No. 18-60662

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

INTERNATIONAL-MATEX TANK TERMINALS
and
ZURICH AMERICAN INSURANCE COMPANY
Petitioners,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
and
DWAYNE D. VICTORIAN,
Respondents.

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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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
and
DWAYNE D. VICTORIAN,

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

This appeal involves Dwayne D. Victorian's claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act). An 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 was issued on June 5, 2017, Record Excerpts Filed on Behalf of

Petitioners (ER) Tab 3. His Order Denying Motion for Reconsideration was issued on July 12, 2017, and became effective when filed in the office of the District Director on July 13, 2017. ER Tab 1 (Certified List) at 5. Victorian's employer, International-Matex Tank Terminals filed a notice of appeal with the Benefits Review Board (Board) on August 3, 2017, within the thirty-day period provided by 33 U.S.C. § 921(a). *Id*. at 4. That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On July 24, 2018, the Board issued its Decision and Order affirming the ALJ's decision. ER Tab 2.

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. International-Matex Tank Terminals filed its Petition for Review with this Court on September 19, 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 Victorian was injured in the State of Louisiana.

STATEMENT OF THE ISSUES

I. The Longshore Act covers injuries that occur on the navigable waters of the United States, which includes any "terminal" or any other area that adjoins such waters and is customarily used to load and unload vessels. 33 U.S.C. § 903(a). While working for International-Matex Tank Terminals, Victorian was injured at its Gretna terminal, a 150-acre bulk liquid storage facility abutting the Mississippi River where liquid products are loaded and unloaded from vessels through a comprehensive and integrated network of pipelines. Is the Gretna terminal a covered situs under the Longshore Act?

II. The Longshore Act covers workers engaged in maritime employment, which includes work related to the loading and unloading of vessels. 33 U.S.C. § 902(3). Victorian's job duties as an assistant shift foreman required him to participate in the process of loading and unloading vessels by checking pipeline lineups, monitoring the flow of product into and out of storage tanks, and coordinating with the entire loading crew from the dock to the tank yard to ensure that the vessel loading or unloading process went smoothly. Without his participation, the loading or unloading of vessels could not proceed. Was Victorian a covered maritime employee?

III. The ALJ found that Victorian was entitled to temporary total disability benefits for his cervical spine injury because he had not yet reached

maximum medical improvement, could not return to his usual work, and was unable to find suitable alternative employment despite reasonable diligence on his part. Is the ALJ's finding supported by substantial evidence?

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).

A. Situs

Section 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).

The enumerated situs, "terminal," is not defined by the Longshore Act or the regulations implementing the Act (20 C.F.R. Part 701). In finding International-Matex Tank Terminals' Gretna terminal a "terminal" within the meaning of Section 903(a), the ALJ relied on two definitional sources:

1. *Webster's II New Riverside University Dictionary*, which 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.

2. An Occupational Safety and Health Administration (OSHA) standard, which 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.

29 C.F.R. § 1917.2 [1]

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[1] Facilities used for the bulk storage, handling and transfer of certain liquids and gases are not covered by OSHA's marine terminal safety standards. 29 C.F.R. § 1917.1(a)(1)(i). OSHA explained in the preamble to the standard that these facilities are not covered because the Coast Guard exercises authority over their working conditions. 46 Fed. Reg. 4182, 4188 (Jan 16, 1981) (citing 29 U.S.C. § 653(b)(1), which removes OSHA authority over working conditions that other federal agencies regulate); *cf. Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002) (general marine safety regulations issued by Coast Guard did not preempt OSHA's authority over working conditions on uninspected vessel conducting inland drilling operations, where

The ALJ also found that the Gretna terminal was an "other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel." 33 U.S.C. 903(a). The catch-all "other adjoining area" must have both a geographical and functional nexus with the water. *Zepeda*, 718 F.3d at 389. The geographical nexus is met when the area borders on, or is contiguous with, navigable waters. *Zepeda*, 718 F.3d at 393-94. For the functional nexus, the area must be used customarily, but not exclusively, for the loading or unloading vessels. *BPU Management, Inc./Sherwin Alumina Co. v. Director, OWCP [BPU]*, 732 F.3d 457, 461 (5th Cir. 2013); *Coastal Prod. Services v. Hudson [Hudson]*, 555 F.3d 426, 432 (5th Cir. 2009).

B. Status

A covered "employee" is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations." 33 U.S.C. § 902(3). The Act does not define "maritime employment," *Herb's Welding, Inc. v Gray,* 470 U.S. 414, 421

Coast Guard regulations did not address such occupational safety and health risks). Thus, the exception is not a determination that a bulk liquid storage facility is not a terminal, a place for the "loading, unloading, movement and other handling of cargo." 20 C.F.R. § 1917.1(a). Rather, when OSHA wanted to state that an area was not a terminal, it clearly did so. *See* 20 C.F.R. § 1917.2 (excluding production and manufacturing areas and storage areas "directly associated" with such activities).

(1985), but it is "an occupational test that focuses on loading and unloading." *Id*. at 424 (quoting *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979)). Loading and unloading are maritime activities when they are "undertaken with respect to a ship or vessel," as opposed to another form of transportation. *Fontenot v. AWI, Inc.,* 923 F.2d 1127, 1131 (5th Cir. 1991); *BPU*, 732 F.3d 457, 462 (5th Cir. 2013). Land-based activity is maritime for purposes of the status test if it is an integral or essential part of loading or unloading a vessel. *Chesapeake & Ohio R.R. v. Schwalb*, 493 U.S. 40, 45 (1989).

A worker need only spend "some of his time" loading or unloading ships to be covered. *Northeast Marine Terminal Co. v. Caputo [Caputo]*, 432 U.S. 249, 273 (1977); *Hudson*, 555 F.3d at 440 (worker covered who spent approximately 10 percent of his time in loading and maintaining loading equipment). Moreover, an employee may have status based on either the activity he was engaged in at the time of his injury, or the nature of his employment as a whole. *Hudson*, 555 F.3d at 439.

C. Temporary Total Disability

A claimant's disability may be permanent or temporary in duration, and total or partial in degree. *La. Ins. Guar. Ass'n v. Abbott [Abbott]*, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's disability is temporary until he has reached maximum medical improvement (MMI), the point at which he is no longer

undergoing treatment with a view toward improving his condition; or when his condition is of lasting and indefinite duration, rather than one in which recovery merely awaits a normal healing period. *See Gulf Best Electric, Inc. v. Methe [Methe]*, 396 F.3d 601, 605 (5th Cir. 2004); *Abbott*, 40 F.3d at 126; *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); s*ee also McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and MMI is not reached until the treatment is complete, even if the treatment is later determined to have been ineffective. *Methe*, 396 F.3d at 605; *Abbott*, 40 F.3d at 126.

A claimant's disability is total if he cannot return to his usual work. *Abbott*, 40 F.3d at 127; *New Orleans* (*Gulfwide*) *Stevedores v. Turner [Turner]*, 661 F.2d 1031, 1038 (5th Cir. 1981). If his employer establishes the existence of suitable alternative employment, the claimant's disability remains total (rather than becoming partial) only if he shows that he has diligently pursued alternative employment, but was unable to secure a position. *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 691 (5th Cir. 1986); *Turner*, 661 F.2d at 1043 (5th Cir. 1981).

II. Statement of the Facts

A. The Gretna Terminal

According to International-Matex Tank Terminals (IMTT), it owns "ten marine terminals located on the East, West, and Gulf Coasts, and the Great Lakes regions of the United States." Claimant's Exhibit ("CX") 1 at 1 (IMTT's website). Its Gretna terminal sits on 150 acres at mile 97.2 on the west bank of the Mississippi River across from New Orleans in Gretna, Louisiana. CX 1 at 3. The terminal has a dock on the river with one deepwater tanker berth and four barge berths. CX 1 at 3; ER Tab 11 at 1; CX 23 at 53; CX 22 at 27.[2] Approximately ten to twelve deepwater tankers dock at the facility per year, and barges arrive on a daily basis. CX 22 at 15. Five barges can moor there at the same time. Hearing Transcript ("Tr.") at 64-65.

The Gretna terminal neighbors several other marine terminals operated by other businesses, including the Blackwater Harvey terminal, which is next to the Gretna terminal along the riverfront. CX 23 at 28-29. Access to the Gretna terminal requires a Transportation Worker Identification Credential (TWIC) card, CX 23 at 58-59, which is issued to "merchant mariners, port

[2] CX 23, also admitted as Employer's Exhibit ("EX") 32, is the deposition testimony of Bill Mercier, operations manager for the Gretna terminal. CX 22, also admitted as EX 31, is the deposition testimony of Kevin Babbs, a shift foreman at Gretna.

facility employees, longshore workers, truck drivers, and others requiring unescorted access to secure areas of maritime facilities." CX 1 at 7.[3]

It is undisputed that the Gretna terminal is a "bulk liquid storage terminal facilit[y]" that handles "non-flammable petroleum products, vegetable oils and bulk commodity chemicals" for various customers at any given time. CX 1 at 1, 3; CX 23 at 8; CX 22 at 16. It consists of 60 storage tanks and a "continuous" system of pipelines and manifolds that run throughout the property (including from the dock) to load and unload vessels and move liquids between the storage tanks.[4] CX 23 at 50-52, 69-70; Tr. at 58, 116. The terminal is divided by a roadway and railroad tracks – with the northern half closest to the river, and the southern half on the other side of the

[3] A TWIC card is currently required solely for maritime facilities. *See* the Transportation Security Administration's Frequently Asked Questions about TWIC at http://www.tsa.gov/stakeholders/frequently-asked-questions-0. ("At this time, the TWIC program is focused on the maritime mode, specifically [Maritime Transportation Security Act of 2002]-regulated facilities and vessels.") TWIC applicants must certify that: "As part of my employment duties, I am required to have unescorted access to secure areas of maritime facilities or vessels in which a Transportation Worker Identification Credential is required; I am now, or I am applying to be, a credentialed merchant mariner…." 49 C.F.R. § 1572.17(e).

[4] According to Mercier's testimony, a manifold is a "big section of pipes with valves" that is used to direct the flow of liquid "in different directions" to the tanks on the terminal. CX 23 at 42; *see* ER Tab 11 at 3, 4 (pictures).

roadway – but pipelines run unimpeded under the roadway. ER Tab 11 at 1 (plat of the terminal); CX 23 at 24-25, 59; CX 22 at 91, 96; Tr. 67-68.

The terminal's northern property line runs along the Mississippi River. ER Tab 11 at 1; CX 1 at 3-5. Other than a levee, there are no intervening structures between the riverside dock and the tank yard.[5] CX 23 at 28; CX 22 at 116-17; Tr. at 67; ER Tab 11 at 1. A steel grate walkway, which Mercier described as a pipeline truss, runs from the dock to the top of the levee; from there, pipelines continue down to the main terminal manifold and on to the storage tanks. CX 23 at 54-55; CX 22 at 100-01, 120; Tr. 68 (describing manifold pictured in CX 1 at 8).

Although the terminal is accessible by railroad and truck, nearly all product is transported by vessel. Mercier testified that about 94% of liquid product arrives and 100% departs the terminal by vessel. CX 23 at 52 (six percent arrives by truck or rail); *id*. at 71. Babbs likewise testified that the majority of product arrives by vessel and 100% is shipped back out on vessel. CX 22 at 15, 18-19; *see also* Tr. 74 (Victorian's testimony that no product had been delivered to or shipped from Gretna terminal by rail or truck within last five years). The terminal then stores the liquid cargo until the IMTT customer

[5] There is also some "batture" – alluvial land – between the river at the low-water stage and the levee. ER 3 at 58 n. 42.

directs its reshipment; the product is then loaded back onto a vessel. CX 23 at 12-13, 71, 102-04, 112. IMTT does not own any of the product at the Gretna terminal. CX 23 at 50; CX 22 at 46, 123.

The terminal is also equipped to combine and blend oil products according to customer specifications. CX 23 at 10-12, 71; Tr. 70-71, 163-164. However, approximately 70-80% of the product at the terminal is simply stored until reshipment; it never gets blended or otherwise treated or altered. Tr. at 165. Blending involves the transfer of product from one storage tank to another via the pipeline system, CX 23 at 34-36, 105-106, and may include "sparging," during which air bubbles are injected into a tank to agitate and blend lighter oils with heavier oils. CX 23 at 11. As Mercier testified, tank to tank transfers merely "commingle" the liquids to lower the viscosity of the oil or "better grade" it. CX 23 at 102-03. The transfers do not create a new product, only a "different" one. *Id*. at 103.

B. Victorian's Job Duties

At the time of his injury, Victorian worked as an assistant shift foreman for the bulk department at the Gretna terminal. Tr. at 75-76. The bulk department is in charge of loading and unloading the vessels as well as transferring product between storage containers. CX 23 at 73-74. A typical shift for the bulk department consisted of four to five people, including a

foreman, an assistant foreman, a gauger, an operator, and a dockman. *Id.* at 74.

As an assistant foreman, Victorian typically performed the duties of a gauger or a pumper. CX 22 at 23, 34. He would check the lineup of the pipelines throughout the tank yard to ensure that the correct valves were open and closed, CX 23 at 66-67, 75; CX 22 at 11; Tr. at 79, 130, and monitor the flow rate of liquid product via computers in the terminal office. CX 22 at 34-35. He would also assume the duties of foreman when the foreman was unavailable. CX 23 at 15; Tr. at 76.

When a vessel docked at the terminal, the entire bulk department crew worked together as a unit to load and unload the vessel and ensure that the cargo made it into or out of the designated storage tank. CX 22 at 33, 38-39, 41-42; CX 22 at 45 (Babbs' deposition: "Q. And obviously the dock guy can't start pumping until the guy in the yard says, we're ready and vice/versa; if it's an outflow job, the dockman can't say it's coming until the pumper and gauger says he's ready, it is a system that requires all of the people to participate in? A. That's right.").

Victorian only occasionally performed dockman duties, Tr. 132-33, 78, CX 23 at 18-19, but he went daily to the dock to supervise the dockman. Tr. 78-79. He also occasionally had to board a vessel. *Id*. Even when he was not

at the docks, he was responsible for the loading and unloading process. CX 23 at 60. While unloading vessels, he typically worked at the "first manifold," which was located in the tank yard, just inside the levee. Tr. 69. He was required to coordinate and communicate with the entire crew from the dock to the tank yard, as well as the vessels and IMTT's traffic department, to ensure that the loading and unloading process ran smoothly. CX 22 at 31-32; Tr. at 76-79, 132.

Victorian also assisted with the other main responsibility of the bulk crew: transferring product from tank-to-tank to consolidate or combine it by blending or sparging. Tr. at 60. Like the loading and unloading of cargo, tank-to-tank transfers required Victorian to check the lines, valves, and gauges. Tr. at 60. Victorian performed both tank-to-tank transfers and loading and unloading of vessels on a regular basis. CX 22 at 125; Tr. at 73, 149.

C. Victorian's Injury

Victorian was injured on June 25, 2014, while assisting in a tank-to-tank transfer. CX 23 at 34, 103-04; Tr. at 80-82. His injury occurred in the northern half of the terminal closest to the river, in front of Tank 107, in the area between it and Tank 106. Tr. 80, 118; CX 32; CX 23 at 31-32; CX 22 at 81; Tr. at 80-81. That area is about 700 feet away from the levee and contains several pipelines and a manifold connecting the tanks to the rest of the

terminal. CX 23 at 32-33, 42-43, 51, 69; Tr. at 58; ER Tab 11. At the time, Victorian had just completed a transfer of product from Tank 123 (located in the southern half of the terminal) to Tank 107. CX 23 at 34. He was preparing to "blow" the product left in the 124 pipeline by connecting an air hose to the pipeline in front of Tank 107. CX 22 at 59, 62, 89. As Victorian prepared to throw the air hose over to the blow fitting about fifteen feet away, it got caught on a step and jerked him backwards, injuring his neck and upper back. CX 2 at 3 (incident investigation form); Tr. at 82.

III. Decisions Below

A. The ALJ awards benefits

In a decision dated June 5, 2017, the ALJ determined that Victorian's work accident satisfied both the situs and status requirements for coverage, and resulted in a temporary total disability.

1. Situs

The ALJ first determined that the Gretna facility was an enumerated situs, namely, a 'terminal," under Section 903(a). The ALJ supported this conclusion by referencing both a dictionary definition of terminal and one promulgated by OSHA. ER Tab 3 at 55-59; *see supra* at 5 (quoting definitions). The ALJ further observed that IMTT itself described its ten U.S. facilities, including the Gretna facility, as "marine terminals," *id.* at 58 (citing

CX 1 at 1), and noted that the facility is accessible by railroad, highway, and water, and is capable of loading and unloading vessels, trucks and rail cars. ER Tab 3 at 58 (citing CX 1 at 2-3).

The ALJ likewise relied on the testimony of IMTT's witnesses Mercier and Babbs to find that 94 percent of the product delivered to the facility comes by vessel, and 100 percent leaves by vessel; the facility's dock loads or unloads barges daily, as well as ten to twelve ships per year; and that liquid product, which arrives by vessel, is unloaded through pipelines and manifolds into the facility's tanks, where it is stored until a customer requests reshipment. ER Tab 3 at 58-59.

Because the Gretna facility's physical attributes and functions matched those of a terminal – and because IMTT referred to it as a terminal on its website – the ALJ found that it was a terminal, and therefore a covered, enumerated situs. *Id*. at 59. He also found that the terminal adjoined navigable waters because it was contiguous with the Mississippi River. *Id*. at 60 (citing *Zepeda*, 718 F.3d 384; *Sidwell v. Container Serv. Inc*., 71 F.3d 134 (4th Cir. 1995); and *BPU*, 555 F.3d 457).

The ALJ rejected IMTT's argument that, because the specific location of Victorian's injury did not abut water, it did not occur on a covered situs. ER Tab 3 at 61. He observed that the injury occurred within the terminal

boundaries, and commented that it is the facility itself, not the specific spot where the injury occurred, that must adjoin navigable waters. *Id*. at 62 (applying case precedent).

In the alternative, the ALJ determined that Gretna terminal was an "other adjoining area" under Section 903(a). *Id*. at 58-59. He found that the facility met the geographic nexus requirement of this clause because of its contiguity with the Mississippi River.

He likewise found the clause's functional component satisfied because the facility was customarily used to load and unload vessels. *Id*. at 66. He again noted the testimony of Gretna's Operation Manager, Bill Mercier, that 94 percent of product arrived by vessel, and 100 percent left by vessel. *Id*. at 67.

The ALJ rejected IMTT's argument that Victorian was not covered because he was injured while standing in front of Tank 107 performing a tank-to-tank transfer. The ALJ relied on the log for Tank 107, which showed that: over the course of a year, fuel from the tank was loaded onto vessels eighty times in a year; and that in a period of six months, fuel was unloaded from vessels into the tank ten times. *Id*. He noted Babbs' testimony that Tank 107 was one of the tanks consistently used to move bunker fuel (for powering ships) onto barges moored at the Gretna terminal dock. *Id*. at 68. Because

both the Gretna facility as a whole, and Tank 107 specifically, were customarily used to load and unload vessels, the ALJ found that the facility met the functional nexus requirement. *Id*. at 69.

2. Status

Citing this Court's decision in *Hudson*, 555 F.3d at 439, the ALJ recognized that a worker may qualify as a covered maritime employee based on either the activity he was engaged in at the time of the injury, or his employment as a whole. *Id*. at 70. The ALJ then found that Victorian qualified based on his employment as a whole:

> Claimant's activities of opening and closing valves which directed the flow of product into specific tanks, monitoring and lining-up the pipelines, reading the gauges on tanks, and communicating with the dockmen to assist in the smooth transfer of product from the moored vessels into the tanks, were all **integral parts of the loading and unloading process** at the terminal and were **one step in the direct chain of unloading or loading vessels**. *New Orleans Depot*, 718 F.3d at 396-97. Undoubtedly, none of the product would be loaded or unloaded on vessels without Claimant performing his duties in the tank yard. *See id*. In the same way . . . Claimant's tank-to-tank transfer can also be characterized as an integral part of the loading process because it was performed in order to sparge the product for the eventual shipment by vessel.

ER Tab 3 at 75 (emphasis in original).

As support, he noted Victorian's testimony that he spent 95 percent of his time loading and unloading vessels, performing tank-to-tank transfers, and mixing or sparging product; and he cited the testimony of Mercier and Babbs –

highlighting in particular Mercier's assessment that 94% of product came by vessel and 100% left that way – to conclude that Victorian regularly performed maritime work and thus fulfilled the status requirement of § 902(3). *Id.* at 74-75.

3. Temporary total disability

With respect to Victorian's cervical spine and nerve injuries – the injuries stipulated to by the parties[6] – the ALJ concluded that Victorian had not yet reached maximum medical improvement due to his desire to proceed with cervical spine surgery. *Id.* at 93. The ALJ also determined that Victorian had been unable to find suitable alternative employment despite reasonable diligence on his part. *Id.* at 100. Thus, the ALJ concluded that Victorian was temporarily totally disabled and entitled to benefits for his work-related injuries. *Id.*

[6] Victorian also claimed that he was entitled to compensation for a left shoulder injury as well as depression and anxiety, but the ALJ determined that those injuries were unrelated to his cervical spine injury and thus not compensable. ER Tab 3 at 79, 88. Victorian filed a motion to reconsider the ALJ's determination as to his left shoulder injury, but the ALJ denied that motion on July 12, 2017. Victorian cross-appealed to the Board, which affirmed the ALJ on the issue. Victorian did not file a cross-appeal in this Court regarding the Board's affirmance.

B. The Board affirms the award of benefits

On July 24, 2018, the Board affirmed the ALJ's decision. ER Tab 2. It found that "the definition of 'terminal' used by the administrative law judge describes both the physical attributes of the Gretna facility and the maritime purpose of its docks, pipelines, and storage tanks, which is to move waterborne shipments from vessel to shore and product from shore to vessel." *Id*. at 5 (citing *Thibodeaux v. Grasso Prod. Mgmt. Inc.*, 370 F.3d 486, 488-91 (5th Cir. 2004)).

The Board rejected IMTT's argument that the terminal was not a covered situs because blending and sparging – which IMTT characterized as manufacturing – took place there. The Board recognized that manufacturing areas are not covered if they are geographically or functionally separate and distinct from loading areas. ER Tab 2 at 5. But it noted the ALJ's finding that the Gretna terminal contained no separate manufacturing facility; all the blending and sparging occurred in the same tanks into which product was loaded onto and unloaded from ships, or from which it was loaded onto ships. *Id*. at 6. Indeed, it observed that all of the terminal's tanks and pipelines were customarily used to load and unload ships. *Id*. This included Tank 107, where Victorian was injured, which "was regularly used to directly load and unload liquid bulk product onto or from vessels." *Id*. Moreover, the Board

emphasized that 70 to 80 percent of the product stored at the terminal was never blended or sparged, but was loaded onto vessels in the same form it was received. *Id*.

The Board accordingly concluded that

> [b]ased on the evidence that employer's entire Gretna facility adjoins navigable waters, that approximately 70 percent of the product is not blended or sparged, and that the lower percentage of product subjected to these processes is not conducted at any fixed, dedicated location within the Gretna facility, we affirm the administrative law judge's conclusions that claimant was injured at a 'terminal' pursuant to Section 3(a), as the loading and unloading of vessels constitutes a substantial part of the employer's business activity at its Gretna facility.

Id.[7]

It also affirmed the ALJ's decision on status. It found that Victorian's duties – directing and monitoring the flow of product to and from vessels and tanks – were integral to the loading and unloading process. *Id.* at 8. The Board found that, because Victorian spent "at least some of his time" performing the indisputably covered duties of loading and unloading, he was covered. *Id*. at 7 (quoting *Caputo*, 432 U.S. at 273).

[7] Having found that the Gretna facility was a terminal, the Board did not address whether it was also an "other adjoining area." Contrary to the IMTT's assertion, OB 24, this was not error; having affirmed the ALJ's finding of situs on one ground, the Board had no need to address the other.

The Board rejected IMTT's argument that Victorian could not have been covered because his injury occurred during a tank-to-tank transfer. It found that the ALJ correctly focused on Victorian's employment as a whole, and found substantial evidence to support the ALJ's finding that some of Victorian's regular duties were integral to the loading and unloading of product to and from vessels, and thus that he was a covered employee under § 902(3). *Id*. at 8.

Finally, the Board affirmed the ALJ's finding that Victorian was temporarily and totally disabled. It found substantial evidence for the ALJ's finding that Victorian intended to have neck surgery, and noted his doctor's opinion that he would not reach maximum medical improvement until a year after that surgery. *Id*. at 9. It thus agreed with the ALJ that Victorian's disability was temporary. The Board further agreed that Victorian's disability was total because Victorian could not return to his usual employment, and was unable to secure alternative suitable employment despite exercising reasonable diligence. *Id*. at 10-11.

SUMMARY OF THE ARGUMENT

The Court should affirm Victorian's award of benefits under the Longshore Act. The ALJ correctly found that the Gretna terminal was a

covered situs, that Victorian had status as a maritime employee, and that he was temporarily totally disabled.

The Gretna terminal is a covered situs under Section 903(a) of the Longshore Act as either an enumerated "terminal," or a catch-all "other adjoining area."

The conclusion that the Gretna facility is a terminal is supported not only by IMTT's corporate name – International-Matex Tank *Terminals* – but also the fact that its own website identifies its facilities as terminals. If IMTT's own recognition that its facilities are terminals were not enough, the ALJ correctly found that the Gretna terminal meets the accepted meaning of the term.

Even if the Gretna terminal were not covered as such, the ALJ correctly found it was an "other adjoining area" because it abuts navigable water and is customarily used for the loading and unloading of ships. That the exact spot where Victorian was injured did not touch water is irrelevant. As this Court has repeatedly held, it is the facility as a whole, not the specific location of the injury, that must abut navigable waters, and the Gretna facility does that. Moreover, loading and unloading of ships customarily occurs at the Gretna terminal, and that is all that is required to make it an "other adjoining area."

That other activities occur there – e.g., tank-to-tank transfers for blending and sparging – is irrelevant.

Victorian also met the status test as a covered "employee" under Section 902(3). The ALJ found that his duties were integral to the loading and unloading of ships, and that he performed those duties on a regular basis. Those findings are supported by substantial evidence. IMTT's arguments against the finding of status are simply requests that the Court make its own contrary factual findings and must be rejected.

Finally, the ALJ correctly determined that Victorian was temporarily totally disabled. He was temporarily disabled because he intended to undergo neck surgery, and would not, according to his doctor, reach macimum medical improvement until a year after surgery. He was totally disabled because he could not return to his usual work and – although IMTT established the existence of suitable alternative employment – was unable to secure such a position despite due diligence.

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. The Gretna terminal is a covered situs under Section 903(a) of the Longshore Act as either an enumerated "terminal" or a catch-all "other adjoining area."

A. The ALJ correctly determined that the Gretna terminal is a terminal within the meaning of the Longshore Act.

Neither the Longshore Act nor its implementing regulations define the enumerated situs, "terminal." The Supreme Court has consistently instructed courts that "[i]t is a 'fundamental canon of statutory construction'" that when statutory terms are undefined, those "words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Courts can use a variety of tools to derive the ordinary meaning of a term, including dictionaries, an agency's regulations, and the context of the statutory terms, such as the purpose and legislative history of the statute. *See Resources of Interpretation—Intrinsic and Extrinsic Aids*, 2A SUTHERLAND

STATUTORY CONSTRUCTION § 45:14 (7th ed.) (describing tools of statutory construction, including dictionaries and legislative history).

Here, the ALJ relied on two definitions to arrive at a working definition of "terminal" under the Longshore Act. The ALJ first cited the general definition of "terminal" found in Webster's Dictionary, and then provided a maritime context to this broad definition by relying on OSHA's definition of "marine terminal." *Supra* at 5, 15-16. Based on these two sources, the ALJ reasonably concluded that terminal means "the end of a transportation line" that includes "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." ER Tab 3 at 59.

This definition of terminal is consistent with other definitions of terminal cited in dicta in relevant case law under the Longshore Act. For example, while declining to adopt them outright, the Supreme Court in *Caputo* found useful the definitions contained in the New York and New Jersey Bi-State Compact that created the congressionally-approved Bi-State Waterfront Commission. *Caputo*, 432 U.S. at 268 n.30. Those definitions delimit a

"marine terminal" as "an area which includes piers, which is used primarily for the moving, warehousing, distributing or packing of waterborne freight or freight to or from such piers, and which, inclusive of such piers, is under common ownership or control." *Id.* (citing N.Y. Unconsol. Laws § 9905 (McKinney 1974)). In addition, in his dissent to the Ninth Circuit's decision in *Hurston*, Judge Alarcon put forth definitions for the various structures enumerated in § 903(a), including a terminal, which he defined as a facility "used to dock ships and to store cargo awaiting loading aboard a ship, or to store off-loaded cargo awaiting inland shipment." *Hurston v. Director, OWCP*, 989 F.2d 1547, 1558 (9th Cir. 1993) (Alarcon, J., dissenting).

The ALJ's definition of terminal also comports with this Court's guidance in defining the enumerated structures in § 903(a). In *Thibodeaux*, the Court explained that the enumerated structures should be defined not just by their physical appearance but also by their function and maritime purpose. *Thibodeaux*, 370 F.3d at 488-91. The ALJ's definition here does both: it describes the physical attributes of a terminal – namely, the wharves, piers, docks, storage and other structures commonly found in a terminal; and the purpose of these structures – the movement of waterborne shipments from

vessel to shore and shore to vessel. In short, the ALJ correctly defined the enumerated structure "terminal."[8]

Substantial evidence also supports the ALJ's ruling that the Gretna terminal met this definition. Employer's own name – International-Matex Tank *Terminals* – goes a long way toward deciding the point. So does IMTT's own website, which identifies its facilities, including the Gretna facility, as "marine terminals" and "bulk liquid storage terminal facilities." CX 1.

If IMTT's own implicit admissions were not enough, the Gretna terminal fits squarely within the ALJ's definition of "terminal." It contains structures typically associated with a terminal: a dock and storage facilities, as well as railroad tracks and a truck berth that allow for the overland shipment of cargo unloaded from vessels (and vice versa). ER Tab 11 at 1; *see supra* at 9-12.

The Gretna terminal also has a distinctly maritime purpose: almost all of the product handled and stored at the facility arrives and leaves on vessels.

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[8] IMTT argues that the ALJ's definition fails to account for the "maritime nature of the [Longshore Act]," which IMTT claims "imparts a meaning . . . that goes beyond . . . ordinary language." OB 22. But the OSHA definition of "*marine* terminal," does just that, requiring the facility to be used for the "primary movement of cargo or materials from vessel to shore or shore to vessel." 29 C.F.R. § 1917(2). Moreover, IMTT offers no working definition of "terminal" whatsoever. Its real complaint is not with the ALJ's definition, but how he applied it here. OB 22-23. We address that contention next.

Supra at 11-12. In addition, a Transportation Worker Identification Credential (TWIC) card – issued to longshoremen and other employees needing access to secure areas of maritime facilities, CX 1 at 7 – is required to access the entire terminal facility. CX 23 at 58-59; *see supra* at 10 (detailing purpose and use of TWIC card). Thus, the Gretna terminal is clearly a terminal under § 903(a). *See Sidwell*, 71 F.3d at 1139 (observing that "the very *raison d'etre*" of the structures and facilities enumerated in Section 903 is their connection with navigable waters).

IMTT nonetheless argues that its blending and sparging services comprise "manufacturing" that exempt the terminal from the OSHA definition, and place the terminal in the catch-all "other adjoining area" category, like the facility at issue in *BPU*. OB 21, 23-24. But neither the ALJ nor the Board found the blending and sparging activities amounted to "manufacturing." They simply assumed, for the sake of the IMTT's argument, that they did. ER Tab 3 at 52, 68-69; ER Tab 2 at 5-6. And as Mercier testified, blending and sparging do not take a raw material and create a new product. Rather, each merely lowers the viscosity of the oil product or improves the grade of the oil. *See supra* at 12. Moreover, blending comprised only a minor part of the work at the Gretna terminal. *See supra* at 12 (observing that the Gretna terminal stores 70-80% of product without

alteration); CX 1 at 1 (IMTT website touting its storage services; billing itself as a "Partner in Product Movement & Storage" to the "petroleum, chemical, consumer products, utilities, and commodity industries."); CX 22 at 16 (Babbs' testimony that IMTT's function is as a "storage facility" for customers).

Regardless, in *BPU*, longshore situs coverage was asserted over the alumina processing facility based on the catch-all "other adjoining area" prong, not as a terminal. 732 F.3d at 461. And for good reason. The primary purpose of the *BPU* plant – an "industrial production site[]" – was to turn raw bauxite into industrial alumina. 732 F.3d at 459. It consisted of discrete manufacturing areas, 732 F.3d at 462, and the manufacturing process itself required numerous steps and alterations to the bauxite to create the finished product (unlike simple blending).[9] *Id*. at 459. Thus, manufacturing

[9] The Court gave a fuller explanation of the process:

> Sherwin's operation begins when raw bauxite is unloaded from vessels at docks in Sherwin's deep water port using an "overhead conveyor system." The overhead conveyor system carries the bauxite over a street and fence separating the dock area from the alumina processing facility. There the conveyor deposits the bauxite into one of several dozen "bins" located in a large covered storage area. The bauxite remains in the storage area until it is needed; this varies from a few weeks to a period of years. Once a particular grade of bauxite is selected for alumina extraction, a small gate located in the floor beneath the appropriate bin or pile is opened to drain the bauxite into a large,

constituted its primary operations while the loading and unloading of vessels played a minor part. For the Gretna terminal, just the opposite is true.

IMTT's argument that its Gretna terminal is a manufacturing facility exempt under the OSHA definition is nothing but a tail (manufacturing)-wagging-the-dog (loading/unloading) contention. The Court should reject it.

B. The ALJ's alternative conclusion – that the Gretna terminal is an "other adjoining area" under the Act – is also supported by substantial evidence.

This Court has held that, for a facility to be covered as an "other adjoining area" under Section 903(a), it must have both a geographical and functional nexus with the water. To have a geographical nexus, the area must physically touch navigable waters. *Zepeda*, 718 F.3d at 393-94. To have a

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> underground "reclaim system." There the bauxite is mechanically sifted through a "screw feeder," which breaks down the bauxite into smaller pieces and deposits it on the "reclaim conveyor belt." From there, the reclaim conveyor belt transports and drops the bauxite onto the "cross-tunnel conveyor." In turn, the cross-tunnel conveyor transports the selected bauxite to the "rod mill," where it is further pulverized as part of the manufacturing process.

Id. at 459-60. The claimant in *BPU* was injured while shoveling bauxite in the cross-tunnel.

Although not germane to the *BPU* decision, the operations at the facility were probably more extensive than depicted and better characterized as mineral milling, rather than manufacturing. *See In Re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586 (5th Cir. 2000).

functional nexus, it must be used customarily, though not exclusively, for loading or unloading vessels. *BPU*, 732 F.3d at 461; *Hudson*, 555 F.3d at 432.

i. IMTT's Gretna terminal meets the geographic nexus requirement because it physically "adjoins" navigable waters.

As the record shows, the Gretna terminal adjoins the Mississippi River. ER Tab 11 at 1; CX 1 at 3-5. The terminal's property line extends to the river, with no intervening property between the terminal and the river, and it has a dock that extends from the property line into the river. *Supra* at 11. Because the facility physically touches navigable waters, the terminal satisfies the geographical nexus. *Zepeda*, 718 F.3d at 393-94 ("'[A]djoining' navigable water [means to] 'border on' or 'be contiguous with' navigable waters.").

IMTT argues that it is not the facility as a whole that must border the river, but rather, the specific site of injury, and here Victorian's injury occurred in front of Tank 107, away from the river with numerous "obstacles" in between. OB 26-27.[10] *Zepeda*, however, clearly rejected a "site of injury" standard. In adopting the Fourth Circuit's approach, which "adheres more faithfully to the plain language of statute," 718 F.3d at 391, this Court stated:

[10] Although IMTT's attorney suggested to Victorian that the distance between the levee and Tank 107 was 700 yards, Victorian could not confirm that distance, Tr. 119; ER Tab 3 at 9, and IMTT's own witness testified that the distance was only 700 *feet*. CX 23 at 32-33.

> The [Fourth Circuit in *Sidwell*, 71 F.3d at 1140 n.11] also indicated that it is *the parcel of land underlying the employer's facility* that must adjoin navigable waters, *not the particular part of that parcel upon which a claimant is injured*. The court quoted our language in *Alabama Dry Dock & Shipbuilding Co. v. Kininess* to demonstrate this point:
>
> > [The back lot upon which a crane was located by which claimant was injured was somewhere] from 150 to 2,000 feet from the water's edge. In any event, the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding.
>
> [*Sidwell*, 71 F.3d] at 1140 n. 11 (alteration in original) (quoting *Ala. Dry Dock*, 554 F.2d 176, 178 (5th Cir. 1977)).

Zepeda, 718 F.3d at 392 (emphasis added). Thus, the parcel of land that is relevant here is the entire Gretna terminal, not the specific spot within the terminal where Victorian was injured.[11]

As noted above, the Gretna terminal does physically touch water – bordering directly on the Mississippi River – and is not separated from it by any other intervening properties or facilities. *See* ER Tab 11 at 1. It thus

[11] In *Zepeda*, the Court found the facility not covered because no part of it physically touched water; the parcel itself was 300 yards away from the Intercoastal Canal at its closest point, and a bottling plant sat between it and the Canal. *Id.* at 386-87; *see also Sidwell*, 71 F.3d at 1139 ("If 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.").

meets this Court's geographic nexus. *See BPU*, 732 F.3d at 461 (finding entire facility including location of injury adjoined navigable waters).[12]

ii. The Gretna terminal meets the functional requirement for coverage because it is customarily used to load and unload vessels.

The Gretna terminal is comprised of a dock, pipelines, and storage tanks that are customarily used for loading and unloading liquid products on and off vessels. *See supra* at 9-12. While the facility also handles customer orders for blending and sparging, maritime loading and unloading constitutes a significant portion, indeed the primary part, of the terminal's work, with barges loading or unloading daily, and tankers 10-12 times per year. *Supra* at 10. It therefore meets the functional requirement of an "other adjoining area" under this Court's precedent. *Hudson*, 555 F.3d at 432.

IMTT's arguments to the contrary are, once again, misguided. It focuses on the fact that Victorian's injury occurred during a tank-to-tank transfer. OB 31. But his activity at the moment of injury, while potentially relevant to his maritime status, *see supra* at 7, does not address the nature of the work that *customarily* occurred at the terminal. *Hudson*, 555 F.3d at 432

[12] The site of the claimant's injury in *BPU* occurred in an underground tunnel in the alumina processing area of the facility, which was separated from the dock by a street and fence. *BPU*, 732 F.3d at 459.

("The situs need not be used exclusively or even primarily for maritime purposes, as long as it is customarily used for significant maritime activity."); *see Global Management Enterprise, LLC v. Commerce and Industry Ins. Co*., 574 Fed. Appx. 333, 336 (5th Cir. 2014) (unpub.) (citing *Kininess*, 554 F.2d at 178) ("a longshoreman is not exempt from coverage just because he sustains injury in a shipyard's back lot instead of in the area used exclusively for shipbuilding or loading."). And as discussed above, the terminal is customarily used to load and unload vessels.

Moreover, IMTT's attempt to cabin-off the specific site of Victorian's injury as a purely "manufacturing" area is unpersuasive.[13] With regard to Tank 107 – where Victorian was injured – the ALJ stated:

> Tank 107, the situs of Claimant's June 25, 2014 injury, was customarily used in the loading and unloading of ships and barges. For example, CX 29 reveals that from July 1, 2013 through July 4, 2014, bunker fuel was pumped from Tank 107 to a barge or ship moored at Employer's dock on 80 occasions. Additionally, on ten occasions, from September 13, 2013 through March 14, 2014, petroleum products were unloaded from barges or ships moored at Employer's dock into Tank 107. (CX 29, pp. 8-19).

ER Tab 3 at 67-68. The ALJ thus concluded that, although the precise site of Victorian's injury "may not be *exclusively* used for loading and unloading

[13] IMTT's assertion that blending and sparging constitute manufacturing is dubious, at best. *Supra* at 12, 30.

vessels, it is clear from the record evidence and testimony that it is *customarily used to [] load or unload ships and barges*." *Id.* at 68 (emphasis in original). He contrasted this with the cross-tunnel in BPU, which "was always beyond the point of surrender [of the cargo] and long removed from any vessel-unloading process.[14] *Id*. at 69.

In short, because the entire Gretna terminal – including the area where Victorian was injured – was customarily used for loading and loading, the site of the injury is covered. *Kininess*, 554 F.2d 178 (site of injury is covered if within a contiguous shipbuilding or longshoring area that adjoins the water); *Hudson*, 555 F.3d at 435 (reasoning that not "every square inch of an area

[14] Undeterred by the ALJ's findings, IMTT tries to constrict the situs inquiry even further by asserting that "the southern portion of the 124 line [a particular pipeline]. . . could not be used to transfer product to a vessel." OB at 31. But this Court "look[s] to the general purpose of the area rather than requiring every square inch of an area to be used for maritime activity." *BPU*, 732 F.3d at 461 (internal quotations omitted). Moreover, IMTT's claim is likely factually incorrect. While it may be true that product located on the southern end of the 124 line could not flow directly to or from the dock via *only* the 124 line (since the northern portion of the line is blocked off as a dedicated line), there is nothing to suggest that a manifold (such as the one located at the site of Victorian's injury between Tank 106 and 107) could not be used to divert the flow of liquid from the southern portion of the 124 line to a *different* line that goes directly to the dock. *See* CX 23 at 42 (Mercier explaining that there are at least 20 manifolds used to direct liquid product throughout the facility). Regardless, IMTT's narrow focus on the 124 line ignores the fact that tank-to-tank transfers involved not just the 124 line, but also the tanks on either end, from which product was loaded or unloaded directly to or from vessels.

'generally' used for loading must be so used. If it did, we would have a game of hopscotch.")

For these same reasons, IMTT's reliance on *BPU* (OB 29-31) is unavailing, as the ALJ found. ER Tab 3 at 68-69. In *BPU*, the claimant was injured in tunnels located beneath surface storage buildings. *BPU* explained that "the fact that the surface-level storage buildings are connected to the unloading process does not automatically render everything above and below the buildings a part of the unloading process." 732 F.3d at 462. To do so, the court cautioned, would ignore "operational realities" and "arbitrarily attribute[] to one distinct area the functions of another." *BPU*, 732 F.3d at 462. It then detailed the activities at the site and determined that the movement of the bauxite on conveyor belts through the tunnels occurred after the unloading process had ended, and was instead part of the alumina manufacturing process. *BPU*, 732 F.3d at 464 ("Ore at this stage is clearly no longer being 'unloaded' from a vessel in any sense of the word."). The court therefore held that the tunnels were an area separate and distinct from the storage buildings and not customarily used for loading and unloading. It thus ruled that the tunnels were not a covered situs.

The absence of a separate manufacturing area in the Gretna terminal stands in stark contrast to the *BPU* facility, and more closely resembles the

unified situs in *Hudson*, which this Court found covered. *Hudson* involved a fixed oil platform that was permanently attached to a sunken barge by pipes and a walkway. 555 F.3d at 434. The platform collected oil via pipeline from surrounding satellite wells, processed the oil, and stored it in a tank. From the tank, it was transferred through pipes into a sunken barge. And from the sunken barge, it was loaded onto ships. *Id*. at 428, 429, 434. The Court found that the sunken barge "clearly qualifie[d] as a covered situs" because that is where the loading of vessels took place. *Id*. at 437. But it also found the platform – where Hudson was injured – covered, because if "no oil flows from the platform's storage tanks into the [sunken barge], no oil is available for a vessel to load." 555 F.3d at 433 n.23. And the *Hudson* court viewed the platform and barge as a single facility, and thus a unified area for purposes of the situs analysis. 555 F.3d at 429, 439.

If *Hudson's* different parts constitute a single covered facility, so must the Gretna terminal's. It not only lacks a distinct manufacturing area, but also, the entirety of the Gretna terminal is used for loading and unloading, as demonstrated by the comprehensive and integrated system of pipelines running throughout it that moves product between vessels and storage tanks. The ALJ's finding that Victorian was injured on a covered "other adjoining area" is both legally correct and supported by substantial evidence.

II. Victorian satisfies the status requirement for coverage under Section 902(3) of the Longshore Act because he regularly played an integral role in loading and unloading vessels.

The Longshore Act extends coverage to workers engaged in maritime employment. 33 U.S.C. § 902(3); *see supra* at 18-19 (explaining in detail status requirement). Any employee "essential or integral" to the loading process is covered, *Schwalb*, 493 U.S. at 46, and "may qualify for maritime status based on either (1) the nature of the activity in which he is engaged at the time of the injury or (2) the nature of his employment as a whole." *Hudson*, 555 F.3d at 439.

The ALJ's determination that Victorian's job duties satisfied the status requirement is supported by substantial evidence. As assistant shift foreman for the bulk department, Victorian regularly assisted in the loading and unloading of vessels in various capacities. He performed the duties of a gauger or a pumper by checking the lineup of the pipelines throughout the tank yard and monitoring the flow rate of liquid product. *See supra* at 13-14 (detailing Victorians'duties). He also occasionally acted as a dockman, and went to the dock on a daily basis to supervise the dockmen and ensure they correctly performed their duties. *Id*. And he occasionally had to board a vessel. *Id*. Even when he was not at the docks, he bore overall responsibility for the loading and unloading process. *Id*. Victorian was required to

coordinate and communicate with the entire crew from the dock to the tank yard, as well as the vessels and IMTT's traffic department as necessary, to ensure that the loading and unloading process ran smoothly. *Id*.; Tr. at 76-79, 132. And no unloading could occur until all of the workers involved in the process – including Victorian – were ready. CX 22 at 45-46. In short, nothing moved within the terminal, or on or off the terminal via the dock, without Victorian performing his duties as assistant shift foreman. *Id*.

Thus, Victorian's regular role in the loading and unloading process (while performing other duties like tank-to-tank transfers) clearly satisfies the status requirement. *See Zepeda*, 718 F.3d at 395 (Clement, J., concurring) (quoting *Herb's Welding,* 470 U.S. at 424); *see also Schwalb*, 493 U.S. at 46 (coverage inures to all those "involved in the essential or integral elements of the loading or unloading process," including those who merely repair the loading equipment or clean up to prevent it from clogging.).

By way of comparison, this Court in *Hudson* held that the transfer of oil from storage tanks on a platform – the production part of the facility – to a sunken barge (where the oil was subsequently loaded onto vessels) was part of the loading process. 555 F.3d at 440. Victorian's duties – transferring oil *directly* from storage tanks to ships, and vice versa – are obviously more closely connected to loading and unloading.

IMTT's arguments that Victorian lacked maritime status are meritless. IMTT leans heavily on Judge Clement's concurrence regarding status in *Zepeda*, 718 F.3d at 396 (Clement, J., concurring).[15] But the concurrence is inapposite. It distinguished between workers whose repair work would stop the loading or unloading process if they were not available – they were essential to the process and hence covered – and non-covered workers, like Zepeda, whose repairs did not "assist a longshoreman or harborworker execute his task" of loading or unloading a vessel. 718 F.3d at 397.

Victorian, by contrast, did not engage in repair work at all – a separate maintenance department took care of repairs, CX 23 at 73-74 – and, as noted above, the loading and unloading of vessels would have stopped without him performing his job. Thus, the conclusion of the *Zepeda* concurrence – that work repairing empty shipping containers did not satisfy the status requirement – is irrelevant to Victorian.

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[15] IMTT contends that the status finding in Judge Clement's concurrence "is an alternative holding and not dictum." OB 35 n.155. But the concurrence failed to command a majority of the en banc court: seven of the fifteen judges joined in the Judge Clement's status analysis, with the remaining eight either expressly disagreeing with it in a dissenting opinion, 718 F.3d at 403 (Stewart, J., dissenting); or finding status unnecessary to decide the case, 718 F.3d at 394 n.21 (majority opinion), 718 F.3d at 398 (Higginson, J., concurring in the judgment.

IMTT also takes issue with two decisions that the ALJ relied on, *Allen v. Agrifos LP*, No. 2004-LHC-1475, 2005 WL 7867177 (ALJ, Nov. 25, 2005), and *Romeo v. GATX Terminals Corp.*, 26 BRBS 536 (ALJ 1992). IMTT argues that Allen "dealt with handling acid product directly from a vessel into a storage container," while Victorian "was involved in tank-to-tank transfers and transferring and mixing product that had already previously been placed in containers." OB 37. Again, IMTT ignores the fact that Victorian was also directly involved in the loading and unloading of vessels. CX 22 at 45-46. And as *Allen* explained, "[t]he Supreme Court has found that a claimant meets the status requirement of coverage if he spends 'at least some of his time engaged in indisputably covered activities.'" 2005 WL 7867177 at *9 (quoting *Caputo*, 432 U.S. at 249). Thus, the ALJ here correctly found *Allen* analogous.

IMTT's criticism of *Romeo* is likewise unfounded. It claims *Romeo* is superseded by Judge Clement's concurrence in *Zepeda* regarding status. OB 37. Specifically, it argues that *Romeo*'s holding – that "'blending and moving product for eventual shipment' is integral to the loading process" – reaches too far in finding status and "is a tantamount example to [sic] the overbroad definition Judge Clement sought to avoid in [*Zepeda*]." *Id.* Even if true, *Romeo's* status finding was also independently based on the ALJ's finding

that, as a pumphouse operator, the claimant was integral to the terminal's loading and unloading process because "nothing moves on that terminal without the pumphouse and nothing comes off the ship without the pumphouse." *Romeo*, 26 BRBS at 547.

Finally, IMTT errs by focusing only on the specific activity that Victorian was performing at the moment of his injury, namely, a tank-to-tank transfer. OB 37-38. Maritime status may also be based on the worker's employment as a whole. *Hudson*, 555 F.3d at 439 (citing *Universal Fabricators, Inc. v. Smith,* 878 F.2d 843, 845 (5th Cir.1989) (in turn citing *Hullinghorst Indus., Inc. v. Carroll,* 650 F.2d 750, 754 (5th Cir. Unit A 1981)); *see also Caputo*, 432 U.S. at 273 (employee has status if he could be assigned to loading and unloading; test is not whether employee was so engaged at time of injury). Thus, even if tank-to-tank transfers do not satisfy the status requirement, Victorian's job duties as a whole – including the essential work he regularly performed during the loading and unloading of vessels – clearly qualify him for coverage under the Act.

III. Substantial evidence supports the ALJ's finding of temporary total disability. Victorian had not yet reached maximum medical improvement, and was unsuccessful at obtaining suitable alternative employment despite exercising reasonable diligence.

The ALJ correctly determined that Victorian suffered from a temporary total disability. He found Victorian's disability temporary because, at the time

of the hearing, Victorian had not yet reached maximum medical improvement (MMI). ER Tab 3 at 92-93. The ALJ based this finding on the fact that Victorian had told two doctors that he wanted to improve his medical condition by undergoing recommended neck-fusion surgery, from which it would take a year to fully recover. CX 4 at 102, 120; ER Tab 3 at 23-24, 92. The ALJ further permissibly found that Victorian was totally disabled because he could not return to his regular work, ER Tab 3 at 93, and had been unable to secure alternative employment despite exercising diligence. ER Tab 3 at 100.

The ALJ's conclusion that Victorian had not reached MMI is consistent with the law of this Circuit. This Court has held that, where a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and MMI has not been reached. *Methe*, 396 F.3d at 605; *Abbott*, 40 F.3d at 126 ("If a physician determines that further treatment should be undertaken, then a possibility of success presumably exists. One cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed.").

Of course, Victorian cannot indefinitely postpone recommended surgery and remain in temporary status. After the "condition has continued for a lengthy period, and it appears to be of lasting duration," MMI has been

attained. *Watson*, 400 F.2d at 654. Here, Victorian began with conservative treatment following his June 2014 injury and continued with it until at least May 2016, just a few months before the October 2016 hearing. ER 3 at 90-91. Only when conservative treatment ultimately failed to control his pain did Victorian opt for surgery. ER 3 at 92-93. Given the seriousness of Victorian's injury and the proposed surgery (a one to two level cervical fusion), ER 3 at 91, it is hard to fault the ALJ for accepting this treatment plan, and finding MMI not yet reached. IMTT's argument (OB 41) that Victorian had reached MMI by the hearing date should be rejected.[16]

IMTT also argues that the ALJ erred in finding Victorian totally disabled. OB 43. While conceding that Victorian cannot return to his regular work, it nonetheless contends that Victorian did not put forth a reasonable effort in seeking suitable alternative employment, and the ALJ erred in ruling otherwise. But the ALJ found Victorian's testimony regarding his job-search efforts to be credible, and the ALJ's findings on credibility are entitled to deference. *Turner*, 661 F.2d at 1037, 1041. The ALJ additionally pointed to

[16] This is not to imply that the temporary disability finding is etched in stone. Two and one half years have passed since the hearing date, and if Victorian still has not undergone the recommended surgery, IMTT is free to pursue modification of that determination under 33 U.S.C. § 922 (modification of awards).

the "job application log" kept by Victorian, several e-mails showing that he applied for jobs online, and the testimony of his wife that she and his daughter had driven him to employers so he could apply for work in person. ER Tab 3 at 99-100. Thus, the Court should also uphold the ALJ's reasonable diligence determination in this case.[17]

[17] IMTT mistakenly relies on *Wilson v. Virginia International Terminals*, 40 BRBS 46 (Ben. Rev. Bd. 2006), 2006 WL 2604888, to claim Victorian was not diligent. While the ALJ in *Wilson* found many reasons to question the claimant's job search efforts – including that he routinely applied for jobs for which he was unqualified, refused to work weekends or mornings, and likely exaggerated his weaknesses while downplaying his strong points to prospective employers – the ALJ here identified no such deficiencies in Victorian's efforts.

CONCLUSION

The Court should affirm the award of Longshore Act benefits to Victorian.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 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
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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 10,919 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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