

Yelena Zaslavskaya
Counsel for Longshore
Office of Administrative Law Judges
U.S. Department of Labor

Note: This paper was originally prepared for the March 2010 Loyola Annual Longshore Conference.

Who is an "Employee:" Construction Workers, Dock Workers, and Specialty Occupations

Coverage Generally: "Situs," "Status," and Who is an "Employee"?

As originally enacted in 1927, the LHWCA sought to compensate for the states' constitutional inability to provide remedies for employment injuries occurring on navigable waters. Pursuant to Section 3(a), the location of the injury determined coverage under the Act.¹ This geographic prerequisite to coverage became known as the "situs" requirement.

The Act was amended in 1972 to extend coverage landward in recognition of the fact that many longshore-related operations are performed over land.² Section 3(a), as amended, provides coverage for injuries "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 in loading, unloading, repairing, dismantling or building a vessel)." 33 U.S.C. §903(a). At the same time, the definition of an "employee" was amended to limit coverage to employees engaged in "maritime employment." Section 2(3), enacted in 1972, provides in relevant part:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker"

33 U.S.C. §902(3). This occupational prerequisite to coverage is referred to as the "status" requirement. The list of occupations in Section 2(3) is not exclusive.³ In 1984, Section 2(3) was amended to specifically exclude from coverage various categories of workers if subject to coverage under a state worker's compensation

¹ Section 3(a) stated that:

"...[C]ompensation would be payable in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)..."

33 U.S.C. § 903(a) (1927).

² See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

³ By using the term "including," Congress indicated that the list of occupations is not exclusive. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, n.9, 17 BRBS 78, n.9(CRT) (1985), citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77-78, n. 7 (1979); H.R.Rep. No. 92-1441, p. 11 (1972).

law, 33 U.S.C. §902(3)(A)-(F), along with members of a crew of a vessel (G) and persons engaged by the master to work on vessels under 18 tons (H), which had been traditionally excluded from coverage.⁴

Thus, coverage under the Act is determined by the concepts of “situs” and “status.” As formulated by the Board, for a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States,⁵ including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee is a maritime employee under Section 2(3) and is not specifically excluded by the Act.⁶ See generally, e.g., *S.W. [Wallace] v. Atlantic Container Serv.*, 43 BRBS 118 (2009), citing 33 U.S.C. §§902(3), 3(a); *Dir., OWCP v. Perini North River Assocs.*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The Act does not define “maritime employment.” Generally, a claimant satisfies the “status” requirement if he is engaged in work that is integral to the loading, unloading, constructing, or repairing of vessels. See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989) (employees injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act); see also *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985) (a welder was not a maritime employee because there is nothing inherently maritime about building and maintaining oil production platforms; while maritime employment is not limited to the occupations specifically listed in Section 2(3), neither can the Act be read to eliminate any requirement of a connection with the loading or construction of ships); see also, e.g., *Balonek v. Texcom, Inc.*, ___ BRBS ___ (2009). In order to satisfy this requirement, claimant need only “spend at least some of [his] time” in indisputably maritime operations. *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). The employee’s maritime activities, however, must be more than episodic, momentary, or incidental to his non-maritime work. Maritime duties that are a regular, non-discretionary part of a job, even if performed infrequently, satisfy the *Caputo* requirement of “some” time and confers coverage

⁴ The applicable regulation, 20 C.F.R. §701.301(a)(12), addresses the exclusions and further provides that the term “employee”

“means any person engaged in maritime employment, including:

(A) Any longshore worker or other person engaged in longshoring operations;

(B) Any harbor worker, including a ship repairer, shipbuilder and shipbreaker; and

(C) Any other individual to whom an injury may be the basis for a compensation claim under the LHWCA as amended, or any of its extensions.”

20 C.F.R. §701.301(a)(12)(i).

⁵ Coverage of employees injured on actual navigable waters is outside the purview of this paper.

⁶ In addition, Section 2(4) contains a complementary definition of the term “employer” as “an employer any of whose employees are employed in maritime employment, in whole or in part,” on a site covered by Section 3(a).

under the Act. See, e.g., *Boudloche*, supra; *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *W.B. [Booker] v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007); *Coastal Prod. Servs. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), reh'g denied, 567 F.3d 752 (5th Cir. 2009).⁷ Additionally, the Supreme Court held in *Caputo* that a claimant need not be performing maritime work at the time of the injury.⁸

Construction Workers, Dock Workers, and Specialty Occupations

The remainder of this article discusses decisions rendered by the circuit courts and the Board, addressing coverage of workers engaged in construction, repair/maintenance, and related work on the waterfront. As noted above, Section 2(3) provides coverage for "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker."⁹ The Board has summarized the pertinent precedent as follows:

"The Board has defined the term 'harbor worker' as including 'at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). . . .' *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); see *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). It is eminently clear the Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes, *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 119 S.Ct. 53 (1998), and those workers injured during the construction of 'inherently maritime' structures, such as piers and dry docks, *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86

⁷ In *Coastal Prod. Servs. Inc. v. Hudson*, the Fifth Circuit found held that a claimant who spent 9.7 percent of his work time performing maritime activities involving loading oil onto transport barges and servicing loading equipment met the status requirement.

⁸ The Fifth Circuit, however, uses the "moment of injury" test to extend coverage, as the court most recently reiterated in *Hudson*. See generally, *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT); see also *Browning v. B.F. Diamond Constr. Co.*, 676 F.2d 547, 548 (11th Cir.1982) ("[E]mployee status can be based upon the maritime nature of the employment as a whole or upon the maritime nature of the claimant's activity at the time of the injury."); *Fleischmann v. Dir., OWCP*, 137 F.3d 131, 137, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) (citing *Caputo* and *Browning* in *dicta* for the proposition that "[a]n employee can establish coverage under § 902(3) either by referring to his or her overall duties or to the particular project the employee was engaged in at the time of injury.").

⁹ Case law addressing coverage of employees involved in the building and repair of ships and their component parts are outside the purview of this article.

(4th Cir. 1979), *cert. denied* 446 U.S. 981 (1980); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992)."

Moon v. Tidewater Constr. Co., 35 BRBS 151, 152-53 (2001).

The pertinent case law makes it clear that not everyone employed on a covered situs is covered. Thus, in both *Caputo*, 432 U.S. 249, 6 BRBS 150(CRT), and *Ford*, 444 U.S. 69, 11 BRBS 320, the Supreme Court has emphasized that Section 2(3) contains occupational, not geographical, requirements. The Director, Office of Workers' Compensation Programs ["OWCP"], and the Board initially adopted an expansive interpretation of Section 2(3) in cases involving construction work on covered sites. Thus, the Board has held that construction of a power plant at a shipyard for future use by the shipyard was covered, and that construction of an oil production pier that did not serve a maritime purpose was covered work. As detailed below, the Fourth and Ninth Circuits, respectively, reversed these decisions.¹⁰ As further discussed below, more recent decisions involving construction on maritime sites tended to invoke the Supreme Court's admonition in *Herb's Welding* that the Act does not cover "all those who breathe salt air," *Herb's Welding*, 470 U.S. at 423, 17 BRBS at 82(CRT), and to engage in closer scrutiny of the maritime purpose of the project.

As the Second Circuit has observed, "the term 'harbor worker' is undefined and ambiguous."¹¹ *Fleischmann v. Dir.*, OWCP, 137 F.3d 131, 136, 32 BRBS 28, 32(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998). Evidently due to this ambiguity, in several cases involving construction and maintenance of maritime structures, the courts chose not to reach the definition of "harbor-worker" under the Act and instead affirmed coverage on the ground that claimants were covered under the general category of "maritime employment." See, e.g., *Joyner*, 607 F.2d 1087, 11 BRBS 86;¹² *Carroll*, 650 F.2d 750, 14 BRBS 373;¹³ *Simonds*, 35 F.3d 122, 28 BRBS 89(CRT);¹⁴ see also *Odom Constr. Co., Inc. v. U. S. Dept. of Labor*, 622 F.2d

¹⁰ *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g Hurston v. McGray Constr. Co.*, 29 BRBS 127 (1995) (decision on remand).

¹¹ See also *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1222 n. 19, 12 BRBS 681, 689, n.19 (5th Cir. 1980) ("Our examination of the common usage and pre-1972 judicial construction of the term 'harborworker' leaves us open as to what Congress intended the term to include. We have found one case which suggests that an employee who paints docks is a 'harborworker.' We leave the correctness of the BRB's definition to another day" (internal citation omitted)).

¹² In *Joyner*, in affirming the holding that dry dock construction was covered, the Fourth Circuit did not specifically address the term "harbor-worker," but noted that the Board's definition was "apt" in this case.

¹³ In *Carroll*, the Fifth Circuit upheld coverage for a carpenter who erected scaffolding as part of a pier repair project on the ground that maintenance and repair of equipment and facilities used in indisputable maritime activities constitute "maritime employment;" the court did not rule on claimant's coverage as a harbor worker, but noted that he performed the work of a "typical harbor-worker." The court held the scaffolding work was an integral part of an indisputably maritime pier repair project, and not merely "incidental" to that project.

¹⁴ In *Simonds*, the Fourth Circuit held that claimant was covered based on his work in constructing pipelines for a pier used to load fuel, steam, and water onto the vessels, as he was "actually engaged in the installation and repair of equipment necessary for the loading process and, thereby, in maritime employment." The Board in that case had concluded that the status requirement was met because claimant was involved in repairing and maintaining equipment essential to the loading or unloading

110, 12 BRBS 396 (5th Cir. 1980), *aff'g sub nom. Maze v. Odom Constr. Co., Inc.*, 7 BRBS 467 (1978), *cert. denied*, 450 U.S. 966 (1981);¹⁵ *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980);¹⁶ *see also Loyd v. Ram Indus., Inc.*, 35 BRBS 143 (2001).¹⁷

By contrast, the Second and Ninth Circuits have directly addressed the definition of "harbor-worker" under the Act. In *Fleischmann v. Dir., OWCP*, 137 F.3d 131, 32 BRBS 28(CRT), the Second Circuit deferred to the Director's position that the term "harbor-worker" includes marine construction workers, so long as the project has a connection to ships required under the court's earlier holding in *Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) (claimant not a harbor-worker because construction of a sewage treatment plant in a river does not have connection to ships). The court held in *Fleischmann* that a pile driver/laborer who worked in construction of bulkheads, piers, and docks was covered as a harbor-worker.¹⁸ The court stated that the Director's interpretation of the term "harbor worker" to include marine construction workers deserved deference "because the term 'harbor worker' is undefined and ambiguous, and because including marine construction workers within the meaning of 'harbor worker' is reasonable and preserves the purposes of the statute." *Id.*, 137 F.3d at 136, 32 BRBS at 32(CRT). The court rejected the ALJ's determination that a claimant is not covered unless he has a connection to loading and unloading, which the ALJ based on the Supreme Court's pronouncement in *Schwalb* that "aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." *Schwalb*, 493 U.S. at 45. The Second Circuit reasoned that *Schwalb* "explicitly exempted enumerated occupations from the requirement that the activity

process pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), and he was a harbor-worker directly involved in the construction or alteration of a pier used in the loading and unloading of ships. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993).

¹⁵ In *Odom*, the Fifth Circuit affirmed the Board's finding of coverage for a claimant who was generally a land-based construction worker but was injured while attempting to move four large concrete blocks on a navigable canal which were used to tie up vessels. The court reasoned that replacing the blocks was maritime work because it furthered maritime commerce, as the blocks could then be used to tie up barges for loading and unloading, and because restoration of a mooring facility was traditionally regarded as a maritime activity rather than as one only "peripherally" related to maritime matters. The court noted that "it is at least arguable that the repair of moorings, even of those not adjacent to main docks, is a type of job that could be performed by a typical harborworker," but deemed it unnecessary to rule on this specific issue as claimant was covered under the general category of maritime employment.

¹⁶ In *Trotti & Thompson*, the Fifth Circuit followed its ruling in *Odom* in holding that a carpenter who built forms and worked with pilings in a wharf construction project was engaged in "maritime employment;" the court did not reach "harbor-worker" definition. The Fifth Circuit rejected any distinction between building a pier and repairing one.

¹⁷ In *Loyd*, the Board affirmed the ALJ's determination that the duties of a pipeline worker engaged in dredging operations in a ship channel were an integral part of the unloading process, satisfying the status test. In a footnote, the Board observed that the decedent's job was similar to that of a harbor worker, an occupation explicitly covered by Section 2(3) of the Act.

¹⁸ The court noted that while the ALJ did not make findings of fact with respect to whether the bulkhead was capable of mooring ships, *Fleischmann's* general employment of building piers and docks sufficed to establish the requisite connection to ships to confer him with status as a harbor worker. *Id.*, 32 BRBS at 32(CRT).

be an integral or essential part of loading or unloading a vessel, and read the Supreme Court's precedent as doing so." *Id.*, 32 BRBS at 31, 35 n.4(CRT).¹⁹

The Ninth Circuit, in turn, addressed the definition of "harbor workers" in two decisions, with the later decision substantially clarifying the uncertainty created by the earlier one. *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), *rev'g Hurston v. McGray Constr. Co.*, 29 BRBS 127 (1995) (decision on remand); *Healy Tibbitts Builders, Inc. v. Dir., OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006). In *Hurston*, reversing the Board, the Ninth Circuit held that the Act did not cover a pile driver engaged in a project to construct an oil production pier because the pier did not accommodate ships and thus was not used for any maritime purpose; the court's earlier holding that this structure was a covered situs as a "pier" did not confer status.²⁰ The court opined that this work was similar to the platform construction work held to be non-maritime in *Herb's Welding*. The court also rejected the Board's reliance on the fact that claimant's work exposed him to a maritime environment. The court reasoned that the claimant's "engagement was for pile driving, which was pier construction, not ship construction In no way was it longshoreman's or shipbuilder's work or anything like those categories." *Hurston*, 181 F.3d at 1012, 33 BRBS at 84(CRT). The court stated that the 1972 amendments were not meant to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, and that *Herb's Welding* prevents the expansive reading of the word "harbor-worker" as advocated by the Director, OWCP. In rejecting the Director's assertion that the claimant was covered as a "harbor-worker" under the Act, the Ninth Circuit stated:

"The Director argues that Mr. Hurston was a 'harbor-worker' under a previous Board decision that defined the term to include 'persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships).' The Board's cases involving construction workers on piers have held that the work was not maritime where the piers were not used to accommodate ships. The argument has no force in this case, because the Board's own case qualified 'piers' with the phrase 'used in the loading, unloading, repair or construction of ships,' and the pier in this case was not so used. Mr. Hurston was not working on a pier used to accommodate ships, or on any sort of shelter or facility for ships, nor does the record establish that he was working in a harbor, which is a place for ships."

¹⁹ The court stated in the footnote: "Because we defer to the Director's definition of 'harbor worker' to include marine construction workers such as Fleischmann, and because *Schwalb* clearly excepted *enumerated* occupations from the requirement of a connection to loading and unloading a vessel, we need not decide whether Fleischmann's work would qualify for coverage under the status test for non-enumerated maritime employees as articulated in *Herb's Welding* and *Schwalb*."

²⁰ As noted above, in *Hurston*, 29 BRBS 127, the Board initially held that the claimant was covered under the Act as a harbor-worker; the Board reasoned that the fact that the pier does not have a maritime purpose is irrelevant as it is an enumerated situs under the Ninth Circuit's earlier decision in that case, and the claimant's work on the pier subjected him to the dangers of a marine environment.

Id. at 1013, 33 BRBS at 84-85(CRT)(footnotes omitted).

More recently, in *Healy Tibbitts Builders, Inc. v. Dir., OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006), the Ninth Circuit deferred to the Director's interpretation of "harbor-worker" as including persons directly involved in the construction of a maritime facility, even if their specific job duties are not uniquely maritime in nature. Accordingly, the court affirmed the Board's finding of coverage with respect to the decedent who was engaged in digging trenches for utility lines as part of a contract to replace berthing wharves which accommodate submarines. Notably, in so holding, the court invoked *Schwalb* and "decline[d] the invitation to interpret the term 'employee' in a way that distinguishes between those who repair equipment used in the loading and unloading process [held covered in *Schwalb*] and those who build the facilities at which that same process takes place. Both groups are essential to the loading and unloading of a ship, and many of the skills necessary to repair the equipment used in that process (e.g., welding, electrical) are no more maritime in nature than those necessary to build a facility like the submarine berths in this case." 444 F.3d at 1098, 40 BRBS at 16(CRT). Further, the exclusion from the Act's coverage of those persons "employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)" under 33 U.S.C. § 902(3)(C) "clearly shows that Congress considered the construction of a maritime facility, like a marina, as fully within the scope of the Act." 444 F.3d at 1099; 40 BRBS at 15(CRT). At the same time, in concluding that the worker's specific duties need not be maritime, the court indicated that the harbor workers are excluded from the *Schwalb* holding based on the Supreme Court's statement that "'aside from the specified occupations' within the Act, of which harbor worker is one, 'land-based activity occurring within [a proper situs] will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.'" *Id.*, 444 F.3d at 1100; 40 BRBS at 17(CRT). Despite rather sweeping language in *Hurston*, the court rejected the employer's assertion that under *Hurston* claimant's specific job duties must have a tangible connection to ship repair or loading/unloading. *Id.*, 444 F.3d at 1100-01; 40 BRBS at 17(CRT). The court further rejected the employer's reliance on *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), stating that Prevetire could not claim to be a "harbor worker" as the power plant he constructed "is not a uniquely maritime structure." 444 F.3d at 1101-02; 40 BRBS at 17-18. The court acknowledged, however, that its earlier holding in *Hurston* may be read as barring coverage for those workers who are constructing a marine facility that does not accommodate ships.

Of note is the Board's unpublished decision in the same case, affirming the ALJ's determination that the decedent was a covered harbor worker based on his involvement in the construction of an inherently maritime structure. *Maumau v. Healy Tibbitts Builders, Inc.*, BRB Nos. 03-0239, 03-0239A and 03-0239B (Dec. 8, 2003)(unpub.) Much like the circuit court, the Board reasoned that the critical fact in this and similar cases "is whether the facility under construction or renovation has a uniquely maritime purpose." *Slip. op.* at 5; *see also Olson v. Healy Tibbitts Constr. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting);²¹ *cf. Silva v. Hydro-Dredge Corp.*,

²¹ In *Olson*, the Board held that claimant, a piledriver engaged in the repair of a breakwater located offshore of a nuclear facility, was covered as a harbor-worker; the breakwater created a harbor and sheltered a dock.

23 BRBS 123 (1989);²² see also *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).²³ In finding maritime status, the Board relied on its earlier holdings in *Hawkins*, 26 BRBS 8 (heavy equipment operator covered as a harbor-worker for injury occurring during installation of utility lines at submarine repair facility) and *Simonds*, 27 BRBS 124, stating that like those other claimants, the decedent was directly involved in a project which was inherently maritime. *Slip. op.* at 6.²⁴ The Board agreed with the ALJ's analysis, which it summarized as follows:

"As the berthing wharves have a past, present, and future use to accommodate submarines and other vessels, the administrative law judge concluded the project had a clearly maritime purpose which is an 'integral or essential part of loading or unloading' a vessel and as such is 'materially distinguishable' from the non-maritime construction in *Hurston* (oil production pier) and *Prevetire* (future power plant)."

Slip. op. at 5. The Board further rejected employers' contention that the decedent was not covered because his specific job duties involved skills used in non-maritime work because "it is the connection of the project to maritime activity which controls." *Id.* at 6. The Board cited, *inter alia*, *Schwalb*, noting that "[a]s the court explained in *Schwalb*, the fact that the repair and janitorial work performed at the railway loading facility in that case was no different from that performed by railroad employees at other locations makes no difference. The test concerns not the type of skills an employee possesses, but whether his use of those skills is integral to loading, unloading, building or repairing a vessel. Work on a pier used for berthing vessels has the requisite connection." *Id.* at 7, n.1. It is noteworthy that, unlike the Second and Ninth Circuits, the Board did not state that harbor workers are expressly excluded from the *Schwalb* holding, but rather sought to harmonize its conclusion with *Schwalb*.

In cases involving facilities that do not have a uniquely maritime purpose, the Fourth Circuit has drawn a distinction between the construction of such facilities on a covered site, holding such work not covered, and the maintenance and repair of such existing facilities, which may be covered employment. In *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT), reversing the Board, the Fourth Circuit held that a pipefitter who was injured during the construction of a power plant on a shipyard which would eventually supply power for shipbuilding, was engaged in construction work that was not maritime. Citing *Herb's Welding*, the court concluded that *Prevetire's* work was

²² In *Silva*, the Board held that claimant, whose work involved the repair of a seawall with no maritime purpose, did not have status.

²³ In *Dickerson*, the Board affirmed the ALJ's finding that claimant's job of removing pilings from the bank of the bayou was not maritime work because it was not established that it was "related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity," citing *Herb's Welding*, *supra*; *Hurston*, *supra*; and *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994)(claimant's construction of concrete pile caps on top of pilings installed prior his employment did not satisfy the status requirement; work was not maritime because it did not aid in navigation and there was no evidence that it was related to loading, unloading, building, or repairing a vessel).

²⁴ The Board elaborated by stating that "[i]n *Hawkins*, 26 BRBS 8, and *Simonds*, 27 BRBS 124, the claimants performed work integral to a maritime project as they were directly involved in the construction or alteration of a pier used in the loading and unloading of ships. In contrast, the Ninth Circuit in *Hurston* recognized that the claimant was not working on a pier used to accommodate ships but rather used exclusively for oil production." *Id.* at 5-6.

not "an integral or essential part of loading or unloading a vessel" and "barely extended beyond breathing salt air." *Id.*, 27 F.3d at 989-90, 28 BRBS at 62(CRT). The court further noted that claimant's construction duties would not have changed had the power plant been located outside the shipyard's fence. *Id.* Thus, the court observed that extending coverage to *Prevetire* would effectively eliminate the status requirement by blurring any distinction with the situs requirement. *Id.*

In recent years, the Board has issued several published decisions applying *Prevetire* in cases involving construction workers, arising in the Fourth Circuit. In *Moon v. Tidewater Constr. Co.*, the Board rejected the claimant's contention that his construction of a warehouse on a shipyard afforded him status as a "harbor-worker" under Section 2(3) of the Act. The Board reasoned that the building in that case was not a pier, dry dock or other uniquely maritime structure, but rather was a warehouse whose use as a maritime storage facility was a future, not a current, one. *Id.* The Board discussed relevant cases, including *Prevetire* and *Hurston*, and concluded that "where the facility under construction or renovation does not have a uniquely maritime purpose, the workers engaged in its construction have not been covered." 35 BRBS 151, 154 (2001). In a more recent case, the Board rejected claimant's assertion that he was a "harbor-worker" because he was constructing a yacht repair facility at a marina under construction, which facility he argued was "inherently maritime." *Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003). The Board stated that, unlike the claimants in *Joyner, supra*, claimant was not engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. Rather, the claimant was engaged to construct a building that eventually would have a maritime purpose and such future use was insufficient to confer coverage under *Prevetire* and *Moon*. Most recently, the Board followed *Prevetire* in *Balonek v. Texcom, Inc.*, ___ BRBS ___ (2009), holding that a cable technician who was injured while installing cables in a shipyard building, which cables would later be used to link the Navy and the Marine Corps to the same computer system, did not satisfy the status test under Section 2(3) because her work did not involve maintenance or repair to a system that was integral to the construction, repair, loading or unloading of a vessel. Even if the system would later be integral to a maritime purpose, such future use is insufficient to confer coverage under *Prevetire* and progeny, and, furthermore, the ALJ rationally found that the cable was not essential or integral to the loading or construction of ships. As part of its rationale for denying coverage to workers involved in construction of facilities that are not "inherently maritime," the Board has observed that "[u]nlike an employee hired by a shipyard to maintain and repair its facilities, e.g., *Graziano*, 663 F.2d 340, 14 BRBS 52, as a construction worker claimant has only a temporary connection to the [naval] base which would terminate" when his construction work was completed. *Moon*, 35 BRBS at 154; see also *Southcombe, supra*; *Boyd v. Hodges & Bryant*, 39 BRBS 17, 21 (2005)(employee of a plumbing and heating company involved in renovating a ship shed that was completely gutted held not covered); *Balonek, supra*.

As noted above, the Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes. See generally *Moon, supra*, citing *Schwalb*, 493 U.S. 40, 23 BRBS 96; *Graziano*, 663 F.2d 340, 14 BRBS 52 (claimant's masonry work on shipyard facilities was sufficient to confer coverage because maintenance and repair of shipyard facilities is essential to shipbuilding); *Price*, 618 F.2d 1059 (railroad employee who painted/maintained support tower which housed conveyor for loading vessels covered); *Kerby*, 31 BRBS 6 (claimants involved in the maintenance and

operation of a power plant which supplied electricity to shipyard were covered). In a recent decision in *B.E. [Ellis] v. Electric Boat Corp.*, after a review of Board decisions involving maintenance employees at a shipyard,²⁵ the Board concluded that coverage in such cases has been determined by considering whether, consistent with *Schwalb*, the employees' functions were essential to the employer's shipbuilding process. 42 BRBS 35 (2008). Affirming the ALJ's grant of a summary judgment for the employer, the Board held that claimant, a shipyard janitor, did not satisfy the status requirement as a matter of law as her job was not integral to employer's shipbuilding. The Board reasoned that although claimant cleaned facilities used by production workers (i.e., bathrooms, offices, and cafeteria), she was not involved in cleaning shipbuilding equipment or production areas, and, therefore, unlike in *Schwalb*, *Sumler*, *Ruffin* and *Watkins*, claimant's job was not such that her failure to perform it would disrupt the shipbuilding process.

Also of note are two unpublished Board decisions which elucidate the degree of a worker's involvement in a maritime construction or repair project sufficient to confer coverage. In *Long v. Washington Group Int'l*, BRB No. 04-0701 (May 9, 2005)(unpub.), the Board affirmed the ALJ's determination that a carpenter employed by a contractor at an oil refinery met the status requirement. First, Claimant was covered because he regularly repaired and maintained the docks, an inherently maritime structure. The Board stated that "[i]t is axiomatic that those workers involved in the construction, repair, alteration or maintenance of harbor facilities, including docks, are harbor workers under the Act." Slip. op. at 3, citing *Fleischmann*, *supra*; *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995);²⁶ *Simonds*, *supra*; *Joyner*, *supra*; *Huff v. Mike Fink Restaurant, Benson's, Inc.*, 33 BRBS 179 (1999);²⁷ *Ripley v. Century Concrete Servics.*, 23 BRBS 336 (1990);²⁸ *Stewart*, 7 BRBS at 365; see also *Graziano*, *supra*; *Price*, *supra*.

²⁵ The Board contrasted *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002)(claimant's work emptying trash barrels from the ship's sides met the status test as it was integral to the employer's shipbuilding and repair operations; the ALJ erred in failing to draw the inference mandated by *Schwalb*, i.e., that claimant's failure to perform her job of emptying debris would eventually impede the ship repair process); *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002)(cleaning around machinery, emptying debris held to be covered; continuous contribution to, or immediate halt of, the shipbuilding process not required); and *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002)(changing air conditioning filters integral/essential to shipbuilding and ship repair, as it would eventually impede such activities) with *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999)(claimant's duties involving cleaning and restocking restrooms and portable toilets throughout the shipyard and aboard ships were not integral to the shipbuilding process). The Board noted its holding in *Gonzales*, 33 BRBS at 148, that claimant's janitorial duties were merely incidental to the shipbuilding operation as they did not involve any shipbuilding equipment, and that such services were more akin to those of a cook, *Coloma v. Dir.*, *OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990), or a courtesy van driver, *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), who were held not to be covered.

²⁶ The Third Circuit affirmed the finding that decedent was a harbor-worker by virtue of his primary duties related to construction work as a dockbuilder.

²⁷ In *Huff*, the Board affirmed the finding that claimant, the harbor master of a permanently moored vessel restaurant and its dock, was not excluded from coverage by Section 2(3)(B). Claimant's duties involved maintenance and repair of the dock, supervision of vessels moored at the dock, as well as maintenance of the vessel, its gangway and its parking lot. He also performed work on or with other vessels owned by the parent corporation. The Board concluded that this work is properly characterized as traditional maritime employment or harbor work.

²⁸ Claimant's participation in a six-month project constructing an addition to a pier held to be not so momentary or episodic as to place claimant outside the coverage of the Act.

Additionally, the Board concluded that claimant's work erecting scaffolding used by other workers to access and repair loading equipment was covered. Rejecting employer's argument that claimant's work was "too tangential" to confer status, the Board stated that "[a]lthough claimant did not actually repair the pipelines or the loading arm or pour the concrete to reinforce the breakwall to protect the dock, his work was essential to these covered activities, as the workers performing the actual repair work could not do their jobs if claimant did not construct the scaffolding or the forms. Had claimant not performed his job, the loading and unloading process would have been impeded." *Slip. op.* at 4, citing *Schwalb, supra*; *Graziano, supra*; *Price, supra*; *Kerby, supra*.

By contrast, in *W.T. v. Gulf Concrete, LLC*, BRB No. 07-0217 (Sept. 26, 2007)(unpub.), the Board held that delivering concrete to waterfront sites to be used, *inter alia*, in the construction of maritime facilities was not covered work because, contrary to claimant's assertion, it was "not an integral part of the construction, maintenance or repair of 'inherently maritime' structures, as [claimant] did not personally perform any tasks which may be deemed essential to those covered endeavors." *Slip. op.* at 3, citing *Graziano, supra*; *Price, supra*; *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977) (sandblasting of a crane to remove rust is covered due to necessity for use of crane in shipbuilding); *Kerby*, 31 BRBS 6. *See also Terlemezian v. J.H. Reid Gen. Contracting*, 37 BRBS 112 (2003)(claimant's work on a road project was directed at improving land transportation at the port in the future and was not an essential aid to the loading process). Rather, claimant's deliveries to shipyards and maritime facilities placed him in the same category as a truck driver "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation." *Id.*, quoting *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61. Claimant's work at those waterfront locations, *i.e.*, the pouring of concrete from his truck to the pumps or pump trucks, was "incidental to his primary responsibility of delivering concrete to the site." *Id.* at 3-4, citing *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem.*, No. 97-3382 (3d Cir. July 31, 1998).²⁹

²⁹ Zube was a tanker-truck driver employed by a refining company to transport petroleum from a storage tank located at a terminal facility to various service stations.