TOPIC 60 LONGSHORE ACT EXTENSIONS

[ED. NOTE: *By express provision of the Defense Base Act (DBA), 42 U.S.C. § 1651 et seq., the Outer Continental Shelf Lands Act (OCLSA), 43 U.S.C. § 1331 et seq., the Nonappropriated Fund Instrumentalities Act (NFIA/NAFI), 5 U.S.C. § 8171 et seq., 5 U.S.C § 2105, and the War Hazards Compensation Act (WHCA), 42 U.S.C. § 1701 et seq., (see also the District of Columbia Workers' Compensation Act), the individuals subject to said acts are covered for workers' compensation purposes by the LHWCA, as amended, 33 U.S.C. § 901 et seq.*

*Aspects of the reported cases common to LHWCA cases generally are discussed elsewhere in this text. Only aspects which are peculiar to the extension acts are digested in this section (with the exception of a few cases which are considered particularly noteworthy).**]***

60.1 DISTRICT OF COLUMBIA WORKERS' COMPENSATION ACT

60.1.1 Applicability of the D.C. Act v. the LHWCA

The District of Columbia Workmen's Compensation Act of 1928, 36 D.C. Code § 501 et seq. (1973) (the 1928 Act), extends the provisions of the LHWCA to injuries and deaths arising out of employment in the District of Columbia. In 1979, the District of Columbia government repealed the 1928 Act and enacted its own workers' compensation law, which became effective on July 26, 1982. The District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code § 301 et seq. (1981) (the 1982 Act).

The 1982 Act "narrowed the scope of coverage and lowered the level of benefits available to injured workers." Railco Multi-Constr. Co. v. Gardner, 564 A.2d 1167, 1171 (**D.C.** 1989). The 1982 Act is administered by the District of Columbia Department of Employment Services with judicial review of administrative decisions in the **D.C. Court of Appeals**. Id.

Injuries to employees in the District of Columbia occurring prior to July 26, 1982, the effective date of the 1982 Act, are covered by the LHWCA. Although an employee's death occurred after the effective date of the 1982 Act, there was liability for death benefits under the LHWCA since the employer first incurred liability for compensation in 1975, when the employee became permanently and totally disabled by his work-related condition (mental illness caused by employment stress). Lynch v. Washington Metro Area Transit Auth., 22 BRBS 351 (1989).

The Board has held that in an occupational disease claim, if the claimant meets the coverage requirements of Cardillo v. Liberty Mutual Insurance Co., 330 **U.S.** 469 (1947), during exposure to injurious stimuli prior to July 26, 1982, jurisdiction over the claim properly rests with the Department of Labor under the LHWCA as extended by the 1982 Act. Exposure after July 26, 1982, which is not covered under the 1982 Act, does not affect the employer's liability under the 1928 Act for injurious exposure which occurred prior to July 26, 1982. Gardner, 564 A.2d 1167; see also Pryor v. James McHugh Constr. Co., 18 BRBS 273 (1986); 20 C.F.R. § 701.101(b).

Where an employee was injured while the 1928 Act was in effect, but dies of causes unrelated to his employment injuries after the 1982 Act went into effect, the 1928 Act gives the U.S. Department of Labor jurisdiction to award death benefits to the widow of the employee. Shea v. Director, OWCP, 24 BRBS 170 (CRT) (**D.C. Cir.** 1991) (claim for death benefits, like a claim for disability benefits, is derivative of the employment injury).

The **District of Columbia Circuit** has held that, as the repeal of the 1928 Act had the effect of severing the application of the LHWCA to the District of Columbia, **the 1984 Amendments to the LHWCA have no effect on and are not to be applied to claims for injuries sustained prior to the effective date of repeal of the 1928 Act**. Pryor v. James McHugh Constr. Co., 27 BRBS 47 (1993). In Pryor, the claimant was exposed to injurious stimuli prior to July 26, 1982, the effective date of the 1982 Act. Thus, the claim was under the jurisdiction of the LHWCA as extended by the 1928 Act, to which the 1984 Amendments did not apply. In Pryor, the Board noted that the burden of establishing non-coverage of a claim under the 1928 Act falls on the employer.

Since it was the 1984 Amendments to the LHWCA which extended to two years the time allowed to file a claim, the claimant in Pryor could not avail himself of the new two-year filing period. Therefore, the Board held that claims under the 1928 Act are governed by the time limitations imposed by Sections 12 and 13 of the LHWCA as they existed prior to the 1984 Amendments. Since the claimant's date of awareness was September 1982 and the claim was not filed until more than one year after that date, the Board found that the claimant had failed to comply with the time limitations.

The provisions of the LHWCA, as they existed in 1982, are preserved for the benefit of employees whose claims are derived from injuries occurring prior to enactment of the 1982 Act. Keener v. Washington Metro. Area Transit Auth., 800 F.2d 1173 (**D.C. Cir.** 1986), cert. denied, 480 **U.S.** 918 (1987).

In **occupational disease** cases, "manifestation" (rather than "exposure") after the effective date of the 1982 Act triggers coverage of the 1982 Act. Railco Multi-Constr. Co. v. Gardner, 23 BRBS 69 (CRT) (**D.C. Cir.** 1990). Finding no controlling precedent, the **District of Columbia Circuit** certified the question to the **District of Columbia Court of Appeals**. In its response opinion, 564 A.2d 1167, that court held that manifestation after the effective date triggers coverage by the 1982 Act, but that any gap in coverage would be filled by continued application of the 1928 Act.

***[ED. NOTE:** The **District of Columbia Circuit** is compelled to defer to the holding of the **District of Columbia Court of Appeals** since a matter of local law is involved. Hall v. C & P Tel. Co., 19 BRBS 67 (CRT) (**D.C. Cir.** 1987).]*

60.1.2 Determining Coverage Under the D.C. Act: The Cardillo Test

Coverage under the Act applies to employees of employers carrying on any business in the District of Columbia, irrespective of where the injury occurs. The term **"employer"** means every person carrying on any employment in the District, and the term **"employee"** means every employee of any such person. 36 D.C. Code § 501. The Board has held that a general partner is not an "employee" within the meaning of the Act. Duncan v. D & K Foreign Auto Repair, 17 BRBS 40 (1985).

The burden of disproving jurisdiction falls upon the employer. Edgerton v. Washington Metro. Area Transit Auth., 24 BRBS 88 (CRT) (**D.C. Cir.** 1991). The Section 20(a) presumption of jurisdiction "applies with equal force to proceedings under the District of Columbia Act." Cardillo, 330 **U.S.** at 474.

The courts have developed a **two-prong test** to determine whether the Act covers specific claimants. First, the fact-finder must **determine whether the employer carries on any employment in the District**. Cardillo, 330 **U.S.** 469. If the fact-finder determines that the employer carries on some employment in the District, he must then weigh the contacts between the employee, the employer, and the District and **determine whether the contacts are substantial enough to confer jurisdiction**. The Section 20(a) presumption applies to the issue of jurisdiction in cases arising under the Act. Cardillo, 330 **U.S.** 469; see Dorn v. Safeway Stores, Inc., 18 BRBS 178 (1986).

In order to be **carrying on employment in the District**, the employer must have some employment activities in the District. In Carraway v. LTD Contracting Co., 16 BRBS 210 (1984), the employer had completed its single project in the District more than one year prior to the date of injury and neither solicited nor accepted any other work in the District. The fact that the employer occasionally published employment opportunities in the Washington Post was insufficient alone to establish that employer carried on employment in the District. In Gatling v. Colonial Masonry, Inc., 11 BRBS 123 (1979), the Board held that the employer must be carrying on employment within the same time frame as the employment injury for jurisdiction to exist.

It should be noted that facts which may constitute contacts under the second part of the jurisdiction test, discussed below, do not necessarily indicate that the employer is carrying on employment. In Oliver v. Frank Brisco Co., 8 BRBS 684 (1978), the employer submitted bids on construction jobs located within the District; hired employees through unions located throughout the metropolitan Washington area, including the District; 40 percent of employer's employees were District residents; and the claimant was hired through a message sent to him at his brother's home in the District. The Board observed that "[a]lthough some of the factors constitute contacts with the District of Columbia, they do not constitute the carrying on of any employment in the District of Columbia." Id. at 686. See also Hill v. Allied Aviation Serv. Co., 8 BRBS 204 (1978).

The second prong of the two-part jurisdiction test requires **"substantial contacts"** between the employee, the employer, and the District. In Cardillo, 330 **U.S.** 469, the **Supreme Court** listed several factors which it considered relevant in determining whether substantial contacts exist to support jurisdiction under the Act. Those **factors** are: the employee's place of residence, the employer's place of business, the place of contract of hire, the employee's prior work in the District over a period of years, the place from which the employee received direction while working outside of the District, the place from which the employee was paid, and whether the employee was subject to transfer to the District.

Another important factor is whether the claimant recently performed services on behalf of the employer within the District. Pfister v. Director, OWCP, 675 F.2d 1314, 15 BRBS 139 (CRT) (**D.C. Cir.** 1982), aff'g Pfister v. Delta Airlines, Inc., 10 BRBS 677 (1979); Director, OWCP v. National Van Lines, Inc. (Riley), 613 F.2d 972, 11 BRBS 298 (**D.C. Cir.** 1979), cert. denied, 448 **U.S.** 907 (1980); Saunders v. Jumbo Food Stores, Inc., 16 BRBS 245 (1984).

Although these factors are all relevant, not all of them need be met for jurisdiction to be proper. Cardillo did not specify how many of the enumerated contacts were required to exist before contacts were "substantial."

Especially significant are those cases finding jurisdiction where the employee was not a resident of the District and the injury did not occur in the District. In National Van Lines, the claimant was a resident of Virginia who was injured in New York while delivering goods picked up in the District, Maryland, and Virginia. The court noted that the usual *indicia* of connection, such as the residence of the employee, headquarters of the employer, and place of entering the contract, were absent, but determined that the common *indicia* of connection were unimportant. The court found that the interstate nature of employer's business and employment-related activities in the Washington, D.C. **metropolitan area** were sufficient to establish jurisdiction.

In National Van Lines, the **District of Columbia Circuit** stated that the 1928 D.C. Act authorizes the "widest permissible extraterritorial application" of the LHWCA to employers which do business in the District. 613 F.2d at 979; Edgerton, 24 BRBS at 90 (CRT). But cf. Exhibit Aids, Inc. v. Kline, 20 BRBS 1 (CRT) (**4th Cir.** 1987) (where employer carried on 40 to 50 percent of its business in the District and claimant intermittently entered the District on this business, there was not a substantial connection between employee, employer, and the District sufficient to confer jurisdiction).

The **District of Columbia Circuit**, the primary venue for these cases, has generally held to the National Van Lines position. For example, where a foreign enterprise established a District facility to recruit metropolitan district area workers and continuously develop United States supply sources for projects abroad, it was held that there was no over extension of the DCW Act into domains exclusively reserved to other states or nations. Gustafson v. International Progress Enters., 20 BRBS 31 (CRT) (**D.C. Cir.** 1987).

In Gustafson, the decedent, who had lived in Arlington, Virginia, was hired by the employer's District facility and worked there prior to working for the employer in Saudi Arabia (where his death occurred). The court found that there were substantial contacts between the employer, the employee, and the District sufficient to establish jurisdiction under the LHWCA as extended by the DCW Act.

In Greenfield v. Volpe Construction Co., Inc., 849 F.2d 635, 21 BRBS 118 (CRT) (**D.C. Cir.** 1988), rev'g 20 BRBS 46 (1987), the **District of Columbia Circuit** expressed its intention to assume jurisdiction over any injuries giving rise to claims under the DCW Act, regardless of whether the injury giving rise to the claim actually occurred in the District.

National Van Lines notwithstanding, in Butts v. Fischbach & Moore and Comstock, 22 BRBS 424 (1989), the Board found there was a lack of evidence of substantial contacts where the claimant did not reside in the District, his job site was not in the District, he never traveled to the District in the course of his employment, and he was not hired in the District. See also Dupree v. Kiewit-Shea Construction Co., 21 BRBS 229 (1988), wherein the Board held that the District's interest in the subway construction project (which was outside the District) or the fact that the general contractor was the Washington Metropolitan Area Transit Authority, was not sufficient to confer jurisdiction under the DCW Act absent any other incidents of contact between the District, the claimant, and the employer.

In Dupree, the claimant's duties as an underground miner were confined exclusively to the Maryland jobsite, he worked for Nebraska corporations which maintained a Maryland office. The claimant had been sent in 1981 from the union hall in the District to the Maryland job site where he was hired by the District union steward. His Maryland job never required him to travel into the District.

For another case where the Board found the contacts to be insufficient, see Smith v. ITT Continental Baking Co., 20 BRBS 142 (1987).

The Board found MacRae v. MacMyer Investments, Ltd., 21 BRBS 332 (1988) to be distinguishable from National Van Lines. In MacRae, the claimant's employment relationship was established and the injury occurred in a Maryland town approximately 60 miles from the District (not in the District's metropolitan area). The Board held that although the claimant made several trips into the District during his employment, there were insufficient contacts to find jurisdiction.

This case, however, can be contrasted with Greenfield v. Volpe Construction Co., Inc., 21 BRBS 118 (CRT) (**D.C. Cir.** 1988). In Greenfield, the **District of Columbia Circuit** found a substantial connection existed where the claimant was injured while working on a job (the Metro subway system) which was "a matter of public concern to the District." The court also noted, however, that the claimant physically returned to the District on work-related tasks even after his transfer to Virginia. See Norfleet v. Holladay-Tyler Printing Corp., 20 BRBS 87 (1987) (making deliveries in the District is carrying on employment there).

The Board has disagreed strongly with the holding in National Van Lines but has followed the decision in factually-similar cases arising in the **District of Columbia Circuit**. See Horton v. A. B. Dick Co., 21 BRBS 101 (1988); Robidoux v. Xerox Corp., 18 BRBS 209 (1986); Walker v. Desks & Furnishings, 17 BRBS 239 (1985); Brocklehurst v. Giant Food, Inc., 16 BRBS 220 (1984).

In Phillips v. Craft Master Corp., 14 BRBS 330 (1981), the claimant was not a District resident at the time of his injury and was working exclusively outside of the District when the injury occurred. The Board held that substantial contacts existed to establish jurisdiction where the claimant had contracted for hire in the District, initially worked in the District, and was subject to transfer back to the District by the same employer. See also Shorb v. Peoples Life Ins. Co., 22 BRBS 67 (1989).

In Cunningham v. Washington Gas Light Co., 12 BRBS 177 (1980), the Board held that where the claimant had previously worked in the District and was transferred outside of the District, it was to be assumed, in the absence of specific evidence to the contrary, that he was subject to transfer back to the District.

For cases finding **no** substantial contacts, see Pfister, 675 F.2d 1314, 15 BRBS 139 (CRT); Butler v. Continental Western Lines, Division of Trailways, Inc., 668 F.2d 1374 (**D.C. Cir.** 1981), aff'g 13 BRBS 1 (1980); Dorn, 18 BRBS 178; Sanford v. Shenandoah's Pride Dairy, 16 BRBS 237 (1984).

In Pfister, neither a showing of one isolated contact by the employee with the District nor the employer's operation of ticket offices in the District were sufficient contacts where overwhelming evidence located the employment relationship in Virginia. In Butler, the employer's three subsidiaries operating in the District and the District residence of claimants (employee's children) were insufficient to confer jurisdiction where the employee's work for the employer had never brought him within 2000 miles of the District and the employee did not reside in the District.

In Dorn, 18 BRBS 178, the claimant, who was hired in the District, lived and worked in the District for nine years before requesting a transfer to Maryland, where she lived and worked for 13 years prior to filing a claim under the LHWCA. The Board held that claimant had severed her contacts with the District when she transferred to Maryland. The Board distinguished National Van Lines based on the specific location of the employment relationship.

In National Van Lines, the claimant regularly entered the District during the course of his employment. Unlike the situation in National Van Lines, once the claimant in Dorn transferred to Maryland she lived and worked exclusively in Maryland, thereby severing all employment ties with the District. Accord, Gustafson, 18 BRBS 191. See also Basinger v. Kaufmann Graphics, Inc., 19 BRBS 165 (1986) (where the only contact claimant had with the District consisted of phone calls to District suppliers, there were clearly no substantial contacts).

In Sanford, 16 BRBS 237, the Board held that **past** contact with the District, standing alone, did not support a finding of substantial contacts. The claimant's travel through the District did not constitute a contact because he did not perform any services there for the employer and was not required to travel through the District by the employer.

60.1.3 D.C. Act and determining Average Weekly Wage

In Kubin v. Pro-Football, Inc., 29 BRBS 117 (1995), the claimant was a former football player for the Washington Redskins who had suffered an injury while lifting weights. The issue was raised as to whether the claimant's average weekly wage should be based on his earning capacity at the time of the injury or at the point he realized the full extent of the disability. In 1981, when the injury occurred, his salary was significantly smaller than in 1985 when the latent injury fully manifested itself. The Board upheld the ALJ's use of the average weekly wage at the time the injury became manifest. Id. at 121. The Board, and the ALJ, were following the holding in Johnson v. Director, OWCP, 911 F.2d 247 (**9th Cir.** 1990), cert. denied, 499 **U.S.** 959 (1991), which treated latent injuries in the same manner as an occupational disease. In both cases the actual time of the injury does not coincide with the claimant's realization of the full extent of his disability.

60.1.4 D.C. Act and Medical Cost

The Claimant, a resident of Austin, Texas, sought medical treatment following his injury. The employer constructively refused treatment and the claimant sought treatment at the Boston Pain Center. Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996). Comparable, though less expensive, treatment was available to the claimant at the Baylor Medical Clinic in Houston, Texas; however, he decided to go to the Boston Clinic. The Board upheld the ALJ's limitation of the claimant's recovery to the amount that the claimant would have been able to recover had the treatment been done locally at the Baylor Medical Clinic.

60.1.5 D.C. Act and Section 14(f) Penalties

In Holliday v. Todd Shipyards Corp., 654 F.2d 415, 13 BRBS 741 (**5th Cir.** 1981), the **Fifth Circuit** had held that the rate paid for permanent total disability should include all intervening Section 10(f) adjustments occurring during periods of prior, temporary total disability should include all intervening Section 10(f) adjustments occurring during periods of prior, temporary total disability.

In Brandt v. Stidham Tire Co., 785 F.2d 329 (**D.C. Cir.** 1986), at 332, 18 BRBS 73(CRT), at 78, the District of Columbia Circuit stated, "In sum, we accept the Holliday ruling as the proper reading of the statue in this circuit at least until the precedent is overruled in the **Fifth Circuit**..." Holliday was overruled *en banc* by the **Fifth Circuit** in Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033, 23 BRBS 36 (CRT)(**5th Cir.** 1990). Thus, in Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (1998), the Board reasoned that Holliday no longer applied to cases under the District of Columbia Workers' Compensation Act and that the claimant was entitled to annual adjustments

pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled.

60.2 DEFENSE BASE ACT
42 U.S.C. § 1651 et seq.

60.2.1 Applicability of the LHWCA

By the terms of the Defense Base Act (DBA) the LHWCA applies "in respect to the injury or death of any employee engaged in any employment ... under a contract entered into with the United States or any executive department, independent establishment, or agency thereof ... where such contract is to be performed outside the continental United States ... for the purpose of engaging in public work." 42 U.S.C. § 1651. The **Second Circuit** has stated:

> The Act was originally intended to cover civilians employed at overseas military bases, was later extended to cover civilians working on overseas construction projects for the United States government or its allies, and was finally extended to protect employees fulfilling service contracts tied to such a construction project or to a national defense activity. The ***sine qua non*** of the Act's applicability has always been a military or a United States government construction connection.

University of Rochester v. Hartman, 618 F.2d 170 (**2d Cir**. 1980).

A claimant, under the DBA, must satisfy the same requirement as to proof of causation as any other claimant under the LHWCA. In Piceynski v. Dyncorp, 31 BRBS 559 (ALJ) (1997), the claimant was unable to carry his burden of proof that his medical complications were the result of **Gulf War Syndrome**. In Wendler v. American Red Cross, BRB 93-0423 (May 29, 1996) (unpublished), the claimant was unable to prove that she was exposed to **Agent Orange** during the period of time that she was stationed in Korea.

60.2.2 Claim Must Stem From a "Contract" For "Public Work" Overseas

In Hartman, the court held that a university professor who was killed while doing research in Antarctica under grants from NASA and the National Science Foundation was not covered under the DBA because he was not engaged in "public work" and his research grant did not constitute a "contract" within the meaning of the DBA. Specifically, the court held that:

> to be compensable under the DBA, a benefit claim must stem from a contract with the United States to perform public work overseas, public work constituting government-related construction projects, work connected with the national defense, or employment under a service contract supporting either activity.

618 F.2d at 176.

In Airey v. Birdair, Division of Bird & Sons, Inc., 12 BRBS 405 (1980), the Board affirmed a judge's denial of benefits where substantial evidence demonstrated that the claimant had not been performing services related to a service contract with the U.S. Government at the time of injury. The Board also found that the claimant had not established that any of his work for employer was related to a service contract with the government.

While working in Saudi Arabia as an administrative assistant for a corporation which had contracted to provide logistical support to the U.S. Army Corps of Engineers, which corps was involved in managing military construction for the Saudi government, claimant in Alan-Howard v. Todd Logistics, Inc., 21 BRBS 70 (1988), was injured. The Board held that the claim for the injury was cognizable under the DBA since the undertaking to aid in the construction of a military facility for Saudi, an **"ally"** of the United States, constituted a **"common defensive military alliance"** and therefore qualified as the "public work" required for coverage under § 1651(a)(4) of the DBA.

Furthermore, the DBA exclusion from coverage of "any employee of ... (a) contractor ... who is engaged exclusively in furnishing materials or supplies under his contract" was held not to apply since the claimant's work as a facilitator under his employer's contract to provide "logistics management and support services" constituted a "service." Specifically, the Board views the pertinent exclusionary language as excluding manufacturers of goods used overseas, rather than individuals who work on-site to facilitate the utilization of such goods, from DBA coverage.

In Rosenthal v. Statistica, 31 BRBS 215 (1998), the Board held that a program manager injured while returning to the United States was not covered by the DBA. The Board based its determination on: 1) the employee was not performing activities related to Statistica'a contract with the State Department at the time of the injury; 2) the employee's travel from Brussels to the United States would have been covered, but the travel in Spain was not government work so the State Department would not be paying for it. This means that just because the employee was in "transportation" is not disposative. Rather, it is the reason for the trip that is important. Had the employee been injured while driving to the Brussels airport to return to the United States, even following a short vacation, he would have been covered by the DBA as being in transportation.

In Casey v. Chapman College, PACE Program, 23 BRBS 7 (1989), the Board held that a professor of Asian Studies who was injured on a U.S. Naval Base in Japan was covered under the DBA, on a finding that his employment teaching Asian Studies in the Pacific to Navy personnel was related to national defense and therefore constituted the **"public work"** required for coverage.

60.2.3 Inapplicability to "Master or Member of a Crew of Any Vessel"

The DBA does not apply to a "master or member of a crew of any vessel." 42 U.S.C. § 1654(3); Sosenik v. Lockheed California Co., 14 BRBS 191 (1981) (claimant, employer's field service representative aboard a U.S. Navy ship, was a crew member and was not entitled to benefits under the DBA).

60.2.4 Substantive Rights Determined Under Provisions of LHWCA as Incorporated into the DBA

In Smith v. Director, OWCP, 17 BRBS 89 (1985), the claimant was awarded benefits under the DBA. The employer was reimbursed for these benefits, however, from the Federal Employees' Compensation Act (FECA) Fund pursuant to the War Hazards Compensation Act (WHCA) because the injury resulted from a war risk hazard. The claimant later filed a claim for a lump sum payment of his future benefits. The judge awarded a lump sum commutation of the benefits under the WHCA and FECA. The Board determined that the substantive provisions of the LHWCA, not FECA, were controlling and that entitlement to commutation should have been considered under Section 14(j) of the LHWCA.

The WHCA provided only the source of benefits. The DBA was determinative of the claimant's rights because he was covered under the DBA, and Section 101(a)(1) of the WHCA excludes employees covered under the DBA.

In Lee v. The Boeing Co., Inc., 123 F.3d 801 (**4th Cir.** 1997), the issue arose as to whether the DBA incorporated Section 3(e) of the LHWCA. The claimant had suffered major injuries in a car crash while working for Boeing in Saudi Arabia. Boeing wanted a credit for payments that the claimant was receiving from the Occupational Hazards Branch of the Social Insurance Laws of Saudi Arabia. The ALJ, and the Board, both found that such **a credit was appropriate**. Lee v. The Boeing Co., 27 BRBS 597 (ALJ) (1994). The claimant then appealed the holding to the **Fourth Circuit** which found that it **did not** have jurisdiction to hear the case and transferred it to the **District Court** for the **District of Maryland**.

In Guthrie v. Holmes & Narver, 30 BRBS 48, 50 (1996), the Board found that housing and food will be considered to be part of the claimant's wages if they are deemed to be given in part, or in place, of wages. See also Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998); Topic 2.13, supra.

60.2.5 Waiver of Applicability by Secretary of Labor

42 U.S.C. § 1651(e) provides that, upon the recommendation of the head of any department or other agency of the United States, the Secretary of Labor may waive the application of the DBA with respect to any contract or classification of employees. In Ann v. Eastern Construction Co., 17 BRBS 163 (1985), the Board affirmed the judge's finding that the document waiving DBA coverage limited the claimant's recovery to the workers' compensation provided by the law of her own country, rather than affording the claimant the option of electing the more favorable benefits of the place of injury.

60.2.6 Appeals of Cases Determined Under DBA

A split has arisen among the United States courts of appeals concerning the proper route of appeal of a DBA case.

The **Sixth Circuit** and the **Fourth Circuit** have concluded that Section 21(b)(3) of the LHWCA as amended in 1972, which provides for direct review of the Board's decision by the U.S. court of appeals for the circuit in which the injury occurred, was not incorporated into the DBA under 41 U.S.C. § 1653(b). Review would therefore remain in the appropriate District Court as it did prior to the Amendments (and thence to the court of appeals). Home Indem. Co. v. Stillwell, 597 F.2d 87 (**6th Cir**. 1979), cert. denied, 444 **U.S.** 869 (1979); Lee v. The Boeing Co., 123 F.3d 801, 805 (**4th Cir.** 1997) (Congress specifically amended the provisions of the LHWCA without changing Section 3(b) of the DBA).

The **Seventh** and **Ninth Circuits**, however, have concluded that Congress meant to incorporate the LHWCA, as amended in 1972, into the DBA. Accordingly, direct appellate review of Board decisions in these circuits lies with the Board and then the United States court of appeals for the circuit where the office of the district director or judge whose compensation order is involved is located. Pearce v. Director, OWCP, 603 F.2d 763, 10 BRBS 867 (**9th Cir**. 1979), transferred, 647 F.2d 716, 13 BRBS 241 (**7th Cir**. 1981), discussing Pearce v. McDonnell Douglas Corp., 5 BRBS 573 (1977); see also Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (**9th Cir**. 1980).

In the **Fifth Circuit**, as in the **Sixth**, appeal of the Board's order on a DBA claim is to the district court, from whose order appeal may then be taken to the court of appeals. AFIA/CIGNA Worldwide v. Felkner, 930 F.2d 1111, 24 BRBS 154 (CRT) (**5th Cir.**), cert. denied, 502 **U.S.** 906 (1991).

60.2.7 Course and Scope of Employment, "Zone of Special Danger"

Under the DBA, the **Supreme Court** has allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In O'Leary v. Brown-Pacific-Maxon, 340 **U.S.** 504 (1951), the employee, while spending the afternoon in employer's recreational facility near the shoreline in Guam, drowned while attempting to rescue two men in a dangerous channel. The **Court** in finding coverage held that "(a)ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." 340 **U.S.** at 507.

In O'Keeffe v. Smith, Hinchman & Grylls Associates, 380 **U.S.** 359 (1965), the employee drowned in a lake in South Korea during a weekend outing away from the job; the **Court** in finding coverage noted that the employee had to work "under the exacting and dangerous conditions of Korea." 380 **U.S.** at 364.

In Ford Aerospace & Communications Corp. v. Boling, 684 F.2d 640 (**9th Cir**. 1982) a heart attack suffered by the claimant while off duty in a barracks provided by his employer in Thule, Greenland, was covered under the zone of special danger test.

In Gillespie v. General Electric Co., 21 BRBS 56 (1988), the Board denied benefits under the DBA to the widow of an individual who died accidently while attempting to temporarily

asphyxiate himself as part of an autoerotic activity (euphemistically referred to as a "recreational activity") on an Air Force Base in West Germany on which he was employed as a civilian radar-equipment installer. In so doing, the Board found no evidence to support the proposition that "a relationship existed between the conditions created by decedent's job and the activity which occasioned his death."

Citing O'Leary, the **Court** held that decedent had gone so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that his death arose out of and in the course of his employment.

A widow claimant was denied death benefits under the DBA on the ground that her complicity in the murder of her husband "effectively severed any causal relationship which may have existed between the conditions created by his job and his death," as well as on the policy ground that she not be allowed to benefit from her own wrongdoing. Kirkland v. Air America, Inc., 23 BRBS 348 (1990).

[ED. NOTE:** The "zone of special danger" **does not** apply to claims brought under the Non-appropriated Fund Instrumentalities Act. McDuffie v. Army & Air Force Exchange Service, BRB No. 96-0825 (Jan 27, 1997) (unpublished).**]

60.2.8 Nationalization of Job Not Compensable

There is no compensable injury that covers American civilians being laid off in foreign countries due to nationalization of jobs. The claimants are still able to preform their jobs just not in that local. Najjar v. Vinnell Corp., BRB No. 96-0906 (Apr. 15, 1997) (unpublished) (Defense Base case - civilian working as a personal specialist was release due to a program of Saudization)

60.2.9 "Wages" Includes Overseas Allowances and Wage Additives

The Board has held, in a claim under the LHWCA as extended by the Defense Base Act, that **overseas allowances and wage additives** were properly included in the determination of the employee's wages because these amounts were (1) easily ascertainable, similar to board, rent or lodging, and (2) were included for purposes of tax withholding and could not be considered fringe benefits. Denton v. Northrop Corp., 21 BRBS 37, 46-47 (1988). See generally Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 43-44 (1990); Lopez v. Southern Stevedores, 23 BRBS 295, 301 (1990); Thompson v. McDonnell Douglas Corp, 17 BRBS 6, 8 (1985).

60.3 OUTER CONTINENTAL SHELF LANDS ACT 43 U.S.C. §1331 et seq.

60.3.1 Applicability of the LHWCA

With respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the LHWCA, 33 U.S.C.A. § 901 et seq. For the purposes of extension of provisions of the LHWCA under this section:

(1) the term **"employee"** does not include a master or member of a crew of any vessel, or any officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term **"employer"** means an employer any of whose employees are employed in such operations; and

(3) the term **"United States"** when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

43 U.S.C. § 1333(b).

The term **"Outer Continental Shelf"** means "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a).

The term **"lands beneath navigable waters"** means:

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal water up to but not above the line of mean high tide and seaward to

> a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles; and
>
> (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as herein above defined.

43 U.S.C. § 1301(a).

The term **"boundaries"** is defined at length at 43 U.S.C. § 1301(b).

The term **"lands beneath navigable waters"** is subject to the limitations set forth in 43 U.S.C. § 1301(f).

[ED. NOTE**: The oil exploration indemnity case of Demette v. Falcon Drilling Co., 253 F.3d 840 (**5th Cir.** 2001), is principally concerned with defining the phrase "by virtue of," which appears at Section 1333(b) of the OCSLA. However, it does provide a good general discussion of OCSLA coverage as well as a reference point for LHWCA Sections 905(b) (bars employers from indemnifying the vessel from LHWCA liability) and 905(c) (OCS exemption to LHWCA's current proscription of indemnity agreements under § 905(b)). Here the worker was injured on a jack-up rig while doing casing work. The **Fifth Circuit** noted that, "[c]asing work is the model case of injuries 'occurring as a result of operations conducted on the [OCS] for the purpose of exploring for, developing, removing, or transporting by pipeline the material resources...of the [OCS].'" The **Fifth Circuit** noted, "If the injured employee is entitled to the benefits of the LHWCA 'by virtue of' section 1333(b) of the OCSLA, then section 905(c) of the LHWCA states that "any reciprocal indemnity provision between the vessel and the employer is enforceable."**]

60.3.2 Coverage - (Situs, Status, "But for" Test)

U. S. Supreme Court

In Offshore Logistics, Inc. v. Tallentire, 477 **U.S.** 207, 219 (1986), the **United States Supreme Court** concluded that: "Congress determined that the general scope of OCSLA's coverage ... would be determined **principally by locale**, not by the status of the individual injured ..." (emphasis added). Nevertheless, although noting that § 1333(b), which makes the LHWCA applicable to injury resulting from certain operations "on the Outer Continental Shelf," was not relevant since the case before the **Court** did not involve a suit of an injured employee against his employer under that section, the **Court** acknowledged that the otherwise "determinative" situs requirement has superimposed on it a status requirement by virtue of that section. Id. at 221, n.2.

Circuit Courts

The **Third Circuit**, in Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805, 21 BRBS 61 (CRT) (**3d Cir.** 1988), held (in remanding the case to the BRB) that claimant, who was injured in an automobile accident on the New Jersey Garden State Parkway in the course of returning to his work aboard a semi-submersible drill rig engaged in drilling operations above the outer continental shelf, was within the coverage of the OCSLA since "but for" his employment in outer continental shelf operations claimant would not have been injured in the automobile accident on the New Jersey highway, and that the injury therefore occurred as a result of such operations and thus was not outside the scope of the OCSLA.

It is noted that the case was decided under the 1958 version of the OCSLA, § 1333(c) of which provided, in pertinent part, that the LHWCA was to apply to "any injury occurring as the result of operations described in subsection (b) ..." Such "operations" under § 1333(b) are those "in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing (etc.) ... the natural resources, or involving rights to the natural resources of the ... outer Continental Shelf." The court viewed the 1978 amendments of § 1333(b), (c) as being "largely technical" and "not meant to change the meaning of the law ..."

Curtis appears to be most intent on reaching a result which satisfies "the administrative, legislative and judicial policy of resolving doubtful LHWCA coverage questions in favor of coverage." Curtis, 849 F.2d at 811. And, its discussions and interpretations of legislative history and decisions of other courts is best read carefully in that light.

The **Supreme Court**, in Herb's Welding v. Gray, 470 **U.S.** 414 (1985), reversed the **Fifth Circuit's** decision, see 703 F.2d 176, 15 BRBS 126 (CRT) (**5th Cir.** 1983), that the claimant's employment was maritime in nature and therefore fell within the direct coverage of the LHWCA, and remanded for consideration of his eligibility for LHWCA benefits under the OCSLA extension provision.

The claimant, who worked as a welder on fixed platforms in an oil and gas field located off the Louisiana coast partly in state waters and partly on the outer continental shelf, spent roughly three quarters of his time working on platforms in state waters and one quarter on platforms on the shelf; **he was injured on a fixed platform in state waters while welding** a gas flow line.

In its decision, the Board had held that since the claimant spent 25 percent of his time working on oil rigs on the Shelf and was injured on a platform that was connected by a gas flow pipeline to another platform located on the Shelf, he was covered under the OCSLA, because his work was an integral part of operations on the Shelf and his injury occurred as the result of such operations. 12 BRBS 752 (1980).

The **Fifth Circuit** having pretermitted the OCSLA question in its original decision now reversed the Board. 766 F.2d 898, 17 BRBS 127 (CRT) (**5th Cir.** 1985). Applying a "but for" test

the court held that the claimant's injury would have occurred even if no part of the overall operation had involved work on the Shelf. The fact that a platform on the Shelf was indirectly connected to the platform on which claimant was injured was deemed unrelated to the accident's causation. Therefore, the injury was held not to have been the result of "operations on the shelf," and coverage was found lacking. In so finding, the court acknowledged that an employee's coverage would change depending on the rig to which he was assigned on a particular day, but concluded that this was dictated by the geographic limitations imposed by the OCSLA.

In a decision which delves at great length into legislative history, the **Fifth Circuit** in Mills v. Director, OWCP, 877 F.2d 356, 22 BRBS 97 (CRT) (**5th Cir**. 1989) denied OCSLA coverage to a welder who was injured on land during construction of an oil production platform destined for the Outer Continental Shelf. For historical perspective, see Mills v. McDermott, Inc., 17 BRBS 756 (ALJ) (1985), aff'd, 19 BRBS 258 (1987) and Mills v. Director, OWCP, 846 F.2d 1013, 21 BRBS 83 (CRT) (**5th Cir**. 1988), rev'd, on reh'g, en banc, 877 F.2d 356 (**5th Cir.** 1989).

In discussing the implications of Tallentire, 477 **U.S.** 207, the **Fifth Circuit** concluded that the **Supreme Court** "could not have made it clearer that a worker must demonstrate **status and situs** to recover LHWCA benefits under § 1333(b)." 22 BRBS at 101 (CRT) (emphasis added).

Also cited in support of its situs holding is the reference in Herb's Welding to "the explicit geographical limitation to the Lands Act's incorporation of the LHWCA ..." 470 **U.S.** at 427.

Having acknowledged the **Third Circuit's** contrary view in Curtis, 849 F.2d 805, the **Fifth Circuit** expressly held that LHWCA coverage, as extended under OCSLA § 1333(b), applies only to employees who satisfy the Herb's Welding "but for" status test, **and** are injured either on an OCS platform or the waters above the OCS, 766 F.2d 898, 900, i.e., that the injury would not have occurred "but for" the extractive operations on the shelf. Mills, 877 F.2d at 362, 22 BRBS at 102 (CRT).

Vis-a-vis the situs requirement for OCSLA coverage, the Mills court explained that its prior decisions in Barger and Stansbury, stood for the proposition "that § 1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas **above the OCS**." Mills, 877 F.2d at 361, 22 BRBS at 102 (CRT) (emphasis added). In Mills, the **Fifth Circuit** definitively held that the LHWCA does not extend to those oilfield workers injured on land or in state territorial waters. "As the legislative history makes plain, congress enacted OCSLA only as a vehicle to fill voids in the rules governing the federally managed territory of the OCS. No such void exists for disputes encompassing areas already governed by state law." Mills at 359. In Martin v. Pride Offshore, Inc., 34 BRBS 192)(2001) an ALJ originally held that a seven-day-on, seven-day-off worker driving home was covered because his injury was the result of fatigue suffered during his seven day work shift on the platform. The Board reversed, relying on Mills, holding that a car accident occurring on a Mississippi highway does not meet the OCSLA situs requirement. Accord, Pickett v. Petroleum

Helicopters, Inc., 266 F.3d 366 (**5th Cir.** 2001), 35 BRBS 101 (CRT) (2001); Sisson v. Davis & Sons, 131 F.3d 555 (**5th Cir.** 1998).,

In Robarge v. Kaiser Steel Corp., 17 BRBS 213 (1985), the Board held that a pipefitter/welder working on a fixed offshore oil platform under construction on the Shelf was an employee under the OCSLA because he was engaged in **"development"** of the natural resources of the Shelf even though the platform was not operational at the time of injury. The Board examined the legislative history and statutory provisions of the OCLSA and concluded that Congress did not intend to exclude workers engaged in pre-production, exploratory activities when return is uncertain.

In Kaiser Steel Corp. v. Director, OWCP, 812 F.2d 518 (**9th Cir**. 1987), the **Ninth Circuit** denied Kaiser's petition for review of the Board's order thereby affirming Robarge. The circuit court held that the OCSLA "should be construed as extending the LHWCA coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the OCS," unless excluded on the face of the statute or as shown by its legislative history. Id. at 522. And, the court advised that the OCSLA "purpose requirement should not be narrowly construed." Id. at 521.

Coverage under the OCSLA is not based on the same requirements as coverage under the LHWCA. One of the significant differences is that the work covered under the OCSLA is not "maritime employment". That is why the LHWCA would not normally cover these individuals without the Congressional mandate found in the OCSLA. This difference in coverage thresholds is clearly demonstrated by the rational of Herb's Welding. Herb's Welding v. Gray, 470 **U.S.** 414 (1985). Here, the **Supreme Court** held that the claimant (a welder) was not a maritime employee because there is nothing inherently maritime about building and maintaining pipelines and platforms. Since Gray was not working in waters covered by the OCSLA, the threshold question was based on a satisfaction of the traditional situs and status requirements found in Sections 2(3) and 3. Had he been working on the OCS the simple fact that he was a mineral resource worker would have given him coverage.

In determining if Gray's job description was maritime employment, the **Court** considered whether the locale of the work significantly altered the nature of the work he was performing. The **Court** noted that while maritime employment is not limited to the occupations specifically mentioned in Section 2(3), neither can the LHWCA be read to eliminate any requirement of a connection with the loading or construction of ships.

As a result of the holding in Herb's Welding, a mineral resources worker on a platform in state territorial waters is usually not covered under the LHWCA or the OCSLA. In Munguia v. Chevron U.S.A., Inc., the **Fifth Circuit** held that the work of a relief pumper gauger who performs duties on a fixed platform maintaining the wells, is essentially identical to land-based work, rather than marine employment. Munguia v. Chevron U.S.A., Inc., 999 F.2d 808 (**5th Cir.** 1993). There may be specific circumstances, however, under which a mineral resources worker in territorial waters may be covered. For example, a worker, engaged by a subcontractor of Exxon Corporation to assist in the cleanup of the massive "Valdez" oil spill in the navigable waters off of Alaska was found to

be covered under the LHWCA. Fontenot v. Industrial Clean-up, Inc., 92-LHC-971(unpublished) (Aug. 17, 1992). The key difference in the holding of Munguia and Fontenot is that the claimant in Fontenot was working on a floating platform that qualified as a "vessel." As a result it was found that the claimant was working in a marine environment and not on an artificial island. The key is whether the platform is found to be a vessel or an artificial island.

[ED. NOTE:** Thus the worker in Fontenot is analogous to a worker in the **Fifth Circuit** who is a "maritime employee" because he is doing his work over water.**]

In conformance with the holding in Herb's Welding, the **Ninth Circuit** has held that a slight geographic shift will bring such a worker into the coverage of the OCSLA. The **Ninth Circuit** has held that the OCSLA extends coverage to a worker injured while working as a pipe fitter/welder on a stationary offshore oil platform, **under construction on the OCS**, since his welding activities contributed directly to the development of natural resources of the OCS. Kaiser Steel Corp. v. Director, OWCP, 812 F.2d 518 (**9th Cir.** 1987), aff'g Robarge v. Kaiser Steel Corp., 17 BRBS 213 (1985).

The **Fifth Circuit's** stress on the "but for" aspect of the Herb's Welding test has resulted in some unusual results. In Recar v. CNG Producing Co., 853 F.2d 367 (**5th Cir.** 1988), the **Fifth Circuit** held that a worker, injured while supervising the maintenance of a production platform, was covered because the work that he was performing furthered resource recovery and the injury would not have occurred "but for" the maintenance work he was supervising on the platform. In another demonstration of the "but for" test's application, the **Fifth Circuit** held that an OCS worker transported by helicopter to an OCS platform, who was injured when the helicopter crashed, was covered under the OCSLA extension of the LHWCA. Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (**5th Cir.**), cert. denied, 461 **U.S**. 958 (1982); Stansbury v. Sikorski Aircraft, 681 F.2d 948 (**5th Cir.**), cert. denied, 459 **U.S.** 1089 (1982).

The **Third Circuit**, in Curtis v. Schlumberger Offshore Serv., 849 F.2d 805 (**3d Cir.** 1988), held that a drilling rig employee injured on a highway while en route to his work site was covered under the OCSLA extension. The court noted that the OCSLA does not contain a "situs" requirement, that it covers injuries "arising out of or in connection with" any OCSLA operations, and that the employee in this case would not have been injured "but for" his job, which was related to operations on the OCS.

Following the holding in Herb's Welding, there remains a continuing uncertainty for mineral resource workers within territorial waters. The **Court** did not pass a judgement as to the LHWCA's applicability to roustabouts performing the function of longshoremen.

60.3.3 Member of a Crew Exclusion

In McDermott International, Inc. v. Wilander, 498 **U.S.** 337, 26 BRBS 75 (CRT) at 82 (CRT) (1991), the **Supreme Court** laid to rest the question of whether or not member of a crew/seaman status requires the performance of duties in aid of navigation:

> We think the time has come to jettison the aid in navigation language ... We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. ... All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. ... It is not the employee's particular job that is determinative, but the employee's connection to a vessel. ... The key to seaman status is employment-related connection to a vessel in navigation. ... [A] necessary element of the connection is that a seaman perform the work of a vessel. See Maryland Casualty Co. v. Lawson, 94 F.2d 190, 192 (**5th Cir.** 1938) ("There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise"), cited approvingly in Norton, 321 **U.S.**, at 573, 64 S. Ct., at 751. In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

In Wilander, the **Supreme Court** acknowledged that the **Fifth Circuit**, in Offshore Co. v. Robison, 266 F.2d 769 (**5th Cir.** 1959) (Wisdom, J.), "correctly determined that ... this **Court** was no longer requiring that seamen aid in navigation." A circuit split had arisen in which the **Seventh Circuit** required a seaman aid in the navigation of the of a vessel for Jones Act coverage. Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (**7th Cir.** 1984).

The member of a crew test in the **Fifth Circuit** is two pronged. The first prong concerns whether claimant was permanently assigned to or did a significant portion of his work on a vessel or an "identifiable fleet of vessels." An "identifiable fleet" is a group of vessels acting together or under one control (a circumstance not present in Nix v. Hope Contractors, 25 BRBS 180, 184-85 (1991), in which, *inter alia*, the captain of each of the several vessels upon which claimant worked had the ultimate authority in matters relating to navigation, and the several vessels upon which he worked were neither owned nor operated "as a unit").

The second prong has to do with claimant's employment-related connection to the vessel, a fact-specific question which depends on the nature of the vessel and the employee's precise relation

to it. In short, claimant's duties must contribute to the function of the vessel or to the accomplishment of its mission, he must be doing the ship's work; it is **not** necessary that he aid in navigation or contribute to the navigation of the vessel. Wilander, 498 **U.S.** at 353; Nix v. Hope Contractors, 25 BRBS at 183.

Barger v. Petroleum Helicopters, 692 F.2d 337 (**5th Cir**. 1982), cert. denied, 461 **U.S.** 958 (1983), involved a claim against a helicopter pilot's employer for the death of the pilot which occurred in a crash over the Outer Continental Shelf while he was transporting passengers to work on a rig on the Shelf. The court held that the helicopter was not a "vessel," that the pilot was an employee covered under the OCSLA because his duties transporting workers and equipment to and from the rig played an important role in developing the Shelf, and that the definition of "employer" in 43 U.S.C. § 1333(c)(2) included the helicopter pilot's employer because its pilot-employee was engaged in operations connected with the development of the Shelf. See also Stansbury v. Sikorski Aircraft, 681 F.2d 948 (**5th Cir**.), cert. denied, 459 **U.S.** 1089 (1982).

Benefits Review Board in the Third Circuit

In its Decision on remand of Curtis, 849 F.2d 805, the Board found that the claimant's function while actually aboard his floating offshore drilling rig (held to be a vessel) was not primarily to aid in its navigation, and therefore under the **Third Circuit's** three part test he was not excluded from OCSLA coverage as a member of a crew. 23 BRBS 63 (1989). It was noted that under the Third Circuit's "relatively narrow view" proof of the performance of "significant navigational functions" was required to support an in aid of navigation finding.

[ED. NOTE: *Curtis is included here as illustrative of the handling of an OCSLA case. Recall, however, that under Wilander, an employee need not be aiding in navigation in order to be covered as a member of a crew.**]***

Also of significance is the Board's analysis of the pre- and post 1978 version of § 1333(a)(1), which has to be read in its entirety to be appreciated; in short, the Board held that floating oil drilling rigs are not excluded from OCSLA coverage under either version. 23 BRBS at 69.

Benefits Review Board in the Ninth Circuit

In Ryan v. Alaska Constructors, 24 BRBS 65 (1990), a case arising in the **Ninth Circuit** and **decided prior to Wilander**, the Board rejected use of the **Fifth Circuit's** two-prong test (see Robison, supra) and applied the **Ninth Circuit's** three-part test for member of a crew status, see Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336 (**9th Cir.** 1982), under which one is excluded from coverage of the OCSLA if he (1) has a more or less permanent connection (2) with a vessel in navigation and (3) he is on board primarily to aid in navigation. Based on this test, the Board found that claimant was a rigger who performed no navigational functions aboard the barge on which he worked, was not a member of its crew, and therefore was covered under the OCSLA.

60.3.4 OCSLA v. Admiralty v. State Jurisdiction

Although the LHWCA provides the exclusive remedy **against an employer** for disability or death of an employee covered under the OCSLA, in Smith v. Pan Air Corp., 684 F.2d 1102 (**5th Cir**. 1982), the **Fifth Circuit** held that admiralty jurisdiction over **non-employer** third parties was not ousted by OCSLA coverage of a helicopter pilot who died while engaged in a maritime function over the Shelf.

In Recar v. CNG Producing Co., 853 F.2d 367, 21 BRBS 153 (CRT) (**5th Cir**. 1988), the **Fifth Circuit** concluded that the claimant satisfied both the situs requirement and the status ("but for") requirement for OCSLA coverage. But, given that the claimant, a fixed platform maintenance foreman, also had a substantial connection with the vessel on which the injury occurred, the court held that the "district court may well have both admiralty jurisdiction under the general maritime law and federal question jurisdiction by virtue of the OCSLA." The determination was left to the district court to make, under the principles set forth in Rodrique v. Aetna Casualty & Surety Co., 395 **U.S.** 352, 353 (1969); Smith, 684 F.2d 1102; and Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223 (**5th Cir**. 1985). Laredo was cited for the proposition that "where admiralty and OCSLA jurisdiction overlap, the case is governed by maritime law."

The OCSLA adopts the laws of the adjacent state, to the extent they are not inconsistent with the Act or other federal law, as "surrogate" federal law in cases where federal law is not applicable or there is a "gap" in federal law. 43 U.S.C. § 1333(a)(2); Rodrique, 395 **U.S.** 352; Smith, 684 F.2d 1102; Wagner v. McDermott, Inc., 79 F.3d 20 (**5th Cir.** 1996), cert. denied, 519 **U.S.** 945 (1997) (OCS work governed by Louisiana law rather that maritime law, thus the Louisiana Oilfield Indemnity Act voided the reciprocal indemnity agreement); Kerr v. Smith Petroleum Co., 909 F.Supp. 421 (**E.D. La.** 1995) (claimant cannot "elect" LHWCA/OCS benefits to circumvent Louisiana worker's comp. provision).

[ED. NOTE:** Just because state law may be adopted into a claim, does not make this an area of state law. Either party may move to have the case removed to federal court, if the case was filed in state court, based on the federal subject matter jurisdiction implicit in the OCSLA. Tennessee Gas Pipeline v. Houston Casualty Insurance Co., 87 F.3d 150 (**5th Cir.** 1996), reh'g and reh'g en banc denied, 95 F.3d 1151 (1997).**]

For a more complete discussion of jurisdictional matters with regard to the OCSLA, see 30 ALR Fed 535.

60.4 NONAPPROPRIATED FUND INSTRUMENTALITIES ACT 5 U.S.C. § 8171 et seq., 5 U.S.C. § 2105(c)

60.4.1 Applicability of the LHWCA

By virtue of the Nonappropriated Fund Instrumentalities Act (NFIA), the LHWCA covers civilian employees of armed forces instrumentalities (such as **base exchanges**), who are paid with funds generated from earnings rather than congressional appropriation. Traywick v. Juhola, 922 F.2d 786 (**11th Cir**. 1991).

Under the literal language of the NFIA, all such employees employed inside the continental United States are covered; citizens of the United States or permanent residents of the United States or a territory or possession of the United States are also covered for such employment outside the United States; employees who do not enjoy such citizenship or residence status, and who are so employed outside the United States, are provided compensation only as prescribed and approved by certain designated authority. 5 U.S.C. §§ 8171, 8172; see also Army & Air Force Exch. Serv. v. Hanson, 360 F. Supp. 258 (**D. Haw.** 1970).

[ED. NOTE: *The "zone of special danger"* ***does not*** *apply to claims brought under the Nonappropriated Fund Instrumentalities Act. McDuffie v. Army & Air Force Exchange Service, BRB No. 96-0825 (Jan 27, 1997) (unpublished).]*

60.4.2 Employee Status

In Symanowicz v. Army & Air Force Exchange Service, 672 F.2d 638, 14 BRBS 651 (**7th Cir**.), cert. denied, 459 **U.S.** 1016 (1982), the claimant was held not to be covered by the NFIA on a finding that although he was injured in the course of performing a service for respondent Exchange, he was a **"mere volunteer"** and therefore was not an "employee" for compensation purposes. See also Symanowicz v. Army & Air Force Exch. Serv., 12 BRBS 961 (1980). Both the Board decision and the circuit court decision bear reading for discussions of **"borrowed employee," "right to control,"** and **"relative nature of work,"** although none of these concepts is peculiar to NFIA cases.

60.4.3 Course/Scope of Employment

In denying a claimant benefits on the principal ground that her injury had not occurred within the scope of her employment under the "coming and going" rule, the Board expressly held that the **"zone of special danger" concept** (which is applicable to Defense Base Act and District of Columbia Workers Compensation Act cases) **is not applicable to the NFIA**. Trimble v. Army & Air Force Exchange Service, 32 BRBS 239 (1998); Cantrell v. Base Restaurant, Wright-Patterson Air Force Base, 22 BRBS 372 (1989); see also Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch, 23 BRBS 175 (1990).

In Trimble v. Army and Air Force Exchange Service, 32 BRBS 239(1998), the Board distinguished Cantrell and Harris, finding that in those cases the employers did not exercise control over where employees parked and did not maintain responsibility for the condition of the area where the claimant was injured. In Trimble, the Board held that a claimant was injured in the course and scope of her employment when she fell on a wet, ice-covered sidewalk adjacent to the employee-designated entrance door to the employer's facility. Although the employer did not own the property and was not required to maintain the sidewalk, the Board found that the employer maintained a degree of control over the property significant enough to place the claimant's accident within the second exception to the "coming and going rule" (employer controls the journey), which generally bars employees injured on their way to or from work from compensation. In reaching this decision, the Board specifically relied on the holding of Shivers v. Navy Exchange, 144 F.3d 322, 32 BRBS 99 (CRT) (**4th Cir.** 1998).

Vitola v. Navy Resale & Service Support Office, 26 BRBS 88 (1992), deals with the question of "under what circumstance an injury arising at an after-hours sports event would fall within the scope of the Act." The ten page case is a primer on the question of whether or not such activity is in the "course of employment," and is worthwhile reading in its entirety.

60.4.4 Exclusivity of Remedy

Without deciding whether or not Section 33 of the LHWCA contemplates third-party actions against the government, the **First Circuit** in Vilanova v. United States, 851 F.2d 1, 21 BRBS 144 (CRT) (**1st Cir**. 1988), cert. denied, 488 **U.S.** 1016 (1989), held that it is clear (5 U.S.C. § 8173) that no such action lies by an employee whose injuries are covered by the NFIA, under which the employee's exclusive remedy against the United States is compensation under the LHWCA. Thus, the claimant was foreclosed from an action under the Federal Tort Claims Act. See also Wilder v. United States, 873 F.2d 285 (**11th Cir**. 1989).

60.4.5 Miscellaneous

For purposes of the NFIA, the U.S. Naval Base, Guantanamo Bay, Cuba, is a "possession" of the United States, which has "extensive domestic control" over it. Utria v. U.S. Marine Exch., 7 BRBS 387 (1978).

60.5 WAR HAZARDS COMPENSATION ACT
42 U.S.C. § 1701 et seq.

Broad Overview

Basically, the War Hazards Compensation Act (WHCA) makes Sections 906, 908, 909, and 910 of the LHWCA (with certain specified limitations and exceptions) and Section 914(m) of the LHWCA (see 33 U.S.C.A. § 914 and 33 U.S.C.A. § 906 for Historical Note and Cross References) applicable to Defense Base Act (DBA) and Nonappropriated Fund Instrumentalities Act (NFIA) employees, and certain others employed outside the continental United States to perform personal services under a contract with the United States.

Injury, death, and inability to earn wages due to detention, resulting from a "war-risk hazard," are compensable.

The WHCA is arcane and must be dealt with on an *ad hoc* basis.