**No. 18-60895**

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

**EXPEDITORS & PRODUCTION SERVICE COMPANY, INCORPORATED;**
**THE GRAY INSURANCE COMPANY**
**Petitioners,**

**v.**

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR;**
**GARRICK SPAIN,**
**Respondents.**

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**On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor**

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# BRIEF FOR THE FEDERAL RESPONDENT

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## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.3, the Director, OWCP, requests oral argument, which she believes would assist the Court.

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IN THE UNITED STATES COURT OF APPEALS
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EXPEDITORS & PRODUCTION SERVICE CO., INC;
THE GRAY INSURANCE COMPANY
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
GARRICK J. SPAIN,

Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Garrick J. Spain filed a claim seeking benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act). The Administrative Law Judge (ALJ) had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919(c) and (d). The ALJ's Decision and Order, issued on May 14, 2018, became effective when filed in the office of the District Director on May 17, 2018. The Employer responsible for paying benefits, Expeditors & Production

Service Company, Inc. (Employer), filed a notice of appeal with the Benefits Review Board on June 11, 2018, within the thirty-day period provided by 33 U.S.C. § 921(a). Certified List, Docketed 2/12/2019. That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3) of the Act. On December 11, 2018, the Board issued its Decision and Order affirming the ALJ's decision.

Under 33 U.S.C. § 921(c), any party aggrieved by a final decision of the Board can obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. The Employer filed its Petition for Review with this Court on December 27, 2018, within the prescribed sixty-day period. The Board's order is final pursuant to § 921(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). This Court has geographic jurisdiction because Spain was injured in Louisiana.

## STATEMENT OF THE ISSUES[1]

The Longshore Act covers injuries that arise out of and in the course of employment if they occur on the navigable waters of the United States or other maritime situs, which includes any "terminal." 33 U.S.C. § 903(a). Spain worked as a shipping and receiving dispatcher at the C-Port 1 terminal. He was on-call 24 hours per day, and was required to live in on-site housing at the nearby C-Port 2 facility, which the Employer concedes is a maritime terminal. He was injured in those living quarters when he slipped and fell in a wet hallway. The ALJ concluded that the injury occurred on a covered situs and was therefore covered by the Longshore Act. The Board affirmed.

The question presented is whether the ALJ's decision finding that Spain was injured on a covered situs is legally correct and supported by substantial evidence.

[1] The Employer also challenges the ALJ's alternate finding that Spain is covered by the Longshore Act as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333 et seq. (OCSLA). Employer's Opening Brief (OB) 14- 24. Because the ALJ's finding that Spain is directly covered by the Longshore Act is legally correct and supported by substantial evidence, there is no need to address the ALJ's alternate finding of indirect coverage via OCSLA should be affirmed.

## STATEMENT OF THE CASE

### I. Statutory Background

To be covered by the Longshore Act, a worker must have been injured on a covered situs, 33 U.S.C. § 903(a), and must have status as a maritime employee, 33 U.S.C. § 902(3). *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 389 (5th Cir. 2013) (en banc). The Employer does not challenge the ALJ's finding that Spain had status as a maritime employee. ALJ Dec. at 18-20. It challenges only the finding of situs.

The provision addressing situs, § 903(a), provides that compensation is payable "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) (emphasis added). There are thus two general types of situses: enumerated situses (piers, wharves, terminals, etc.) and other adjoining areas.

"Terminal" is not defined by the Longshore Act or the regulations implementing the Act (20 C.F.R. Part 701). In finding that C-Port 2 is a

"terminal," the ALJ relied on a dictionary definition,[2] as well as the definition of a "marine terminal" from an Occupational Safety and Health Administration regulation.[3] ALJ Dec. at 14-15.

## II. Statement of the Facts

C-Port 1 and C-Port 2 are marine terminals that are located at Port Fourchon and adjoin the water near the mouth of Bayou Lafourche, where it enters the Gulf of Mexico. Tr. 91-92; EX 12; CX 52. The facilities service oil and gas rigs on the Outer Continental Shelf (OCS), sending and receiving supplies and equipment by vessel. Tr. 32-34, 36-39

The Employer provides personnel to Anadarko Petroleum, and hired Spain as a shipping and receiving dispatcher. Tr. 112-13. He worked at C-Port 1,

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[2] *Webster's II New Riverside University Dictionary* defines "terminal" as "[o]f, relating to, situated at, or forming an end or boundary," "relating to or occurring at the end of a section of series," "either end of a transportation line, as a railroad;" and "terminus" as a "terminal on a transportation line or the town in which it is located," or "a border or boundary." *Id*. at 1194.

[3] 29 C.F.R. § 1917.2 defines "marine terminal" as "wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent storage or adjacent areas and structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas nor does the term include storage facilities directly associated with those production or manufacturing areas."

servicing two OCS rigs. Tr. 32-34, 51-52. He spent approximately 90% of his time performing duties related to vessel loading or unloading. ALJ Dec. at 20; Tr. 42-50, 60, 69-89, 123, 126, 127, 131-34, 145-59, 160-61, 213-18; 246-49, 271; CX 4 at 31-32.

Because of his schedule – 7 days on and 7 days off, 12 hours per day with 24-hour on-call status – Spain was required to live in a trailer on the premises, and had to remain in those living quarters while not working. Tr. 101-04; 164-66. Spain lived for 8 to 10 months in housing at C-Port 1. Tr. 164-65, 190. When Anadarko wanted to consolidate all of its employees into C-Port 1's living quarters, Spain was transferred to a trailer at C-Port 2, while continuing to work at C-Port 1. Tr. 32, 112-13, 137-38, 164, 317.

C-Port 2 is about 1.5 miles away from C-Port 1, and surrounded by a perimeter security fence that encloses the loading operations and living quarters areas. EX 6, 12; CX 52-54; Tr. 197-99. The living quarters are 500-600 feet from the water. They are on the same side of the public road as the rest of the terminal, and there are no large structures between them and the loading area. Tr. 290; CX 52-54; EX 12. They are separated from the loading area by an internal security fence around the loading area, which is required by the Department of Homeland Security, and which contains a separate secured gate for the loading area. Tr. 285-87; EX 12; CX 52-54. Spain was injured on June 4, 2014, in his trailer at C-Port 2,

when he slipped in a wet hallway on his way to the bathroom, injuring his neck, back, pelvis, right hip, and shoulder. Tr. 166-69.

## III. Decisions Below

### A. The ALJ awards benefits.

In a decision dated May 14, 2018, the ALJ determined that Spain's injury satisfied both the situs and status requirements for coverage.[4] The ALJ first determined that C-Port 2, where Spain was injured, was a 'terminal" under Section 903(a). The ALJ supported this conclusion by referencing a dictionary definition of terminal, and a definition of marine terminal promulgated by OSHA. ALJ Dec. at 14-15; *see supra* at 5 ns. 2-3 (quoting definitions). He found that C-Port 2 meets the ordinary meaning of a terminal because "it is 'the end of a transportation line' that receives various products from customers, consolidates product, and transports or loads product out of the facility by vessel." ALJ Dec. at 15. He found it was also a marine terminal "because it has structures associated with the primary movement of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments." *Id*.

[4] The Employer does not challenge the ALJ's finding that Spain had status as a maritime "employee" under the Longshore Act. ALJ Dec. at 18-20.

Finally, the ALJ found that the living quarters where Spain was injured were "within the boundaries of C-Port 2 (i.e., a parcel of land that is contiguous with navigable water)," and therefore that his injury occurred on a covered situs. He rejected the Employer's arguments that its separation by an internal fence, or its distance from the water, excluded it from being part of the overall situs. *Id*. (citing *Global Mgmt. Enter. v. Commerce & Indus. Ins. Co.*, 574 Fed. Appx. 333, 336 (5th Cir. 2014), in turn citing *Coastal Prod. Servs., Inc. v. Hudson*, 555 F.3d 426 (5th Cir. 2009) (when an injury occurs in a distinct part of a larger facility, the situs is not evaluated by reference to fences or labels alone)).[5]

**B. The Board affirms the award of benefits.**

On appeal to the Board, the Employer conceded that C-Port 2 was a terminal; it argued only that the living quarters where Spain was injured were not part of that terminal. Bd. Dec. at 4. The Board disagreed, finding the ALJ's determination that the living quarters were within the boundaries of C-Port 2 was rational, supported by substantial evidence, and legally correct. *Id*.

[5] In the alternative, the ALJ determined that: (1) even if C-Port 2 was not an enumerated situs, it would qualify as an "other adjoining area" under Section 903(a); and (2) Spain was also covered by the Longshore Act as extended by OCSLA because his work had a substantial nexus with mineral extraction on the Outer Continental Shelf. *Id*. at 15-17, 20-22.

The Board relied on this Court's case law for the proposition that a covered situs "is not defined 'according to fence lines and local designations.'" *Id*. (quoting *Hudson*, 555 F.3d at 433). "Rather, '[t]he test is whether the situs is within a contiguous [] area which adjoins water.'" *Id*. (quoting *Zepeda*, 718 F.3d at 393, in turn quoting *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir. 1977)). It reasoned that the living quarters' function, and its proximity and connection to the loading location supported the ALJ's finding that it was part of the terminal.

> Personnel working at C-Port-2, including shipping and receiving dispatchers such as claimant, are required to sleep and eat in the living quarters due to their work schedules of 12 hours per day with a 24-hour on-call status. While the living quarters are separated from C-Port-2 by a security fence and there is secured access to the loading operations at C-Port-2, the living quarters are designated for use only by people working at the port and are on the same side of the public road as the loading operations, which adjoin navigable waters. Employer's operations supervisor, Bernard Wiltz, testified that there is a fence along the exterior of all of C-Port-2 that encloses the loading operations, the living quarters, and the internal security fences. Tr. at 285-286. [Mr. Wiltz testified that the internal security fences are a requirement of the Department of Homeland Security. Tr. 286.] Pictorial evidence indicates that the living quarters are not separated from the bayou or the loading operations by any other large structures. CXs 51 at 21; 52.

Bd. Dec. at 5 (bracketed sentence originally in a footnote). The Board thus found that substantial evidence supported the ALJ's conclusion that the living

quarters were within the boundaries of the C-Port 2 marine terminal, and thus that Spain was injured on a covered situs.[6]

The Board also rejected the Employer's argument that Spain could not be covered because he worked at C-Port 1, but was injured at C-Port 2. It noted that the § 903(a) situs analysis is not concerned with where the employee is assigned to work, but where the injury occurs. Moreover, it noted that the Employer did not dispute that Spain was injured in the course and scope of his employment. Bd. Dec. at 6 n.6. Accordingly, it affirmed the ALJ's ruling that Span's injury was covered by the Longshore Act.[7]

## SUMMARY OF THE ARGUMENT

The Court should affirm the ALJ's determination that Spain is covered by the Longshore Act because he was injured on a covered situs. The Employer concedes that "C-Port 2 is a marine terminal" and thus an enumerated situs under 33 U.S.C. § 903(a). The fact that Spain, a maritime worker, was injured in C-Port 2 fairly compels the ALJ's conclusion that the Longshore Act applies.

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[6] Having found that Spain was injured on a covered terminal, the Board did not address whether C-Port 2 was also an "other adjoining area" under § 903(a). Bd. Dec. at 6 n.7. The Employer now concedes that C-Port 2 is a terminal. OB at 5; *see also infra* at 18 n.12 (explaining why C-Port 2 also qualifies as an "other adjoining area.")

[7] The Board also affirmed the ALJ's alternative finding that Spain was covered under OCSLA. Bd. Dec. at 7-8.

The Employer attempts to escape this straightforward logic by arguing that C-Port 2's living quarters are not really part of C-Port 2. But the cases it relies on stand only for the proposition that injuries suffered in areas separated from those facilities (and from navigable waters) by public roadways or other non-maritime areas are not covered by the Longshore Act. C-Port 2, in contrast, is a single parcel of land surrounded by a perimeter fence. Its living quarters are separated from the loading area (and Bayou Lafourche) only by an internal security fence. That internal fence does not transform C-Port 2's living quarters into a separate facility.

The Employer also argues that Spain's injury should not be covered because he was injured at C-Port 2, while his loading duties were performed at C-Port 1. But that point is irrelevant for purposes of the Longshore Act, which focuses on where employees are injured, not where they normally work. Moreover, it overlooks the fact that Spain was required to be in C-Port 2's living quarters when he was not working at C-Port 1 because he was on-call 24 hours a day during his 7-day shifts. His injury, therefore, not only occurred on a covered situs, but arose out of and in the course of his employment.

In the end, Spain is a maritime employee who was injured on a maritime situs. He is covered by the Longshore Act.

## STANDARD OF REVIEW

The Court's "review of Review Board decisions is limited to considering errors of law and ensuring that the Review Board adhered to its statutory standard of review, that is, whether the ALJ's findings of fact are supported by substantial evidence and are consistent with the law." *Sisson v. Davis & Sons, Inc.,* 131 F.3d 555, 557 (5th Cir.1998). Because questions of coverage require "the application of a statutory standard to case-specific facts," they are "ordinarily [] mixed question[s] of law and fact." *Zepeda*, 718 F.3d at 387. Where the ALJ has "resolved the factual disputes presented by the parties," coverage under the Longshore Act is a question of law, subject to *de novo* review. *Id*. at 387, 388.

## ARGUMENT

### I. Spain was injured on a covered situs.

The Employer concedes that "C-Port 2 is clearly a marine terminal." OB at 5. A "terminal" is a specifically enumerated situs under § 903(a) of the Longshore Act. 33 U.S.C. § 903(a). And there is no question that Spain was injured in C-Port 2's sleeping quarters. Given these facts, the ALJ and Board reached obvious conclusion: Spain was injured on a covered maritime situs.

Employer makes two arguments against this seemingly inevitable conclusion. First, it argues that C-Port 2's sleeping quarters are not part of C-Port 2. Second, it argues that C-Port 2 is not a maritime situs as applied to Spain

because he performed his loading and unloading duties at C-Port 1. Neither argument passes muster.

## II. C-Port 2's living quarters are part of the C-Port 2 marine terminal.

In light of the Employer's concession that C-Port 2 is a marine terminal, an enumerated situs, it is forced to argue that the living quarters where Spain was injured are not part of that terminal. But the ALJ's finding that they are part of the terminal is both supported by substantial evidence and consistent with governing law. The living quarters are within the perimeter fence that surrounds all of C-Port 2, are on the same side of the public road as the rest of the terminal, and are not separated from the water by any large structures. CX 52-54; EX 12. While there is an additional internal fence around the loading area, that fence is inside the fence that surrounds all of C-Port 2, and exists because the loading area is a "restricted area" by law and thus requires restricted access points. Tr. 286 (Employer's operations manager, Bernard Wiltz testifying that the fence is required by the Department of Homeland Security);[8] *see also infra* at 18 n.11. The ALJ permissibly determined that the entire facility is one terminal.[9]

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[8] The transcript spells this name as "Wilts." The Director follows the spelling used by the Employer and the Board, "Wiltz."

[9] Of course, the fact that C-Port 2 is called a "terminal" is not dispositive on its own. Even an enumerated location is a covered situs only if it bears a functional relationship to maritime commerce. *See Thibodeaux v. Grasso Production Mgmt.,*

The Employer argues that the holdings below are contrary to three decisions: *Kent v. Norfolk Shipbuilding and Dry Dock Corporation*, 1999 WL 35135306 (Ben. Rev. Bd. Oct. 29, 1999); *Griffin v. Newport News Shipbuilding and Dry Dock Company*, 32 Ben. Rev. Bd. Serv. 87, 1998 WL 285575 (Ben. Rev. Bd. May 27, 1998); and *Kerby v. Southeastern Public Service Authority of Virginia*, 31 Ben. Rev. Bd. Serv. 6, 1997 WL 85168 (Ben. Rev. Bd. Feb. 26, 1997), *aff'd* 135 F.3d 770 (Table), 1998 WL 77837 (4th Cir. 1998). But these cases are readily distinguishable because they did not involve injuries on maritime facilities but rather injuries on separate parcels of land that were divided from nearby maritime facilities by public roads or railroads.

Each of these cases turned on whether the injury occurred in an area "adjoining" navigable waters. They were governed by Fourth Circuit law, which provides that "an area is 'adjoining' navigable waters only . . . if it is 'contiguous with' or otherwise 'touches' such waters." *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1138–39 (4th Cir. 1995) (Explaining that "[i]f there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term."). This rule, requiring strict geographic contiguity between the area the injury took place

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*Inc.*, 370 F.3d 486, 488-89 (5th Cir. 2004). But the required functional nexus plainly exists here: C-Port 2 is used to load and unload ships.

and navigable waters, was subsequently adopted by this Court. *Zepeda*, 718 F.3d at 393-94 ("[W]e adopt the *Sidwell* definition of "adjoining" navigable water to mean "border on" or "be contiguous with" navigable waters.").

In all three cases, situs was found lacking because the injury took place in an area that failed *Sidwell's* geographic contiguity test. The claimant in *Kent* was injured in a parking lot "surrounded on all four sides by public streets" and "separated from employer's [fenced] shipyard by public roads which do not adjoin navigable water." 1999 WL 35135306 at *1, *2. The Board acknowledged that *Sidwell* also stated that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on which a claimant is injured[.]" *Id.* at *3 (quoting *Sidwell*, 71 F.3d at 1140). But that was no help to Kent, because the parking lot where he was injured was "separate and distinct parcel of land" and therefore could not be an "adjoining area" under *Sidwell* and its progeny. *Id.*

*Griffin* is almost identical to *Kent*. The claimant was injured in a parking lot that was "separated from employer's shipyard by . . . a public road" and "surrounded by three other roads. *Griffin*, 1998 WL 285575 at *2. The Board held that the parking lot was "a separate and distinct parcel of land" that was "not contiguous with navigable water" or the separately fenced shipyard across the street, and therefore could not be a covered situs under 33 U.S.C. § 903(a), as interpreted by *Sidwell*. *Id.*

Finally, the injury in *Kerby* happened at a power plant that provided electricity to a nearby shipyard. 1997 WL 85168 at *1. "The parcel of land on which the power plant is located" was "separated from [the shipyard] by a privately owned railroad spur." *Id.* Moreover, the plant and the shipyard were "each surrounded by a chain link fence which separated each property from the railroad spur and each other." *Id.* The Board, reversing the ALJ, held that those facts established that the power plant was not an adjoining area under *Sidwell.* 1997 WL 85168 at *1. The Fourth Circuit affirmed in an unpublished decision. *Kerby v. Southeastern Public Service Authority of Virginia*, 135 F.3d 770 (Table), 1998 WL 77837 (4th Cir. 1998).

C-Port 2's living quarters are markedly different from the parking lots in *Griffin* and *Kent* or the power plant in *Kerby*. Most importantly, they are located on the same parcel of land as the rest of the C-Port 2 terminal. There is no public road, railroad, or any other non-maritime facility separating the living quarters from the navigable waters of the Bayou Lafourche. And while there is a security fence between the quarters and C-Port 2's loading area, these areas are not separately fenced like the plant and the shipyard in *Kerby*, or the parking lots and shipyards in *Griffin* and *Kent*. Rather, all of C-Port 2, including the living quarters, are encompassed by a perimeter fence.

The fact that C-Port 2 is a single parcel of land is dispositive. As *Sidwell* teaches, "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured." 71 F.3d at 114; *accord Zepeda*, 718 F.3d at 392 (favorably discussing this aspect of *Sidwell*). There is no dispute that C-Port 2 is adjacent to navigable waters. The Employer has cited no authority for the proposition that an internal security fence alone is sufficient to divide a terminal into multiple parcels for situs purposes. Nor would such a rule be wise. This Court has explained that it "do[es] not define a covered area for LHWCA purposes according to fence lines and local designations because they 'are subject to manipulation for compensation purposes.'" *Hudson*, 555 F.3d at 433 (quoting *Texas Stevedore Co. v. Winchester*, 632 F.2d 504, 515 (5th Cir. 1980) (en banc)).[10] In sum, the internal security fence does not transform C-Port 2's living quarters into a separate facility.[11]

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[10] *Winchester's* holding that geographic continuity with navigable waters is not required to establish situs was overturned by *Zepeda*. 718 F.3d at 394. But nothing in *Zepeda* suggests that an internal fence in an otherwise integrated parcel of land like C-Port 2 effectively divides that parcel for situs purposes. To the contrary, this Court has continued to apply the principle that fences alone do not control the situs inquiry after *Zepeda*. *See Global Mgmt. Enterprises,* 574 Fed.Appx. at 336 ("When an injury occurs in a distinct part of a larger facility, the situs is not evaluated by reference to fences or labels alone. Instead, this court considers whether the site of the injury is within a contiguous shipbuilding [i.e., longshore] area which adjoins the water.").

[11] While Mr. Wiltz testified that the internal fence was required by the Department of Homeland Security, Tr. 286, the relevant regulations make clear that the

In addition to trying to divorce C-Port 2's living quarters from the remainder of that terminal, the Employer accuses the Board of treating the C-Port 1 and C-Port 2 facilities as a single unit for situs purposes. OB at 7. But the Board did no such thing. It merely affirmed the ALJ, who, as the finder of facts, determined that all of C-Port 2, including the living quarters, constituted a single terminal area for purposes of assessing whether it was a covered situs. ALJ Dec. at 15; Bd. Dec. at 5. Given this record, it is not clear that the ALJ could have reached any other conclusion. In any event, his determination that Spain's injury occurred on a covered situs was supported by substantial evidence and, as demonstrated above, consistent with law. It should be affirmed.[12]

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Employer could have included the living quarters in the restricted area if it chose. 33 C.F.R. §§ 105.260(b) ("The facility owner or operator may also designate the entire facility as a restricted area."), 101.105 ("The entire facility may be designated the restricted area, as long as the entire facility is provided the appropriate level of security.").

[12] The Employer also argues that the ALJ and Board incorrectly ruled that C-Port 2 qualifies as an "other adjoining area" under 33 U.S.C. § 903(a). OB 9-15. This argument is irrelevant in light of the Employer's admission that C-Port 2 is a maritime terminal, and therefore an enumerated situs. *See* OB at 5. But even absent that admission, C-Port 2 would qualify as an "other adjoining area" because it has a functional relationship to maritime commerce (it is used to load and unload ships) and (as explained above) the area where Spain's injury occurred satisfies that *Sidwell/Zepeda* geographic contiguity test. *See Zepeda*, 718 F.3d at 392 ("An 'other adjoining area' seeking coverage as an LHWCA-covered situs must . . . satisfy both a geographic and a functional component.").

## III. The fact that Spain's loading and unloading work took place at C-Port 1 does not change the fact that his injury at C-Port 2 occurred on a covered situs.

The Employer's alternate argument against Longshore Act coverage is that Spain's injury should not be covered because he was injured at C-Port 2, while his loading duties were performed at C-Port 1. OB 8 ("Appellants contend that situs by way of a marine terminal presupposes that the Appellee is at the situs where he or she is working, not at some foreign situs.") Notably, the Employer offers no authority to support this proposition. Nor has the Director's research uncovered any such authority.

The absence of such authority is not surprising. As the Board pointed out, the Act is concerned not with where employees work, but where they are injured. Bd. Dec. at 6 n.6. *See* 33 U.S.C. § 903(a) ("compensation shall be payable . . . if the disability or death results from an *injury occurring upon the navigable waters* of the United States (*including any adjoining . . . terminal*") (emphasis added); *see also Sidwell*, 71 F.3d at 1139 n.8 ("The statute is expressly limited to the place where the 'injury occurr[ed].'") Because Spain's injury occurred on C-Port 2, that location is the proper focus of the situs inquiry. And C-Port 2 is a covered situs. As noted above, the Employer concedes that C-Port 2 is a maritime terminal, and the ALJ's finding that C-Port 2's living quarters are part of that terminal is supported by substantial evidence and consistent with governing law.

Moreover, the Employer ignores the fact that Spain was on-call at all times, was assigned to live at C-Port 2, and was not permitted to leave the living quarters during the 12 hours of his day that he was not performing his loading duties. Tr. 101-04, 166. During those 12 hours, the C-Port 2 living quarters were, in effect, his workplace.[13] In any event, it is well-established that resident employees injured while on call are entitled to workers' compensation benefits:

> Injuries to employees required to live on the premises are generally compensable if one of the two following features is present: either the claimant was continuously on call, or the source of the injury was a risk distinctly associated with the conditions under which the claimant lived because of the requirement of remaining on the premises.

Larson'S Workers' Compensation Law § 24.01 (2014).[14] While these are either/or requirements, both are met here: Spain was continuously on call, and the source of

[13] The Employer seems to concede that, if Spain had been injured in the C-Port 1 living quarters, where he lived for the first 8-10 months of his employment, Tr. 164-65, 190, he would have been covered by the Longshore Act because that was where he performed his loading duties. OB 8. But the distinction is irrelevant; regardless of which living quarters he was assigned to, the fact remains that Spain would have been there because it was a condition of his employment.

[14] Professor Larson further explains that, "when a worker is on the premises night and day all his comfort and incidental activities are within the course of employment, including sleeping at night. When the employee is on call at all hours, the reason for this broad coverage is strengthened, since then the position may be analogized to that of an employee who is on duty and paid during his lunch period or rest interval." Larson's Worker's Compensation Law § 24.01; *see also* § 24.02 (addressing on-call employees) and § 24.03 (addressing employees not on-call but injured while living where required by employer).

his injury – a wet hallway that caused his fall – was a risk of the living conditions in the C-Port 2 quarters. His injury, therefore, arose out of and in the course of his employment.

This Court addressed a similar situation in *Hotard v. Devon Energy Production Co., LP*, 308 Fed. Appx. 739 (5th Cir. 2009).[15] There, the worker was off-duty and asleep in a bunk on an offshore oil platform when he was bitten by a spider. The Court found him covered even though he was off-duty, recognizing that a worker need not be performing his duties at the time of his injury to be covered. *Id*. at 742-43 (citing *O'Leary v. Brown-Pacific-Maxon, Inc*., 340 U.S. 504, 506-07 (1951)). It further found that the claimant was injured in the course of his employment because, although his job did not require him to sleep on the platform, it created a situation where he typically did. 308 Fed. Appx. at 743. Here, Spain's injury was more clearly in the course of his employment, as he *was* required to sleep in the C-Port 2 living quarters. Moreover, while Hotard had a work schedule similar to Spain's – 12-hour shifts with 7 days on and 7 days off –

[15] Hotard's injury fell under OCSLA because it occurred on the outer continental shelf. *See* Petitioner's Opening Brief, 2008 WL 5972627 at iv, 1, 9; Respondent's Opening Brief, 2008 WL 5972628 at 2. Regardless, because OCSLA extends the provisions of the Longshore Act, 43 U.S.C. § 1333(c), 33 U.S.C. § 902(2)'s requirement that a worker's injury must arise out of and in the course of employment applies under either statute.

there is no indication in the decision or the parties' filings that he was on-call during the 12 hours he was off-duty.

In sum, when Spain was injured in C-Port 2's living quarters, he was a maritime worker on a maritime situs. The fact that Spain's actual loading and unloading duties occurred at the nearby C-Port 1 is irrelevant. The ALJ's and Board's rulings that Spain's injury is directly covered by the Longshore Act should be affirmed. As a result, there is no need to consider the Employer's argument that the ALJ and Board erred by holding, in the alternative, that Spain is also covered by the Longshore Act as extended by the Outer Continental Shelf Lands Act.

## CONCLUSION

The Court should affirm the rulings below that Spain is entitled to Longshore Act benefits because he was injured on a maritime situs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, I electronically filed the foregoing Response through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

## COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. Proc. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 5,516 words;

2. Pursuant to Fifth Circuit Rule 25.2.1, the text of the electronic brief filed with the Court is identical to the text in the paper copies; and

3. The brief was scanned for viruses through McAfee VirusScan Enterprise 8.0, and no virus was detected; and

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/s/ Matthew W. Boyle
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