No. 18-60542

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WOOD GROUP PRODUCTION SERVICES,
Petitioner,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
and
LUIGI MALTA,

Respondents.

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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.2, the Director, OWCP, requests oral argument, which she believes would assist the Court.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
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On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Luigi A. Malta filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act). The Administrative Law Judge (ALJ) had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919(c) and (d). The ALJ's Decision and Order on Second Remand,

issued on October 26, 2017, ER Tab 3,[1] became effective when filed in the office of the District Director on October 30, 2017. Malta's employer, Wood Production Services (Employer), filed a notice of appeal with the Benefits Review Board on October 31, 2017, within the thirty-day period provided by 33 U.S.C. § 921(a). Certified List, Docketed 9/28/2018. That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On July 23, 2018, the Board issued its Decision and Order affirming the ALJ's decision. ER Tab 4.

Under 33 U.S.C. § 921(c), any party aggrieved by a final decision of the Board can obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. Employer filed its Petition for Review with this Court on September 4, 2018, within the prescribed sixty-day period. The Board's order is final pursuant to § 921(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). This Court has geographic jurisdiction because Malta was injured in Louisiana state territorial waters.

[1] ER refers to Employer/Petitioner's Record Excerpts.

STATEMENT OF THE ISSUES

I. The Longshore Act covers injuries that occur on the navigable waters of the United States, which includes any area that adjoins such waters and is customarily used to load and unload vessels. While working for Employer, Malta was injured on the Black Bay Central Facility, an off-shore fixed platform that abuts navigable waters and is used, on a daily basis, to load and unload vessels. Is the Central Facility a covered situs under the Longshore Act?

II. The Longshore Act covers workers engaged in maritime employment, which includes the loading and unloading of vessels. Malta spent between 25 and 35 percent of his time loading and unloading vessels, and was injured while unloading a vessel. Does Malta have status as a maritime employee?

STATEMENT OF THE CASE

I. Statutory Background

To be covered by the Longshore Act, a worker must have been injured on a covered situs, 33 U.S.C. § 903(a), and must have status as a maritime "employee," 33 U.S.C. § 902(3). *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 389 (5th Cir. 2013) (en banc).

A. Situs

Section 903(a) provides for compensation "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). An "other adjoining area" must have both a geographical and functional nexus with the water. *Zepeda*, 718 F.3d at 389. The geographical nexus is met when the area borders on or is contiguous with navigable waters. *Zepeda*, 718 F.3d at 393-94. For the functional nexus, the area must be used customarily, but not exclusively, for the loading or unloading vessels.[2] *Coastal Prod. Servs. v. Hudson*, 555 F.3d 426, 432 (2009); *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457, 461 (5th Cir. 2013).

B. Status

A covered "employee" is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."

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[2] Fixed platforms are considered artificial islands and treated as "other adjoining area[s]." *Herb's Welding, Inc. v Gray,* 470 U.S. 414, 421-22(1985) (artificial island); *Coastal Prod. Servs. v. Hudson*, 555 F.3d 426, 432 (5th Cir. 2009) (other adjoining area).

33 U.S.C. § 902(3). The Act does not define "maritime employment," *Herb's Welding,* 470 U.S. at 421, but it is "an occupational test that focuses on loading and unloading." *Id*. at 424 (quoting *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979)). Loading and unloading are maritime activities when they are "undertaken with respect to a ship or vessel," as opposed to another form of transportation. *Fontenot v. AWI, Inc.,* 923 F.2d 1127, 1131 (5th Cir. 1991); *BPU Management, Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457, 462 (5th Cir. 2013).

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

II. Statement of the Facts

Employer Wood Group Production Services staffs oil and gas personnel for clients in the oil and gas industry (in this case Helis Oil and Gas Company). Tr. I at 27, 28; EX 1. It employed Malta as an Offshore Warehouseman at Helis' Black Bay Central Facility. Tr. I at 10, 20, 23, 30. The Central Facility is a fixed, off-shore platform located within Louisiana state territorial waters that provides support

services for oil and gas production.[3] ER Tab 1 at 2 (stip. 2); Tr. I at 11-12, 29-30. The facility has a warehouse, dining and sleeping quarters for twenty-two workers, tanks for storing potable water and fuel, and three cranes to load and unload ships docked at the platform. CX 3; EX 6; Tr. I at 11-12, 15-16. It was constructed to replace a nearby, land-based, dock and warehouse facility that Hurricane Katrina destroyed.[4] Tr. II at 38.

Malta, like the other workers, resided at the Central Facility for seven days, then returned to shore for seven days off. Tr. I at 16; Tr. II at 34. He worked 12 hours a day. Tr. I at 11, 13; Tr. II at 34. Malta loaded and unloaded materials, equipment and supplies, maintained warehouse and potable water stocks, kept an inventory of supplies, and ordered supplies as necessary. Tr. I at 22-24; Tr. II at 17. The supplies from third-party vendors arrived with packing slips indicating what had been shipped. Tr. II at 26, 28. Most supplies arrived at the Central Facility by vessels owned by a third party, Shallow Draft Elevating Boats, which shipped from Venice, Louisiana. Tr. I at 17-20.

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[3] Because the Central Facility is situated within state territorial waters, the extension of the Longshore Act to the outer continental shelf does not apply. 43 U.S.C. § 1333.

[4] Oil and gas were separately produced at satellite wells and transported by pipeline. Tr. I at 31.

Loading and unloading vessels at the Central Facility was a "big part" of Malta's job, ER Tab 1 at 4; Tr. I at 27-29, 36, which he performed "everyday." *Id.* at 13, 33-34. Overall, he spent 25 to 35 percent of his time loading and unloading vessels. Tr. II at 37-38. The supplies and equipment included pipes, compressors, valves, drinking water, tools, chemicals, repair parts, nitrogen cylinders, diesel fuel, and phalanges. *Id*. at 12, 23, 30-31. The materials unloaded from ships were stored in the Central Facility's warehouse. Tr. I at 22.

As noted, there were three cranes on the Central Facility platform: the "quarters crane" near the platform's sleeping quarters; the compressive platform crane; and the warehouse crane. CX 3; EX 6; Tr. I at 15-16. Malta unloaded vessels at all three locations, but ships transporting supplies from shore normally arrived at the platform in the water beneath the "quarters crane." Tr. I at 15. A crane operator would lift cargo baskets off the vessels and move them toward the platform, where Malta would assist in the unloading by pulling the baskets onto the platform and unloading them. Tr. I at 18, 25. Malta also worked with vessel crews to unload potable water off barges, or diesel fuel off tug boats, and store it in tanks on the Central Facility platform. Tr. I at 18-20; Tr. II at 30-31. (Recall, the Central Facility was also a residential and dining facility for twenty-two workers.) During

that process, Malta operated valves on the platform while maintaining contact with the vessel crews. *Id*.

Malta also loaded field boats with supplies for the satellite wells. He did so every day, at the beginning of each day's shift, and whenever workers at a satellite well requested additional supplies. Tr. I at 20-21; Tr. II 17-18, 21-22. The loading involved finding the requested equipment, hooking it to the crane boom, and communicating with the crane operator through hand signals to get the equipment loaded onto the boat. *Id*. In addition to the loading of field boats, Malta also shipped equipment back to shore for repair, for which he had to include paperwork identifying the equipment and destination. Tr. II at 26, 28. He also spent up to 10 hours per week on barges taking inventory or loading or unloading tote tanks. Tr. I at 23; Tr. II at 32, 34-37.

Malta was injured while unloading a third-party vessel owned by Shallow Draft on April 14, 2012. ER Tab 1 at 3; ER Tab 3 at 3; Tr. I at 16-18, 25; CX 1, 2. A cargo basket containing a supposedly empty CO_2 canister had been lifted off a vessel by crane when Malta "grabbed the tag line, [and] pulled it in." Tr. I at 18. As he removed the canister from the cargo basket, the canister's valve broke off and it suddenly discharged. Malta injured his back, left arm, shoulder, and foot diving away from the canister. ER Tab 1 at 1; CX 1, 2.

III. Decisions Below

A. The ALJ finds the Central Facility is not a covered situs.[5]

In a decision dated April 3, 2014, the ALJ ruled that the Central Facility was not a covered situs and denied benefits. Relying on *Thibodeaux v. Grasso Prod. Mgmt. Inc.*, 370 F.3d 486, 488 (5th Cir. 2004), the ALJ determined that the Central Facility's purpose was "to further drilling for oil and gas," and therefore, the unloading of boats there did not confer a maritime purpose on the platform. He distinguished *Hudson* – where this Court found a fixed oil platform to be covered, 555 F.3d at 426 – on the ground that there oil was stored at that platform and then loaded onto barges, thus giving it an "independent connection to maritime commerce."[6]

B. The Board reverses: the Central Facility is a covered situs.

The Board reversed the ALJ's no situs finding and vacated the denial of benefits. It found the ALJ's analysis "inconsistent with the plain language of Section 3(a), which requires only that the other adjoining area be 'customarily used by an employer in loading [or] unloading . . . a vessel.' 33 U.S.C. § 903(a)." ER

[5] It is undisputed that the Central Facility meets the geographic component.

[6] On May 7, 2014, the ALJ denied Malta's motion for reconsideration. Except for its title, this order is identical to his prior decision.

Tab 2 at 6 (brackets in original). Observing that the Central Facility was used to load and unload vessels, and had three cranes specifically designed for that purpose, the Board concluded that

> the uncontroverted evidence in this case reflects that the Central Facility, in essence, functioned as an offshore dock and a collection and distribution facility used to unload and store supplies and equipment delivered from the mainland by vessels and to load materials onto other vessels for delivery to the satellite oil and gas production platforms. Thus, based on the plain language of Section 3(a), the Central Facility, which is customarily used by an employer in loading and unloading vessels, qualifies as a covered situs.

Id. at 7 (citations to the record omitted).

The Board thus found misguided the ALJ's full-throated reliance on *Thibodeaux*. It explained that the *Thibodeaux* platform (unlike the Central Facility) was not "customarily" used for loading or unloading vessels – only the workers' personal gear were regularly unloaded there (with production equipment unloaded only occasionally). *Id*. at 7 (citing *Thibodeaux*, 370 F.3d at 488, 494). Moreover, the Board rejected the ALJ's overly broad reading of *Thibodeaux* that there must be an independent maritime purpose when the unloading includes oil and gas equipment and supplies. *Id*. at 7. The Board reiterated that the Act requires only the customary loading or unloading of vessels, *id*., and advised "the nature of the cargo that was loaded and unloaded is not determinative of the situs inquiry." *Id*. at 8. It then pointed out the obvious – that the loading and unloading of vessels are

traditional maritime activities that are necessarily related to maritime commerce. *Id*. (citing *BPU Mgmt.*, 732 F.3d 457, 462 (2013), and *Hudson*, 555 F.3d at 430 n.6)). It thus concluded that where the "claimant is injured in an area that is customarily used for loading and unloading vessels, it follows that the requisite relationship with maritime commerce is established for purposes of the functional component of the situs test, and any further inquiry into whether there is an 'independent connection to maritime commerce' is superfluous." *Id*.

Having found the Central Facility a covered situs, the Board remanded the case for the ALJ to determine whether Malta had status as a covered employee.

C. The ALJ finds Malta has status as a maritime employee.

On remand, the ALJ found that Malta has status as a maritime employee under § 902(3) because he "loaded or unloaded the cargo from a ship or vessel, [and thus] was performing a traditional maritime activity [with] a direct relationship to maritime commerce." ER Tab 3 at 6.[7] The ALJ noted that this Court has found the status test satisfied when the claimant spends "some," but not necessarily a

[7] The ALJ issued a prior decision on remand on June 10, 2016, and the Employer appealed. The Board remanded the case a second time because the ALJ failed to make a determination regarding Malta's status as a maritime employee. *Malta v. Wood Group Production Servs*., BRB No. 16-0552 (April 13, 2017). ER Tab 3 is the ALJ's decision on second remand, dated October 26, 2017.

"substantial" amount, of time in maritime activity, and has found ten percent of a claimant's time sufficient. *Id*. at 4 (citing *Boudlouche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1347-48) (5th Cir. Unit A 1980) (status satisfied when worker engaged in loading 2.5 to 5 percent of time). Malta, the ALJ found, exceeded that, spending 25 to 35 percent of his time loading and unloading vessels. *Id*. (citing Tr. II at 37-38).

The ALJ rejected Employer's argument, based on *Fontenot*, 923 F.2d 1127, that Malta did not have status because the cargo he loaded and unloaded was used in oil and gas production, and thus unrelated to maritime commerce. The ALJ observed that *Fontenot* "explains why the loading and unloading of a vessel is an inherent activity of maritime commerce; it does not require that the loading and unloading of a vessel have an independent connection to maritime commerce." ER Tab 3 at 4 (citing *Fontenot*, 923 F.2d at 1131).

The ALJ also rejected Employer's attempt to analogize Malta's duties to the nonmaritime workers in *Munguia v. Chevron U.S.A., Inc*., 999 F.2d 809 (5th Cir. 1999) (a pump-gauger), and *Herb's Welding,* 470 U.S. 414 (a welder) – who loaded only personal gear and equipment to perform their jobs on a given day. Unlike those workers, Malta

> did not merely load and unload a few items for individual use for a specific mission on a satellite platform. He used a crane to unload

> pipes, compressors, valves, drinking water, tools, chemicals, repair parts, nitrogen cylinders, and phalanges from supply vessels coming in from Venice, Louisiana, on a daily basis.

Id. at 5 (citing Tr. I at 19, 30).

Finally, the ALJ recognized that the underlying nature of the cargo – *i.e.*, supplies and equipment for oil production – was not relevant in determining Malta's status. Because Malta unloaded cargo from a ship, he was performing a traditional maritime activity, and thus had status as a § 902(3) employee. *Id*. at 6 (citing *Gilliam v. Wiley M. Jackson Co*., 659 F.2d 54, 58 (5th Cir. 1981)). Under the facts of Malta's employment, and the Central Facility's use as an extended offshore dock, the supplies that Malta handled did not lose their identity as "cargo." *Id*. at 5.

D. The Board affirms the ALJ's status determination.

The Board affirmed the ALJ's finding of status. It found Malta was "entitled to coverage based on both his overall job, a portion of which involved loading and unloading vessels, and the covered employment duties he was performing at the moment of injury." ER Tab 4 at 5. It disagreed with Employer that this case was similar to *Munguia*, where the claimant merely loaded personal gear onto small transport boats; instead, it found *Hudson* compelling, where coverage was found based on loading and unloaded-related duties comprising 9.7 percent of Hudson's

time (as compared to the 90 percent he spent in oil and gas production). Here, Malta used cranes to load and unload a variety of cargo from third-party vessels accounting for 25-35% of his time. The Board thus concluded that "the mere fact that the claimant's work is in the 'oil and gas industry' is not sufficient to deny coverage." *Id*. at 5-6.

The Board also agreed that Malta did not have to establish, in addition to his loading and unloading of ships, an "independent connection" to maritime commerce. On the one hand, it discounted the cases relied on by Employer, which involved workers who were not involved in loading or unloading activities, *id*. at 6 n.4; while on the other, it approvingly cited this Court's decision in *Gilliam*, 659 F.2d 54, where claimant was injured while offloading a barge containing pilings for the construction of a bridge (which employer claimed was a non-maritime activity). *Gilliam* held that the pilings were cargo transported on and unloaded from a vessel; that claimant's participation in unloading them made him a covered employee; and that "[t]he fact that the pilings he was unloading were to be used to build a bridge," a non-maritime activity, "does not add a different gloss to the situation," as most cargo does not "bear[ ] a direct relationship to maritime employment." ER Tab 4 at 7 (quoting *Gilliam*, 659 F.2d at 58).

In light of *Gilliam*'s holding, the Board agreed with the ALJ that "it is of no consequence [to the status inquiry] that the cargo being unloaded would be used for oil production work." *Id*. at 7 (brackets in original) (quoting ER Tab 3 at 6). The Board thus affirmed the ALJ's finding of coverage because Malta regularly engaged in the loading and unloading of vessels at a covered situs.

SUMMARY OF ARGUMENT

The Court should affirm the decisions below finding coverage under the Longshore Act. To be covered, a worker must be injured on a maritime "situs," and have "status" as a maritime employee. 33 U.S.C. §§ 903(a), 902(3). A covered situs includes any area adjoining navigable waters that is customarily used in the loading and unloading a vessel. Similarly, a worker who spends at least some time in the loading and unloading of ships or who is injured while doing so has status as a maritime employee.

Malta was injured while unloading supplies and equipment from a vessel at the Central Facility, an off-shore, fixed platform operating as a warehouse and distribution center and as a dining and residential facility for twenty-two workers. It is undisputed that vessels were loaded and unloaded on a daily basis at the Central Facility, and Malta, himself, spent 25-35% of his time so engaged.

Malta's coverage under the Longshore Act is clear. The situs requirement was satisfied because the Central Facility abutted navigable waters and was customarily used for the loading and unloading of vessels. Likewise, Malta had status as a maritime employee because he regularly loaded and unloaded vessels and, in addition, was injured while unloading a vessel.

In defense, Employer contrives requirements that are simply not found in the statutory text or case precedent. Specifically, it argues that: (1) the Central Facility cannot be a covered situs because its overall purpose was to support oil and gas production and the loading and unloading of vessels was for that purpose; and (2) Malta likewise was not covered because he was involved in oil and gas production, not maritime commerce. Nothing in the Longshore Act's definitions of situs and status suggests that coverage is precluded – or that different coverage standards apply – simply because a worker is injured on a fixed offshore platform or any other area used to support oil and gas production. Nor does the Act differentiate between different types of cargo by basing coverage on what is actually loaded or unloaded from ships, or how the cargo may be used for in the future. Rather, the plain language of the statutory text simply requires that the area be customarily used to load or unload vessels, and the worker be engaged in those activities.

Supreme Court and Circuit precedent comports with the Act's plain text. *Hudson* found situs coverage at a fixed platform where oil was stored and then loaded onto and shipped by vessel, whereas *Thibodeaux* reached the opposite result at a drilling platform where only the workers' personal gear was regularly loaded and unloaded. Likewise, *Gilliam*, *BPU Mgmt.*, and *Fontenot* underscore that it is the process of loading and unloading a vessel that makes an activity maritime in nature, not the kind of the cargo moved. Accordingly, a worker whose job entails loading and unloading vessels is a maritime employee, as *Herb's Welding*, *Hudson*, and other cases make clear.

In short, Employer's attempt to engraft additional, extra-statutory requirements onto the Longshore Act finds no support in the Act itself or the case law. The petition for review should be denied.

STANDARD OF REVIEW

Because questions of coverage require "the application of a statutory standard to case-specific facts," they are "ordinarily [] mixed question[s] of law and fact. *Zepeda*, 718 F.3d at 387. Where the facts are not in dispute, as here, they are pure questions of law, subject to *de novo* review. *Id*.

ARGUMENT

I. The Central Facility is a covered situs.

A. The plain language of 33 U.S.C. § 903(a) requires only that an area adjoin navigable waters, and be customarily used to load or unload vessels, to be a covered situs.

As the Benefits Review Board correctly observed, the plain language of § 903(a) alone is sufficient to resolve the situs issue in this case. "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475 (1992), *aff'g Nicklos Drilling Co. v. Cowart*, 927 F.2d 828 (5th Cir. 1991) (en banc); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Andrepont v. Murphy Exploration and Production Co*., 566 F.3d 415, 421-22 (5th Cir. 2009). Here, as in *Cowart*, "[t]he controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." 505 U.S. at 476. The plain text of § 903(a) requires only that an "other adjoining area" adjoin navigable waters and be customarily used to load or unload vessels. 33 U.S.C. § 903(a).

Consistent with the plain text, the case law finds coverage of areas that are "customarily" (not exclusively) used for loading ships. *BPU Mgmt.*, 732 F.3d at 461; *Hudson*, 555 F.3d at 435. But "the mere act of loading, unloading, moving, or

transporting something is not enough: 'Nothing intrinsic in any of these activities establishes their maritime nature, rather it is that they are undertaken with respect to a ship or vessel.'" *BPU Mgmt.*, 732 F.3d at 462 (quoting *Fontenot*, 923 F.2d at 1131). Thus, "the essential elements of unloading" encompass "taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." *Caputo*, 432 U.S. at 267. Adjoining areas where this occurs are covered situses. *E.g., id*. at 281 (covering "entire terminal facility [because it] adjoined the water and one of its two finger-piers clearly was used for loading and unloading vessels").

This basic rule applies with equal force to adjoining areas involved in oil and gas production. *Hudson*, where situs coverage was found, involved a fixed platform that was permanently attached to a sunken barge by pipes and a walkway. 555 F.3d at 434. The platform collected oil via pipeline from surrounding satellite wells, processed that oil, and transferred it into the sunken barge. *Id*. at 428. Ships would then dock at the barge to be loaded with oil. *Id*. at 429, 434.

The employee was injured on the platform portion of the facility, not the sunken barge where the loading of vessels actually occurred. *Id*. at 429. Thus, the primary question was whether the platform and the barge were part of the same "overall area," such that the loading activity on the barge also made the platform a

covered situs. *Id*. at 433. Although the panel disagreed on that point,[8] there was no question that the barge "clearly qualifie[d] as a covered situs" because that is where the loading of vessels took place. *Id*. at 437; *see also id.*at 443 (dissent distinguishing production platform from barge, a maritime situs, where transportation of oil from sunken barge occurred).[9]

Conversely, no situs coverage was found in *Thibodeaux*, 370 F.3d at 494, which involved a fixed, drilling/production platform. Although boats came from shore to the platform, they typically transported only employees and their personal gear, and only "on occasion" did they transport "equipment used for production."

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[8] The majority found that it did, even though the platform, if considered alone "is better thought of as a processing plant functionally connected to oil production and not to the loading or unloading of cargo from vessels." 555 F.3d at 433. It concluded that the storage of the processed oil in tanks on the platform, from which it was transferred to the sunken barge, was essential to the loading process, as the sunken barge would otherwise have had no oil to load onto ships. *Id*. at 434, 437.

[9] Employer argues that *Hudson* treated the oil as cargo only because "it was a product being transferred for consumption within the stream of commerce." OB 18. But *Hudson* never used that terminology or reached that conclusion. In fact, *Hudson* found that the oil was cargo precisely *because it was being loaded onto a vessel*. *Hudson*, 555 F.3d at 437-38 ("In fact, oil is the primary product of the platform and is shipped by barge, for which the platform (unlike the satellite wells) is a necessary part of the loading process in the field as configured. So, although it need not be the case, here the platform does appear to have a predominantly maritime use – facilitation of the loading of cargo (oil, the main product of the platform).)"

370 F.3d at 487-88, 494. Moreover, in contradistinction to *Hudson*, no oil was shipped from the platform. *Id*. at 494. At most, *Thibodeaux* indicates that the regular unloading of only the worker's personal gear is insufficient to transform a platform, where no shipping occurs, into a covered situs. *Id*.; *see* 555 F.3d at 438 ("The [*Thibodeaux*] platform served no maritime purpose precisely because it was in no way involved in loading or unloading a vessel. . . *Drilling* is contrasted with *shipment* (which we construe to mean loading or unloading).") (emphasis in original); *cf*. *Herb's Welding*, 470 U.S. at 425 ("[Worker's]welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat.").

Finally, and more generally, the Court has made clear that (with the possible exception of a worker's own personal gear, which is not relevant here) the use to which cargo will be put after its unloading is irrelevant to coverage. In *Gilliam*, 659 F.2d at 58, the Court held that the Longshore Act covered a worker injured while unloading a vessel even though the pilings being unloaded from the supply barge were to be used in the construction of a bridge being built at the site of the unloading. It rejected the Board's findings that, because the pilings were to be used for the non-maritime purpose of bridge-building, and because they were to be used at the location where they were unloaded, they were not cargo. 659 F.2d at 55, 58.

The Court made clear that, if an item is moved over navigable waters by vessel, it is cargo, regardless of whether it will eventually be used for a maritime purpose or something else, like bridge-building. 659 F.2d at 58. As the Court noted "only a minute percentage of cargo actually bears a direct relationship to maritime employment. Certainly, had the pilings been off-loaded at a port, destined to be shipped to an inland location for another purpose, no one would contend that they did not constitute maritime cargo." *Id*.[10]

In sum, the case law is in lock step with the plain statutory text: situs coverage exists for adjoining areas where the loading and unloading of vessels customarily occurs.

[10] Although Employer correctly notes (OB 17) that *Gilliam* addressed only status, the Court's description of the cargo is relevant to the situs "adjoining area" inquiry, which also contains a functional (loading and unloading) nexus. *See Hudson*, 555 F.3d at 432. Moreover, Employer's contention (OB 25) that *Gilliam* is no longer good law in light of *Fontenot* is incorrect. Fontenot was covered under *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983) because he was injured while physically present on navigable waters (thus mooting the adjoining area functional inquiry). Moreover, *Fontenot's* description of maritime employment as involving the loading and unloading of cargo from a vessel is in no way inconsistent with *Gilliam*. *See Fontenot*, 923 F.2d at 1131.

B. Because the Central Facility adjoins navigable waters and is customarily used to load and unload vessels, it is a covered situs.

As Employer concedes, and the ALJ and Board found, the Central Facility meets the geographic component of the situs test because it "adjoins" – i.e., is contiguous with – navigable waters. ER Tab 1 at 5 (citing *Zepeda*, 718 F.3d 384); Opening Brief (OB) 13.

The facility also meets the functional component of the situs test because it was "customarily used for loading [or] unloading . . . a vessel." 33 U.S.C. § 903(a). Three cargo-hoisting cranes were located at the Central Facility, and the loading and unloading of vessels occurred on a daily basis. CX 3; EX 6; Tr. I at 15-16. Using cargo baskets, these cranes unloaded supplies, materials, tools, equipment, products, and chemicals from third-party vessels. Potable water and diesel fuel were also unloaded from vessels directly into the Central Facility's holding tanks. Tr. I at 18-20; Tr. II at 30-31; *see* CX 2. They were also used to load tote tanks, as well as supplies in need of repair, onto ships returning to shore. Tr. II at 26, 28, 32, 34-37. Some of the items unloaded were stored and consumed at the Facility by the workers residing there (like water and other supplies) while others were later loaded onto vessels for delivery to the company's satellite facilities. The Central Facility effectively functioned as an offshore dock or terminal used to unload and store supplies and equipment delivered by vessels, and to load these materials onto other

vessels for distribution to satellite wells. Put simply, the loading and unloading of cargo from vessels was part of the Central Facility's "raison d'etre." *See Zepeda*, 718 F.3d at 392 (citing *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134 (4th Cir. 1995)).

The ALJ and Board correctly determined that the Central Facility is a covered situs, and the Court should affirm that finding.[11]

II. Because Malta was engaged in maritime employment – specifically the loading and unloading of vessels – for 25 to 35 percent of his time, and was unloading a vessel at the time of his injury, he is a covered employee.

Because Malta was injured on a covered situs, he is covered by the Longshore Act if he had status as an "employee" under § 902(3). "Employee" is defined, in pertinent part, as a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations." 33 U.S.C. § 902(3). The ALJ and Board correctly found that Malta was engaged in maritime employment. Indeed, because Malta was engaged in the very work activities that made the Central Facility a maritime situs – the loading and unloading of vessels – there is no real question that he was engaged in maritime employment.

[11] Employer's overarching argument – that a facility whose ultimate business purpose is related to oil and gas production cannot be a covered situs – is wholly undercut by *Hudson*, where the platform had an oil production purpose and was much more closely and directly connected to that purpose than the Central Facility.

The status requirement is "an occupational test that focuses on loading and unloading." *Ford*, 444 U.S. at 80); *Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 46-47 (1989) (worker covered if he "is engaged in longshoring operations," *i.e.*, the loading or unloading of ships or other tasks that are integral to such activities). It was added to the Longshore Act by Congress in 1972 "to cover those workers on the [covered] situs who are involved in the essential elements of loading and unloading," regardless of "whether they were injured on the ship or on an adjoining pier or dock." *Herb's Welding,* 470 U.S. at 423, 426. As noted above, loading and unloading are maritime activities when they are "undertaken with respect to a ship or vessel." *Fontenot,* 923 F.2d at 1131.

A worker is a covered employee if he spends "at least some of his time" in the loading or unloading of ships. *Caputo*, 432 U.S. at 273. He need not spend a "substantial" portion of his time in such activities. *Boudlouche*, 632 F.2d at 1347-48 (worker covered who spent 2.5 to 5 percent of his time loading and unloading); *Hudson*, 555 F.3d at 440 (worker who spent approximately 10 percent of his time in loading and maintaining loading equipment covered); *see also Howard v. Rebel Well Serv.*, 632 F.2d 1348, 1350 (5th Cir. 1980) (worker covered who spent 10 percent of his time repairing barges used as floating drilling rigs because ship repair is another covered activity under § 903(a)). Moreover, an employee may have

status based on either the activity he was engaged in at the time of his injury, or the nature of his employment as a whole. *Hudson*, 555 F.3d at 439 (citing *Universal Fabricators, Inc. v. Smith,* 878 F.2d 843, 845 (1989), in turn citing *Hullinghorst Indus., Inc. v. Carroll,* 650 F.2d 750, 754 (5th Cir. 1981)).

There is no dispute that Malta spent a good portion of his workday loading and unloading vessels. *Cf. Herb's Welding*, 470 U.S. at 425 ("Gray was a welder. His work had nothing to do with the loading or unloading process. . ."). In fact, he loaded and unloaded vessels every day, spending between 25 and 35 percent of his total working time performing such tasks, significantly more than the claimants in *Boudlouche* or *Hudson*. There is also no dispute that Malta was injured while unloading a ship. Consequently, he had status based on either his employment as a whole or the activity he was engaged in at the time of his injury, and is therefore a covered employee under § 902(3) of the Act. *See Hudson*, 555 F.3d at 439.

The ALJ and Board thus correctly determined that Malta was a covered employee, and the Court should affirm that finding.

III. Employer's attempts to engraft extra-statutory requirements on the Longshore Act's coverage provisions are unpersuasive.

Employer argues (OB 27-28) that because the cargo loaded and unloaded at the Central Facility consisted of supplies for the oil and gas production, the Facility was required to have an independent "connection to maritime commerce." This

examination into the nature and purpose of the cargo is not found in the Longshore Act itself – § 903(a) covers locations that are if it is "customarily used . . . in loading [or] unloading . . . a vessel). Nor does the case law establish it.

Employer primarily relies on *Thibodeaux*, 370 F.3d at 494, to make its case. But as discussed above, *supra* at 20, the fixed, drilling/production platform there, unlike the Central Facility, (a warehouse and residential and dining facility requiring the steady shipment of goods and equipment), simply was *not* customarily used for loading and unloading.[12] *Thibodeaux* therefore cannot withstand the weight Employer puts on it. It does not establish a broad exception from the Longshore Act for the oil and gas industry, or redefine loading or unloading, or mandate a connection to maritime commerce beyond the loading and unloading of cargo from a vessel. That process *is* maritime commerce.[13] *Ford*, 444 U.S. at 80

[12] *Hudson* specifically contrasted the drilling activity in *Thibodeaux* from the loading and unloading of vessels that occurred at the platform before it. *Hudson*, 555 F.3d at 438-39. *Hudson* further observed the platforms in *Herb's Welding* and *Munguia* were used strictly for drilling or production. 555 F.3d at 429 n.6,

[13] Even if some independent relationship to maritime commerce beyond the loading and unloading of ships were necessary, it would be satisfied here. As project warehouseman, Malta ordered equipment and supplies (including potable water and fuel) from land-based, third-party vendors. Third-party shippers, like Shallow Draft Elevating Boats; then transported these goods by vessel to the Central Facility, where they were then unloaded, and either consumed on site (potable water, fuel, foodstuffs), or stored and then loaded and shipped *again* by vessel (not by land

(maritime employment involves loading and unloading of vessels); *Fontenot*, 923 F.2d at (loading and unloading of a vessel enables ship to engage in maritime commerce); *Hudson*, 555 F.3d at 439 (platform where oil loaded has maritime use).

Employer reprises this same argument – that loading and unloading of a vessel must have an independent maritime connection – when it comes to the status requirement. But like the Act's provision governing situs, the status provision, § 902(3), covers, without further qualification, workers "engaged in longshoring operations," *i.e.*, the loading or unloading of ships or other tasks that are integral to such activities. *See Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 46-47 (1989).

Moreover, Employer cites no case in which a worker who actually loads or unloads vessels, like Malta, was required to make a greater showing in order to meet the status requirement. Rather, the cases it relies on involve claimants who were either not directly involved in the loading or unloading of vessels, or loaded only personal gear and equipment needed to the complete their assigned duties. *See Herb's Welding*, 470 U.S. at 423 (welder whose "work had nothing to do with the loading or unloading process, nor . . . the maintenance of equipment used in such

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transportation). A clearer example of "maritime commerce" could hardly be imagined.

tasks"); *Munguia*, 999 F.2d at 809 (pumper/gauger servicing oil wells on fixed platforms but not engaged in loading or unloading of cargo); *Pippen v. Shell Oil Co*., 661 F.2d 378, 382 (5th Cir. 1981) (wireline operator for electrical contractor injured while on drilling vessel); *Carroll*, 650 F.2d 750 (land-based carpenter building scaffolding under a pier); *Smith v. Labor Finders*, 46 BRBS 35 (2012) ("beach-walker" cleaning spilled oil from beaches); *Miller v. CH2M Hill Alaska, Inc*., BRB No. 13-0068, 2013 WL 6057071 (2013) (same); *Hough v. Vimas Painting Co., Inc*., 45 BRBS 9 (2011) (worker vacuuming debris from blasting process used to clean a bridge); *Zube v. Sun Refining and Marketing Co*., 31 BRBS 50, 1997 WL 295231 (1997) (trucker loading fuel from storage tanks onto truck and delivering it to service stations); *McKenzie v. Crowley American Transport, Inc*., 36 BRBS 41, 2002 WL 937755 (2002) (trucker driving containers overland); *Bazenor v. Hardaway Constructors, Inc*., 20 BRBS 23, 1987 WL 107407 (1987) (worker hired to clean up accumulated construction materials was not a covered harbor worker because he "was not directly involved in either ship construction or maintenance of shipyard facilities"); *see also Thibodeaux*, 370 F.3d at 488 (situs case involving welder).

Employer's heavy reliance (OB 30) on *Munguia* is especially misguided. There, the worker was not sufficiently engaged in loading or unloading to confer

status because the only things he put onto a boat – a boat owned by his employer for the sole purpose of enabling its employees to service the oil production field, 999 F.2d at 810 – were "the tools and equipment he would need for the day." *Id*. at 812. By contrast, the worker at the fixed platform in *Hudson* was covered because he was engaged in loading and unloading: "Unlike the welder in *Herb's Welding,* Hudson was directly involved in the loading of cargo into transport barges for shipment to shore – a distinctly maritime activity." *Hudson*, 555 F.3d at 440. Indeed, the ALJ specifically accounted for, and distinguished *Munguia*, on the ground that status was not found there (or in *Herb's Welding*) "because the claimant merely loaded and unloaded the gear he needed for a particular mission in a satellite platform." ER Tab 3 at 5 (citing *Munguia*, 999 F.2d at 812, and *Herb's Welding*, 470 U.S. at 425).

Malta did far more than just load and unload his personal gear. He spent approximately 30 percent of his work time loading and unloading vessels with cargo – including pipes, compressors, valves, drinking water, fuel, tools, chemicals, repair parts, nitrogen cylinders, and phalanges, equipment and supplies far beyond those for his own personal use on a single mission – and unloaded them from third-party vessels transporting them from Venice, Louisiana, on a daily basis.[14] ER Tab 3 at 5.

[14] It is worth noting the twenty-two workers lived and dined at the Central Facility. Although the record is not entirely clear on how food and other necessaries for daily

As Employer's own project manager testified, loading and unloading vessels at the Central Facility was a "big part" of Malta's job, Tr. I at 27-29, 36, which he performed "everyday [sic]." *Id.* at 13, 33-34. Certainly, Malta was far more engaged in the loading and unloading of vessels than many other workers found covered by the Longshore Act. *See Hudson*, 555 F.3d at 440 (worker who spent only about 10 percent of his time either loading oil onto vessels or maintaining loading equipment on a fixed off-shore platform); *Gilliam*, 659 F.2d at 57-58 (construction foreman unloading cargo – bridge building materials – from a vessel at the time of his injury;); *Schwalb,* 493 U.S. at 43 (railroad company janitor who cleaned coal from a loading machine); *Carroll,* 650 F.2d at 755-57 (carpenter who built scaffolding under a pier to facilitate the repair, by others, of a turntable used for loading).

CONCLUSION

Neither *Herb's Welding*, *Munguia*, nor *Thibodeaux* broadly hold that a fixed platform can never be a covered situs, or that any worker who works on one is automatically precluded from satisfying the status test. Rather, the same statutory

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living were delivered, Malta testified that "supplies" for the Central Facility arrived by vessel. Tr. I at 22-24; Tr. II at 17, 26, 28.

requirements apply to fixed platforms and oil and gas workers that govern land-based facilities and their workers

In sum, a fixed platform is a covered situs if it is customarily used for loading and unloading vessels, and a specific worker is a covered employee if he spends some of his time engaged in loading or unloading a vessel, or is injured while engaged in loading or unloading. Because the Central Facility was customarily used for loading and unloading of vessels, and because Malta not only spent 25 to 35 percent of his time loading and unloading vessels, but was injured while unloading cargo from a vessel, he was covered by the Longshore Act. The decisions below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2018, I electronically filed the foregoing Response Brief through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

s/ Matthew W. Boyle
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COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. Proc. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 7,376 words;

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

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