworthiness and general maritime negligence against his employer. The LHWCA was not applicable due to the recreational camp exception from statutory coverage; therefore, the injured worker was not limited to a 905(b) action against the employer-vessel owner. Also, the court held that the exclusive remedy provision of the Louisiana Compensation Act could not be applied since it would interfere with the uniform application of the general maritime law. The Eleventh Circuit reached a contrary conclusion regarding the effect to be given the exclusive remedy provision of a state worker's compensation act in a maritime context. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1533 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Remember that the state law is usually preempted by the LHWCA, if applicable. *Perron v. Benn Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992).

16. The vessel owner has an obligation not to create a dangerous condition aboard the vessel once work starts. *Davis v. Portline Transportes Maritime*, 16 F.3d 532 (3d Cir. 1994). A decision commenting upon the vessel owner's duty in the context of "active operations/active control" is *Coyle v. Krestjan Palusalu Marine Company*, 83 F. Supp. 2d 535 (E.D. Pa. 2000). For conditions that arise after work commences, the plaintiff must show crew involvement in an area under vessel control. The Ninth Circuit concluded that the vessel owner had a continuing duty of exercising due care to the longshore worker in the context of the ship's mooring lines. It appears that this court comes close to the *Scindia* rejected doctrine of

reasonable care under the circumstances. *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807 (9th Cir. 2002).

17. An interesting corollary to *Edmonds* is set forth in *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999). Fontenot was employed by ENSCO on a fixed platform that was owned by Dual Drilling Co., off the Louisiana coast. He collected compensation benefits pursuant to the LHWCA from ENSCO. An action was thereafter filed against Dual for general damages. A Louisiana statute permits a non-employer to deduct from any recovery by the plaintiff the proportionate fault of the non-party employer (ENSCO). This result is contrary to *Edmonds*. It should be noted as predicates that state law governs Fontenot's action pursuant to the terms of the OCSLA,[1] and the platform is not a vessel for the purpose of triggering a 905(b) cause of action similar to *Edmonds*. The adjoining state third party action law applies to a fixed structure even though the compensation recovered from the employer is pursuant to the LHWCA.

18. *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) focuses upon an action by a harbor worker employed by one of Bethlehem Steel's subcontractors. The injury was allegedly due to Bethlehem Shipyard's failure to properly supervise the work. The court concluded that the injured worker was a "borrowed servant" of Bethlehem Shipyard; therefore, his action against the "borrowing employer" was limited to compensation pursuant to the Longshore Act. The authority of the "borrowing employer" need only encompass the worker's performance of the particular work in which he was engaged at the time of the accident. In other words, the issue is whether the worker was for all practical purposes an employee of the borrowing company. The court also states that "[T]hus, a central purpose of these changes to the LHWCA was to 'minimize the need for litigation as a means for providing compensation for injured workmen.'"

1/ The Outer Continental Shelf Lands Act covers personal injuries on fixed structures. On the subject of worker's compensation benefits from the employer, state compensation is applicable within that state's coastal waters, while compensation payments are made pursuant to the LHWCA if the fixed structure is situated outside state territorial waters. The adjoining state's substantive law applies to fixed structures over navigable water if there is no "inconsistency" with federal law.